

# **Lawyer Trust Accounting Basics and Recent Changes to Bar Rules**

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# Managing IOTA Trust Accounts: the basics

- ✔ Bar trust account rules require client and certain third party funds to be held in trust.
- ✔ Funds that belong to the client or to another person are required to be held separate from the lawyer's own funds under the Bar rules and the lawyer is a fiduciary for the funds while they are held in trust on behalf of the client or third person.
- ✔ Interest (if any) from IOTA trust fund interest is "swept" into the Bar Foundation's bank account and used for client security fund and other purposes.
- ✔ Rule 5-1.1(j) states that trust funds cannot be disbursed until they are actually "collected". Cashier's and certified checks, bank or other financial institution checks, lawyer or real estate broker's trust account checks, government checks, and insurance company checks are considered to be collected upon receipt.
- ✔ But do not depend on this rule...only disburse when check fully clears.



# Managing IOTA Trust Accounts: the basics

- ✔ Commingling of trust funds with the attorney's own funds in the trust account for an unreasonable time is prohibited under the Bar rules.
- ✔ Rule 5-1.1 (a) Nature of Money or Property Entrusted to Attorney.  
(1) Trust Account Required; Commingling Prohibited.
- ✔ A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for fees, costs, and expenses, shall be kept in a separate bank or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account.
- ✔ A lawyer may maintain his or her funds belonging to the lawyer in the trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account.



# Managing IOTA Trust Accounts: the basics

- ✦ An IOTA client trust account is not always required depending on the lawyer's practice. If the lawyer does not accept advances on costs and expenses, unearned fee deposits, or other funds of the client or a third person which are nominal, short term funds, an IOTA trust account is not required under the Bar rules.
- ✦ Under the Rules Regulating Trust Accounts, any attorneys with trust account signature authority on the trust account and all partners in a law firm bear ultimate responsibility to insure compliance with the Bar Rules related to IOTA trust accounts.



# Managing IOTA Trust Accounts: the basics

- ✔ All attorneys with trust accounts must participate in the Bar's Interest on Trust Accounts (IOTA) Program.
- ✔ 5-1.1 (g) (4) Notice to Foundation.
- ✔ Lawyers or law firms shall advise the Foundation, at Post Office Box 1553, Orlando, Florida 32802-1553, of the establishment of an IOTA account for funds covered by this rule. Such notice shall include: the IOTA account number as assigned by the eligible institution; the name of the lawyer or law firm on the IOTA account; the eligible institution name; the eligible institution address; and the name and Florida Bar attorney number of the lawyer, or of each member of The Florida Bar in a law firm, practicing from an office or other business location within the state of Florida that has established the IOTA account.



# Managing IOTA Trust Accounts: the basics

- Definition of nominal, short term funds.
- 5-1.1 (g) (1) Definitions. (A) “nominal or short term” describes funds of a client or third person that, pursuant to subdivision (3), below, the lawyer has determined cannot practicably be invested for the benefit of the client or third person.
- What does this mean?



# Managing IOTA Trust Accounts: the basics

- What are Nominal, short term funds?
- 5-1.1 (3) Determination of Nominal or Short-Term Funds. The lawyer shall exercise good faith judgment in determining upon receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer shall consider such factors as:
  - the amount of a client's or third person's funds to be held by the lawyer or law firm; the period of time such funds are expected to be held; the likelihood of delay in the relevant transaction(s) or proceeding(s); the cost to the lawyer or law firm of establishing and maintaining an interest-bearing account or other appropriate investment for the benefit of the client or third person; and minimum balance requirements and/or service charges or fees imposed by the eligible institution.
  - Determination of whether a client's or third person's funds are nominal or short term "shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with ethical impropriety or other breach of professional conduct based on the exercise of such good faith judgment."



# Managing IOTA Trust Accounts: the basics

- ✔ Trust account records and procedures required under Bar Rules.
- ✔ 5-1.2 (b) Minimum Trust Accounting Records. The following are the minimum trust accounting records that shall be maintained:
  - ✔ (1) A separate bank or savings and loan association account or accounts in the name of the lawyer or law firm and clearly labeled and designated as a “trust account.”
  - ✔ (2) Original or duplicate deposit slips and, in the case of currency or coin, an additional cash receipts book, clearly identifying: (A) the date and source of all trust funds received; and (B) the client or matter for which the funds were received.





# Managing IOTA Trust Accounts: the basics

- ✔ Trust account records and procedures required under Bar Rules.
- ✔ 5-1.2 (b) Minimum Trust Accounting Records. The following are the minimum trust accounting records that shall be maintained:
  - (3) Original canceled checks, all of which must be numbered consecutively, or, if the financial institution wherein the trust account is maintained does not return the original checks, copies that include all endorsements, as provided by the financial institution.
  - ✔ (4) Other documentary support for all disbursements and transfers from the trust account.
  - ✔ (5) A separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance, and containing at least: (A) the identification of the client or matter for which the funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and; (D) the reason for which all trust funds were received, disbursed, or transferred.



# Managing IOTA Trust Accounts: the basics

- ✔ Trust account records and procedures required under Bar Rules.
- ✔ 5-1.2 (b) Minimum Trust Accounting Records. The following are the minimum trust accounting records that shall be maintained:
- ✔ (6) A separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance, and containing: (A) the identification of the client or matter for which trust funds were received, disbursed, or transferred; (B) the date on which all trust funds were received, disbursed, or transferred; (C) the check number for all disbursements; and (D) the reason for which all trust funds were received, disbursed, or transferred.
- ✔ (7) All bank or savings and loan association statements for all trust accounts.



# Managing IOTA Trust Accounts: the basics

- ✔ Trust account records and procedures required under Bar Rules.
- ✔ 5-1.1 (c) Minimum Trust Accounting Procedures.
- ✔ The minimum trust accounting procedures that shall be followed by all members of The Florida Bar (when a choice of laws analysis indicates that the laws of Florida apply) who receive or disburse trust money or property are as follows:
  - ✔ (1) The lawyer shall cause to be made monthly: (A) reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; and (B) a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefor.



# Managing IOTA Trust Accounts: the basics

- ✔ Trust account records and procedures required under Bar Rules.
- ✔ 5-1.1 (c) Minimum Trust Accounting Procedures.
- ✔ (1) The minimum trust accounting procedures that shall be followed by all members of The Florida Bar (when a choice of laws analysis indicates that the laws of Florida apply) who receive or disburse trust money or property are as follows:
  - ✔ (2) At least annually, the lawyer shall prepare a detailed listing identifying the balance of the unexpended trust money held for each client or matter.
  - ✔ (3) The above reconciliations, comparisons, and listing shall be retained for at least 6 years.
  - ✔ (4) The lawyer or law firm shall authorize and request any bank or savings and loan association where the lawyer is a signatory on a trust account to notify Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, in the event any trust check is returned due to insufficient funds or uncollected funds, absent bank error.
  - ✔ (5) The lawyer **shall file** with The Florida Bar between June 1 and August 15 of **each year a trust accounting certificate showing compliance** with these rules on a form approved by the board of governors.



# Managing IOTA Trust Accounts: the Basics

- ✔ Attorney responsibility and liability when Letters of Protection (LOP's) are issued to third parties on behalf of the client.
- ✔ Rule 5-1.1 (f) Disputed Ownership of Trust Funds.
- ✔ When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- ✔ Florida Bar Ethics Opinion 82-2.
- ✔ funds received and held in trust by a lawyer for a specific purpose may not be applied to satisfy the lawyer's lien for costs and fees over the client's or former client's objections without prior approval of the court.



# Managing IOTA Trust Accounts: the Basics

- ✓ Trust Account Audits under the Bar Rules:
- ✓ When can the Bar conduct an audit of an IOTA trust account?
- ✓ Rule 5-1.2 (e) Audits.
- ✓ Any of the following shall be cause for The Florida Bar to order an audit of a trust account:
  - (1) failure to file the trust account certificate required by rule 5-1.2(c)(5);
  - (2) return of a trust account check for insufficient funds or for uncollected funds, absent bank error;
  - (3) filing of a petition for creditor relief on behalf of an attorney;
  - (4) filing of felony charges against an attorney;
  - (5) adjudication of insanity or incompetence or hospitalization of the attorney under The Florida Mental Health Act;
  - (6) filing of a claim against the attorney with the Clients' Security Fund;
  - (7) when requested by a grievance committee or the board of governors;or
  - (8) upon court order.



# Managing IOTA Trust Accounts: the Basics

- ✔ Trust Account Audits under the Bar Rules.
- ✔ Who pays for the cost of the audit?
- ✔ 5-1.2 (f) Cost of Audit. Audits conducted in any of the circumstances enumerated in this rule shall be at the cost of the attorney audited only when the audit reveals that the attorney was not in substantial compliance with the trust accounting requirements. It shall be the obligation of any attorney who is being audited to produce all records and papers concerning property and funds held in trust and to provide such explanations as may be required for the audit. Records of general accounts are not required to be produced except to verify that trust money has not been deposited thereto. If it has been determined that trust money has been deposited into a general account, all of the transactions pertaining to any firm account will be subject to audit.



# New Trust Account Rules which require Trust Account Plan

- ✔ Amendments to Rule 5-1.2(c) were implemented by the Florida Supreme Court in opinion dated March 27, 2014.
- ✔ Rule 5-1.2(c) will require a written trust account plan for each of a (multi-lawyer) law firm's trust accounts which must be provided to each lawyer in the firm. According to the amended rule, the written plan must include the names of all lawyers who sign trust account checks for the law firm and review trust account checks, the names of the lawyers who are responsible for supervising and reconciling the law firm's trust account or accounts, monthly and annually, and the names of the lawyers who are responsible for answering any questions that lawyers in the firm may have about the firm's trust account or accounts.
- ✔ **Amended rules become effective June 1, 2014.**





# New Trust Account Rules which require Trust Account Plan

- ✓ Amended rule states that an individual “may” notify the managing partner or shareholder of discrepancies to address the possibility that a lawyer may learn that the managing partner or another lawyer responsible for the firm’s trust accounts is misappropriating or otherwise mishandling funds.
- ✓ Amended rule states that if lawyer with personal knowledge learns that the noncompliance has not been corrected within a reasonable time, the lawyer must report the trust account noncompliance to staff counsel for the Bar if such a report is required by Rule 4-8.3, which requires a lawyer to report misconduct which “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects...”



# New Trust Account Rules which require Trust Account Plan

- ✔ Responsible lawyers must be shareholders, partners, or owners of the law firm. If a non-lawyer staff member is responsible for filling out a check or is authorized by the supervising partner to sign it before a lawyer reviews it, or if a CPA or office manager prepares the initial reconciliation of the trust account(s), that person's title should be included in the plan along with the name of the lawyer who reviews that staff member or accountant's actions and approves them.
- ✔ Examples of written trust account plans for both small law firms and large law firms are on the Bar's website.
- ✔ Amended rule also requires that the written trust account plan be updated and redistributed to each lawyer in the firm whenever there are material changes to the plan, including changes in the lawyer or lawyers who will be signing or reviewing all trust account checks and are responsible for supervising reconciliation of the firm's trust account or accounts.



# Recent Proposed Bar Trust Account Rule Revisions

- ✔ On 3/28/14, BOG approved significant revisions to the trust account rules.
- ✔ Most significant would amend Rule 4-1.5 to explicitly state that nonrefundable fees are considered earned on receipt and must not be placed in lawyers' trust account and also provides a definition for retainers, flat fees, and advance fees.
- ✔ Comment to Rule 4-1.5 would state, "A nonrefundable retainer or nonrefundable flat fee is the property of the lawyer and should not be held in trust. If a client gives the lawyer a negotiable instrument that represents both an advance on costs plus either a nonrefundable retainer or a nonrefundable flat fee, the entire amount should be deposited into the lawyer's trust account, then the portion representing the earned nonrefundable retainer or nonrefundable flat fee should be withdrawn within a reasonable time. An advance fee must be held in trust until it is earned. Nonrefundable fees are, as all fees, subject to the prohibition against excessive fees."
- ✔ Proposed revisions would also amend Rule 5-1.1(a)(1) to create an exception to permit a lawyer to deposit sufficient funds into the lawyer's trust account to make up a shortfall in the trust account caused by misappropriation, bank error, bank charge or a bounced check (not commingling).



# Recent Bar Trust Account Case

- ✔ *The Florida Bar v. Mirk* 64 So. 3d 1180 (2011).
- ✔ Lawyer's misappropriation of \$31,487.50 in client funds held in his trust account violated Bar rules regulating trust accounts
- ✔ Although lawyer claimed that he had an agreement with client entitling him to \$40,000 as a flat fee, such an agreement was not in writing, attorney made a number of withdrawals from his client trust account without his client's knowledge or permission, and fee dispute could not be handled in such a manner.
- ✔ Disbarment is the presumed appropriate discipline when a lawyer misappropriates client money held in trust and fails to present any arguments to rebut the presumption of disbarment.



# Managing IOTA Trust Accounts: Tips

- ✔ Tips for IOTA Trust Account Management.
- ✔ The trust account and trust checks must be labeled “IOTA Trust Account”.
- ✔ The bank authorization to notify The Florida Bar if there is an insufficient or uncollected funds check should be in writing.
- ✔ Trust account checks should indicate that they are void after 90 days for accounting purposes and to protect against late deposited or cashed checks.
- ✔ The procedure for reporting and disposing of unclaimed trust account funds is set forth in Chapter 717, Florida Statutes and should be followed.
- ✔ Only attorneys should be authorized to sign IOTA trust account checks and make withdrawals from the account.
- ✔ protect your username and password for on-line access!
- ✔ Disputes regarding disbursement of trust funds received by the attorney must be resolved pursuant to the Bar rules, including Rule 5-1.1 (e) and (f) as discussed above and potential interpleader and trust funds deposited into court registry.



# Managing IOTA Trust Accounts: Tips

- ✓ **If you have trust funds and can't find your client**
- ✓ Unclaimed or unidentified client funds/property should be escheated to the State per F.S. 717
- ✓ Call the Department of Financial Services
- ✓ <http://www.fltreasurehunt.org/>
- ✓ Unclaimed Property Office 1-888-258-2253
- ✓ Email address: [Funclaim@fldfs.state.fl.us](mailto:Funclaim@fldfs.state.fl.us)



# Managing IOTA Trust Accounts: Tips

- ✔ **Trust Accounting and Your Employees**
- ✔ Embezzlement Red Flags
- ✔ Personality Changes
- ✔ Family Crisis
- ✔ Extravagant Living
- ✔ Gambling Addiction
- ✔ Drug Addiction
- ✔ Over Protective of Work
- ✔ Vacation Time Limited
- ✔ You Don't Review Trust Account Records



# Managing IOTA Trust Accounts: Tips

- ✔ **Trust Accounting and Your Employees**
- ✔ Check out employee references- FDLE criminal background check
- ✔ Contingent offers to hire
- ✔ Fiduciary bonds of all law firm staff
- ✔ Controls: The person who writes the check should not sign the check
- ✔ Maintain control!
- ✔ No blank checks
- ✔ Store checks in a secure location
- ✔ Pre-print checks with “void after 90 days”
- ✔ Sequentially numbered checks
- ✔ Never allow a stamp of your signature
- ✔ Don’t make checks payable to “cash”
- ✔ Requirement to report large sums of cash
- ✔ Receive trust account bank statement unopened





# Managing IOTA Trust Accounts: Tips


- ✔ **Trust Accounting and Your Employees**
- ✔ **Don't Create Invitations to Steal**
- ✔ Separate duties: At least two people: One person makes deposit
- ✔ Another person writes checks
- ✔ One person makes journal and ledger entries
- ✔ Another person prepares the bank reconciliation and monthly comparison
- ✔ Cross-train your support staff



# Managing IOTA Trust Accounts: Tips

- ✔ **Trust Accounting: disbursements against uncollected funds**
- ✔ **6 exceptions allowing immediate disbursement**
- ✔ Certified checks and cashiers' checks
- ✔ Loan proceeds from bank or institutional lender
- ✔ Bank checks; official checks; money orders; and within the State of Florida, credit union checks Federal or State Government checks
- ✔ Checks on another FL lawyer's trust account or the escrow account of a licensed real estate broker
- ✔ Checks issued by insurance companies licensed by the State of Florida
- ✔ ...but don't do it!
- ✔ Wait until funds are collected
- ✔ Be careful –Rule states, “may disburse” not shall disburse
- ✔ YOU are still the guarantor

# Resources

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- ✓ Bar's website has Bar rules and ethics opinions and other useful information and links. *www.floridabar.org*.
  - ✓ Law Office Management Assistance Service (LOMAS)
  - ✓ The Florida Bar Ethics Department provides opinions to attorneys on future circumstances and issues. 1 800 235-8619.
  - ✓ Contact an attorney with experience in the area and whose practice includes analysis of ethics issues and Bar rules.



# Final Note

Thanks for your attention...  
...and be careful out there!