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AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION
COMMISSION ON INTEREST ON LAWYER TRUST ACCOUNTS
SECTION OF LAW PRACTICE MANAGEMENT
STANDING COMMITTEE ON PARALEGALS
NATIONAL ORGANIZATION OF BAR COUNSEL

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 **RESOLVED**, That the American Bar Association adopts the black letter *Model Rules for*
2 *Client Trust Account Records*, dated August 2010, to replace the *Model Rule on Financial*
3 *Recordkeeping*, adopted February 1993.

4
5 **MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS**

6
7 **RULE 1: RECORDKEEPING GENERALLY**

8
9 A lawyer who practices in this jurisdiction shall maintain current financial records
10 as provided in these Rules and required by [Rule 1.15 of the Model Rules of
11 Professional Conduct], and shall retain the following records for a period of [five years]
12 after termination of the representation:

- 13
- 14 (a) receipt and disbursement journals containing a record of deposits to and
15 withdrawals from client trust accounts, specifically identifying the date,
16 source, and description of each item deposited, as well as the date, payee and
17 purpose of each disbursement;
 - 18
 - 19 (b) ledger records for all client trust accounts showing, for each separate trust
20 client or beneficiary, the source of all funds deposited, the names of all persons
21 for whom the funds are or were held, the amount of such funds, the
22 descriptions and amounts of charges or withdrawals, and the names of all
23 persons or entities to whom such funds were disbursed;
 - 24
 - 25 (c) copies of retainer and compensation agreements with clients [as required by
26 Rule 1.5 of the Model Rules of Professional Conduct];
 - 27
 - 28 (d) copies of accountings to clients or third persons showing the disbursement of
29 funds to them or on their behalf;
 - 30
 - 31 (e) copies of bills for legal fees and expenses rendered to clients;

- 32 (f) copies of records showing disbursements on behalf of clients;
- 33
- 34 (g) the physical or electronic equivalents of all checkbook registers, bank
- 35 statements, records of deposit, pre-numbered canceled checks, and substitute
- 36 checks provided by a financial institution;
- 37
- 38 (h) records of all electronic transfers from client trust accounts, including the
- 39 name of the person authorizing transfer, the date of transfer, the name of the
- 40 recipient and confirmation from the financial institution of the trust account
- 41 number from which money was withdrawn and the date and the time the
- 42 transfer was completed;
- 43
- 44 (i) copies of [monthly] trial balances and [quarterly] reconciliations of the client
- 45 trust accounts maintained by the lawyer; and
- 46
- 47 (j) copies of those portions of client files that are reasonably related to client trust
- 48 account transactions.
- 49

50 Comment

51

52 [1] Rule 1 enumerates the basic financial records that a lawyer must maintain with regard

53 to all trust accounts of a law firm. These include the standard books of account, and the

54 supporting records that are necessary to safeguard and account for the receipt and disbursement

55 of client or third person funds as required by Rule 1.15 of the Model Rules of Professional

56 Conduct or its equivalent. Consistent with Rule 1.15, this Rule proposes that lawyers maintain

57 client trust account records for a period of five years after termination of each particular legal

58 engagement or representation. Although these Model Rules address the accepted use of a client

59 trust account by a lawyer when holding client or third person funds, some jurisdictions may

60 permit a lawyer to deposit certain advance fees for legal services into the lawyer's business or

61 operating account. In those situations, the lawyer should still be guided by the standards

62 contained in these Model Rules.

63 [2] Rule 1(g) requires that the physical or electronic equivalents of all checkbook

64 registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute

65 checks be maintained for a period of five years after termination of each legal engagement or

66 representation. The "Check Clearing for the 21st Century Act" or "Check 21 Act", codified at 12

67 U.S.C. §5001 *et. seq.*, recognizes "substitute checks" as the legal equivalent of an original check.

68 A "substitute check" is defined at 12 U.S.C. §5002(16) as "paper reproduction of the original

69 check that contains an image of the front and back of the original check; bears a magnetic ink

70 character recognition ("MICR") line containing all the information appearing on the MICR line

71 of the original check; conforms with generally applicable industry standards for substitute

72 checks; and is suitable for automated processing in the same manner as the original check.

73 Banks, as defined in 12 U.S.C. §5002(2), are not required to return to customers the original

74 canceled checks. Most banks now provide electronic images of checks to customers who have

75 access to their accounts on internet-based websites. It is the lawyer's responsibility to download

76 electronic images. Electronic images shall be maintained for the requisite number of years and

77 shall be readily available for printing upon request or shall be printed and maintained for the
78 requisite number of years.

79 [3] The ACH (Automated Clearing House) Network is an electronic funds transfer or
80 payment system that primarily provides for the inter-bank clearing of electronic payments
81 between originating and receiving participating financial institutions. ACH transactions are
82 payment instructions to either debit or credit a deposit account. ACH payments are used in a
83 variety of payment environments including bill payments, business-to-business payments, and
84 government payments (e.g. tax refunds.) In addition to the primary use of ACH transactions,
85 retailers and third parties use the ACH system for other types of transactions including electronic
86 check conversion (ECC). ECC is the process of transmitting MICR information from the bottom
87 of a check, converting check payments to ACH transactions depending upon the authorization
88 given by the account holder at the point-of-purchase. In this type of transaction, the lawyer
89 should be careful to comply with the requirements of Rule 1(h).

90 [4] There are five types of check conversions where a lawyer should be careful to comply
91 with the requirements of Rule 1(h). First, in a "point-of-purchase conversion," a paper check is
92 converted into a debit at the point of purchase and the paper check is returned to the issuer.
93 Second, in a "back-office conversion," a paper check is presented at the point of purchase and is
94 later converted into a debit and the paper check is destroyed. Third, in an "account-receivable
95 conversion," a paper check is converted into a debit and the paper check is destroyed. Fourth, in
96 a "telephone-initiated debit" or "check-by-phone" conversion, bank account information is
97 provided via the telephone and the information is converted to a debit. Fifth, in a "web-initiated
98 debit," an electronic payment is initiated through a secure web environment. Rule 1(h) applies to
99 each of the type of electronic funds transfers described. All electronic funds transfers shall be
100 recorded and a lawyer should not re-use a check number which has been previously used in an
101 electronic transfer transaction.

102 [5] The potential of these records to serve as safeguards is realized only if the procedures
103 set forth in Rule 1(i) are regularly performed. The trial balance is the sum of balances of each
104 client's ledger card (or the electronic equivalent). Its value lies in comparing it on a monthly
105 basis to a control balance. The control balance starts with the previous month's balance, then
106 adds receipts from the Trust Receipts Journal and subtracts disbursements from the Trust
107 Disbursements Journal. Once the total matches the trial balance, the reconciliation readily
108 follows by adding amounts of any outstanding checks and subtracting any deposits not credited
109 by the bank at month's end. This balance should agree with the bank statement. Quarterly
110 reconciliation is recommended only as a minimum requirement; monthly reconciliation is the
111 preferred practice given the difficulty of identifying an error (whether by the lawyer or the bank)
112 among three months' transactions.

113 [6] In some situations, documentation in addition to that listed in paragraphs (a) through
114 (i) of Rule 1 is necessary for a complete understanding of a trust account transaction. The type of
115 document that a lawyer must retain under paragraph (j) because it is "reasonably related" to a
116 client trust transaction will vary depending on the nature of the transaction and the significance
117 of the document in shedding light on the transaction. Examples of documents that typically must
118 be retained under this paragraph include correspondence between the client and lawyer relating
119 to a disagreement over fees or costs or the distribution of proceeds, settlement agreements
120 contemplating payment of funds, settlement statements issued to the client, documentation
121 relating to sharing litigation costs and attorney fees for subrogated claims, agreements for
122 division of fees between lawyers, guarantees of payment to third parties out of proceeds

123 recovered on behalf of a client, and copies of bills, receipts or correspondence related to any
124 payments to third parties on behalf of a client (whether made from the client's funds or from the
125 lawyer's funds advanced for the benefit of the client).

126
127 **RULE 2: CLIENT TRUST ACCOUNT SAFEGUARDS**

128
129 **With respect to client trust accounts required by [Rule 1.15 of the Model Rules of**
130 **Professional Conduct]:**

- 131
- 132 (a) **only a lawyer admitted to practice law in this jurisdiction or a person under**
133 **the direct supervision of the lawyer shall be an authorized signatory or**
134 **authorize transfers from a client trust account;**
 - 135
 - 136 (b) **receipts shall be deposited intact and records of deposit should be sufficiently**
137 **detailed to identify each item; and**
 - 138
 - 139 (c) **withdrawals shall be made only by check payable to a named payee and not to**
140 **cash, or by authorized electronic transfer.**

141
142 **Comment**

143
144 [1] Rule 2 enumerates minimal accounting controls for client trust accounts. It also
145 enunciates the requirement that only a lawyer admitted to the practice of law in the jurisdiction
146 or a person who is under the direct supervision of the lawyer shall be the authorized signatory or
147 authorize electronic transfers from a client trust account. While it is permissible to grant limited
148 nonlawyer access to a client trust account, such access should be limited and closely monitored
149 by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client
150 trust account and can be disciplined for failure to supervise subordinates who misappropriate
151 client funds. See, Rules 5.1 and 5.3 of the Model Rules of Professional Conduct.

152 [2] Authorized electronic transfers shall be limited to (1) money required for payment to
153 a client or third person on behalf of a client; (2) expenses properly incurred on behalf of a client,
154 such as filing fees or payment to third persons for services rendered in connection with the
155 representation; or (3) money transferred to the lawyer for fees that are earned in connection with
156 the representation and are not in dispute; or (4) money transferred from one client trust account
157 to another client trust account.

158 [3] The requirements in paragraph (b) that receipts shall be deposited intact mean that a
159 lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same
160 time, a practice commonly known as a split deposit.

161
162 **RULE 3: AVAILABILITY OF RECORDS**

163
164 **Records required by Rule 1 may be maintained by electronic, photographic, or**
165 **other media provided that they otherwise comply with these Rules and that printed**
166 **copies can be produced. These records shall be readily accessible to the lawyer.**

167
168 **Comment**

170 [1] Rule 3 allows the use of alternative media for the maintenance of client trust account
171 records if printed copies of necessary reports can be produced. If trust records are computerized,
172 a system of regular and frequent (preferably daily) back-up procedures is essential. If a lawyer
173 uses third-party electronic or internet based file storage, the lawyer must make reasonable efforts
174 to ensure that the company has in place, or will establish reasonable procedures to protect the
175 confidentiality of client information. See, ABA Formal Ethics Opinion 398 (1995). Records
176 required by Rule 1 shall be readily accessible and shall be readily available to be produced upon
177 request by the client or third person who has an interest as provided in Model Rule 1.15, or by
178 the official request of a disciplinary authority, including but not limited to, a subpoena duces
179 tecum. Personally identifying information in records produced upon request by the client or third
180 person or by disciplinary authority shall remain confidential and shall be disclosed only in a
181 manner to ensure client confidentiality as otherwise required by law or court rule.

182 [2] Rule 28 of the Model Rules for Lawyer Disciplinary Enforcement provides for the
183 preservation of a lawyer's client trust account records in the event that the lawyer is transferred
184 to disability inactive status, suspended, disbarred, disappears, or dies.

185
186 **RULE 4: DISSOLUTION OF LAW FIRM**

187
188 **Upon dissolution of a law firm or of any legal professional corporation, the partners**
189 **shall make reasonable arrangements for the maintenance of client trust account records**
190 **specified in Rule 1.**

191
192 **Comment**

193
194 [1] Rules 4 and 5 provide for the preservation of a lawyer's client trust account records in
195 the event of dissolution or sale of a law practice. Regardless of the arrangements the partners or
196 shareholders make among themselves for maintenance of the client trust records, each partner
197 may be held responsible for ensuring the availability of these records. For the purposes of these
198 Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules
199 1.0(c),(g), and (h) of the Model Rules of Professional Conduct

200
201 **RULE 5: SALE OF LAW PRACTICE**

202
203 **Upon the sale of a law practice, the seller shall make reasonable arrangements for**
204 **the maintenance of records specified in Rule 1.**

205

REPORT

Overview

The Model Rule on Financial Recordkeeping, adopted in February 1993, delineates the types of records that lawyers must maintain to satisfy the requirements in Rule 1.15 of the Model Rules of Professional Conduct. Specifically, Model Rule 1.15 requires a lawyer to preserve “complete records” with respect to a lawyer’s client trust accounts and to “render a full accounting” for the receipt and distribution of trust property, but it does not include practical guidance to the lawyer on the maintenance of these records. The Model Rule on Financial Recordkeeping provided uniform and minimal standards for compliance with these fiduciary obligations and for establishing basic accounting control systems. See, Appendix A, attached.

Every United States jurisdiction has adopted the requirement of Model Rule 1.15 that a lawyer maintain “complete records.” Twenty-eight jurisdictions have additional rules or comments outlining the types of records that must be maintained; an additional five jurisdictions direct lawyers to the ABA Model Rule on Financial Recordkeeping as a guide for recordkeeping requirements.

There have been many changes in banking laws and practices since the adoption of the Model Rule on Financial Recordkeeping. The Check Clearing for the 21st Century Act (“Check 21”), 12 U.S.C. §5001 et. seq., was adopted in 2003 and allows banks to use electronic images of checks as a substitute for canceled checks. In addition, many merchants now convert paper checks into electronic images and the original checks are often destroyed. Most jurisdictional rules, and the current ABA Model Rule on Financial Recordkeeping, require lawyers to maintain the original canceled checks. Accordingly, lawyers are inadvertently running afoul of their jurisdiction’s rules of professional conduct. This resolution eliminates this danger for lawyers by defining what records a lawyer must maintain to satisfy the “complete records” requirement of Rule 1.15 and how those records must be maintained.

Along with changes to banking practices through “Check 21,” methods of banking have changed for lawyers and their clients. Electronic banking, and specifically, wire transfers or electronic transfers of funds have become more prevalent. This form of banking presents a special set of problems for lawyers with trust accounts because there is often no discernable paper trail to the transaction. Records of these transactions can be found as part of the lawyer’s monthly statement or through the lawyer’s online banking system, but banks do not provide specific confirmation of electronic transactions as a matter of course. Lawyers must be proactive in securing the necessary records for these transactions.

This resolution addresses a lawyer’s recordkeeping requirements following the electronic transfer of funds from client trust accounts and clarifies who can authorize transactions from client trust accounts. The resolution also addresses issues related to record maintenance and outlines necessary safeguards that a lawyer must have in place when

using electronic record storage systems. Finally, the scope of the Model Rules for Client Trust Account Records has been clearly defined and the structure simplified.

Title and Structure

A goal of any ABA Model Rule is to serve as a guide to individual jurisdictions in attaining the highest standards in the practice of law. Model Rules should be clearly structured, focused, and provide easy to follow instructions to lawyers. The Model Rules are now organized into five separate Rules. This new organization increases the readability of the Model Rules and the associated comments.

The Model Rule on Financial Recordkeeping was adopted as a guideline for lawyers to follow in satisfying the “complete records” requirement of Model Rule 1.15 when the lawyer is handling the “property of clients or third persons.” The requirements contained within the Model Rule were meant to primarily address the lawyer’s handling of client trust accounts or money held in trust by the lawyer. The new Model Rules for Client Trust Account Records more accurately reflect the intended scope.

Rule 1: Recordkeeping Generally

New Rule 1 and its supporting comments address general recordkeeping requirements for all lawyers holding client funds. Many of the provisions remain unchanged from what was formerly Section A of the Model Rule on Financial Recordkeeping. The substantive changes to this section focus on advances in banking practices that have occurred since the Model Rule on Financial Recordkeeping was adopted.

“Check 21” was adopted to enable banks to process more checks electronically by allowing them to capture a picture of the front and back of a check along with the associated payment information and transmit that information electronically. This process eliminates the need for banks to move the actual paper check from bank to bank for processing because the captured image of the check becomes a “substitute check” and can be processed electronically. As a result of these electronic images, banks are now allowed to provide either the original canceled check or the “substitute check” to the account holder. Accordingly, the lawyer will either receive a canceled check, a “substitute check,” or have access to an electronic image of the check through the bank’s on-line system.

New Rule 1 specifically includes substitute checks as an alternative to pre-numbered canceled checks. The current Model Rule requires a lawyer to maintain the canceled check or its equivalent. Although a substitute check is legally the same as a canceled check, the addition of specific language eliminates the risk of disciplinary agencies finding a lawyer maintaining substitute checks in violation of the jurisdiction’s rules.

The current Model Rule lacks any specific provisions for the maintenance of records following the electronic transfer of funds. While many individual jurisdictions have adopted provisions to cover the increase in electronic banking mechanisms, most

jurisdictions still mirror the ABA Model Rule. New Rule 1 and its supporting comments seek to provide specific guidelines for securing the authorization for electronic transfers and for maintaining the necessary accounting information to satisfy the requirements of Model Rule 1.15.

New Rule 1 outlines the specific recordkeeping requirements for any electronic transfer of funds from a client trust account. Comments 3 and 4 delineate the many environments in which an electronic funds transfer or electronic check conversion can occur (e.g. wire transfers, electronic transfers of funds, and automatic clearing house (ACH) transactions). Electronic fund transfers are assumed to carry a greater risk of abuse than paper check withdrawals. Therefore, lawyers should maintain detailed information regarding each electronic transfer and be especially vigilant in complying with Rule 1(h).

Rule 2: Client Trust Account Safeguards

Rule 2 (formerly Section B) and its supporting comments address the minimum safeguards that must be in place with respect to client trust accounts. The vast majority of jurisdictions allow a nonlawyer employee to have access to and authorize transactions from a client trust account. While a lawyer should limit client trust account access and authorization, new Rule 2(a) allows an employee under the direct supervision of a lawyer to authorize transactions on a client trust account. Such authorization should be limited and the lawyer should closely monitor all transactions from client trust accounts. If a lawyer grants authorization privileges to nonlawyer employees, the lawyer remains personally and professionally liable for all transactions. See, Rule 5.1 (Responsibility of Partners, Managers, and Supervisory Lawyers) and Rule 5.3 (Responsibilities Regarding Non-lawyer Assistants) of the Model Rules of Professional Conduct.

Rule 3: Availability of Records

The lawyer's client trust account records may be maintained by electronic, photographic, computer or other media or in paper format at the lawyer's office or at an off-site storage facility. Regardless of which record storage option is chosen, the records must be readily accessible to the lawyer and the lawyer must be able to produce and print them upon request.

Many lawyers are now using third-party storage systems to store their files. Prior to using third-party or internet based file storage, the lawyer must ensure that the company has established reasonable procedures to protect client confidentiality and ensure that the files can be accessed by a disciplinary authority, client, or interested third-party, following issuance of a subpoena or other demand for production by a court.

Rule 28 of the Model Rules for Lawyer Disciplinary Enforcement provides for the preservation of a lawyer's client trust account records in the event that the lawyer is transferred to disability inactive status, suspended, disbarred, disappears, or dies.

Rule 4: Dissolution of Partnership and Rule 5: Sale of a Law Practice

It is the responsibility of all partners in a law firm to ensure the proper storage and accessibility of client trust account records. If a proper system is not established prior to the dissolution or sale of a law firm, each partner may be held personally and professionally responsible.

Conclusion

The Model Rules for Client Trust Account Records provide guidelines to lawyers for compliance with the “complete records” requirement of Rule 1.15 of the Model Rules of Professional Conduct by establishing minimum standards for maintaining a lawyer’s financial records. The new Model Rules do not increase the regulatory obligation for lawyers. They seek to eliminate the risk of noncompliance by lawyers with client trust accounts in banks using “substitute checks” or electronic imaging of checks; to clarify the recordkeeping requirements for lawyers making electronic fund transfers; and to clarify record storage requirements. The new Model Rules accommodate current standards of practice while continuing to protect the interests of clients.

Respectfully submitted,
Hon. Daniel J. Crothers, Chair
Standing Committee on Client Protection
August 2010

APPENDIX A

~~ABA MODEL RULE ON FINANCIAL RECORDKEEPING~~

ABA MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS

A. RULE 1. RECORDKEEPING GENERALLY

A lawyer who practices in this jurisdiction shall maintain current financial records as provided in ~~this~~ these Rules, and required by [Rule 1.15 of the Model Rules of Professional Conduct], and shall retain the following records for a period of [five years] after termination of the representation:

- ~~(1)~~ (a). receipt and disbursement journals containing a record of deposits to and withdrawals from ~~bank accounts which concern or affect the lawyer's practice of law,~~ client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;
- ~~(2)~~ (b). ledger records for all client trust accounts ~~required by [Rule 1.15 of the ABA Model Rules of Professional Conduct]~~ showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;
- ~~(3)~~ (c). copies of retainer and compensation agreements with clients [as required by Rule 1.5 of the Model Rules of Professional Conduct];
- ~~(4)~~ (d). copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;
- ~~(5)~~ (e). copies of bills for legal fees and expenses rendered to clients;
- ~~(6)~~ (f). copies of records showing disbursements on behalf of clients;
- ~~(7)~~ (g). the physical or electronic equivalents of all checkbook registers, ~~check stubs~~ bank statements, records of deposit, pre-numbered canceled checks, and ~~or~~ their equivalent substitute checks provided by a financial institution;
- (h). records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

- ~~(8)~~ (i). copies of [monthly] trial balances and [quarterly] reconciliations of the lawyer's client trust accounts maintained by the lawyer; and
- ~~(9)~~ (j). copies of those portions of client files that are reasonably ~~necessary for a complete understanding of the financial transactions pertaining to them~~ related to client trust account transactions.

Comment

[1] ~~Paragraph A Rule 1~~ enumerates the basic financial records that a lawyer ~~should~~ must maintain with regard to ~~the business and~~ all trust accounts of a law firm. These include the standard books of account, and the supporting records which are necessary to safeguard and account for the receipt and disbursement of client or third person funds as required by Rule 1.15 of the ABA Model Rules of Professional Conduct or its equivalent. Consistent with Rule 1.15, this rule proposes that lawyers maintain ~~financial~~ client trust account records and safekeeping records for a period of five years after termination of each particular legal engagement or representation. Although these Model Rules address the accepted use of a client trust account by a lawyer when holding client or third person funds, some jurisdictions may permit a lawyer to deposit certain advance fees for legal services into the lawyer's business or operating account. In those situations, the lawyer should still be guided by the standards contained in these Model Rules.

[2] Rule 1(G) requires that the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks be maintained for a period of five years after termination of each legal engagement or representation. The "Check Clearing for the 21st Century Act" or "Check 21 Act", codified at 12 U.S.C. §5001 et. seq., recognizes "substitute checks" as the legal equivalent of an original check. A "substitute check" is defined at 12 U.S.C. §5002(16) as "paper reproduction of the original check that contains an image of the front and back of the original check; bears a magnetic ink character recognition ("MICR") line containing all the information appearing on the MICR line of the original check; conforms with generally applicable industry standards for substitute checks; and is suitable for automated processing in the same manner as the original check. Banks, as defined in 12 U.S.C. §5002(2), are not required to return to customers the original canceled checks. Most banks now provide electronic images of checks to customers who have access to their accounts on internet-based websites. It is the lawyer's responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall be readily available for printing upon request or shall be printed and maintained for the requisite number of years.

[3] The ACH (Automated Clearing House) Network is an electronic funds transfer or payment system that primarily provides for the interbank clearing of electronic payments between originating and receiving participating financial institutions. ACH transactions are payment instructions to either debit or credit a deposit account. ACH payments are used in a variety of payment environments including bill payments, business-to-business payments, and government payments (e.g. tax refunds.) In addition to the primary use of ACH transactions, retailers and third parties use the ACH system for other types of transactions including electronic check conversion (ECC). ECC is the process of transmitting MICR information from the bottom of a check, converting check payments to ACH transactions depending upon the authorization

given by the account holder at the point-of-purchase. In this type of transaction, the lawyer should be careful to comply with the requirements of Rule 1 (H).

[4] There are five types of check conversions where a lawyer should be careful to comply with the requirements of Rule 1(H). First, in a "point-of-purchase conversion," a paper check is converted into a debit at the point of purchase and the paper check is returned to the issuer. Second, in a "back-office conversion," a paper check is presented at the point of purchase and is later converted into a debit and the paper check is destroyed. Third, in an "account-receivable conversion," a paper check is converted into a debit and the paper check is destroyed. Fourth, in a "telephone-initiated debit" or "check-by-phone" conversion, bank account information is provided via the telephone and the information is converted to a debit. Fifth, in a "web-initiated debit," an electronic payment is initiated through a secure web environment. Rule 1(H) applies to each of the type of electronic funds transfers described. All electronic funds transfers shall be recorded and a lawyer should be careful not to re-use a check number which has been previously used in an electronic transfer transaction.

~~[2]~~[5] The potential of these records to serve as safeguards is realized only if the procedures set forth in Paragraph A(8) Rule 1(i) are regularly performed. The trial balance is the sum of balances of each client's ledger card (or the computerized equivalent). Its value lies in comparing it on a monthly basis to a control balance. The control balance starts with the previous month's balance, then adds receipts from the Trust Receipts Journal and subtracts disbursements from the Trust Disbursements Journal. Once the total matches the trial balance, the reconciliation readily follows by adding amounts of any outstanding checks and subtracting any deposits not credited by the bank at month's end. This balance should agree with the bank statement. Quarterly reconciliation is recommended only as a minimum requirement; monthly reconciliation is the preferred practice given the difficulty of identifying an error (whether by the lawyer or the bank) among three months' transactions.

[6] In some situations, documentation in addition to that listed in paragraphs (a) through (i) of Rule 1 is necessary for a complete understanding of a trust account transaction. The type of document that a lawyer must retain under paragraph (j) because it is "reasonably related" to a client trust transaction will vary depending on the nature of the transaction and the significance of the document in shedding light on the transaction. Examples of documents that typically must be retained under this paragraph include correspondence between the client and lawyer relating to a disagreement over fees or costs or the distribution of proceeds, settlement agreements contemplating payment of funds, settlement statements issued to the client, documentation relating to sharing litigation costs and attorney fees for subrogated claims, agreements for division of fees between lawyers, guarantees of payment to third parties out of proceeds recovered on behalf of a client, and copies of bills, receipts or correspondence related to any payments to third parties on behalf of a client (whether made from the client's funds or from the lawyer's funds advanced for the benefit of the client).

B. RULE 2. CLIENT TRUST ACCOUNT SAFEGUARDS

With respect to client trust accounts required by [Rule 1.15 of the ABA Model Rules of Professional Conduct]:

- (1) **A.** **only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory on the account or authorize transfers from a client trust account;**
- (2) **B.** **receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and**
- (3) **C.** **withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized bank electronic transfer.**

Comment

~~[3]~~[1] ~~Paragraph B~~ Rule 2 enumerates minimal accounting controls for lawyer client trust accounts. It also enunciates the requirement that only a lawyer admitted to the practice of law in the jurisdiction or a person who is under the direct supervision of the lawyer shall be an the authorized signatory ~~on a lawyer trust account~~ or authorize electronic transfers from a client trust account. While it is permissible to grant limited non-lawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See, Rule 5.1 and 5.3 of the Model Rules of Professional Conduct.

[2] Authorized electronic transfers shall be limited to (1) money required for payment to a client or third person on behalf of a client; (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation; or (3) money transferred to the lawyer for fees which are earned in connection with the representation and are not in dispute; or (4) money transferred from one client trust account to another client trust account.

[3] The requirements in paragraph (b) that receipts shall be deposited intact mean that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, a practice commonly known as a split deposit.

C. RULE 3. AVAILABILITY OF RECORDS

Records required by ~~this rule~~ Rule 1 may be maintained by electronic, photographic, ~~computer~~ or other media provided that they otherwise comply with ~~this rule~~ these Rules and ~~provided further~~ that printed copies can be produced. These Records shall be ~~located at the lawyer's principal office in the jurisdiction or in a readily accessible location~~ readily accessible to the lawyer.

Comment

~~[4]~~[1] ~~Paragraph C~~ Rule 3 allows the use of alternative media for the maintenance of ~~bookkeeping~~ client trust account records if printed copies of necessary reports can be produced. If trust records are computerized, a system of regular and frequent (preferably daily) back-up procedures is essential. If a lawyer uses third-party electronic or internet based file storage, the lawyer must make reasonable efforts to ensure that the company has in place, or will establish,

reasonable procedures to protect the confidentiality of client information. *See*, ABA Formal Ethics Opinion 398 (1995). Records required by Rule 1 shall be readily accessible and shall be readily available to be produced upon request by the client or third person who has an interest as provided in Model Rule 1.15, or by the official request of a disciplinary authority, including but not limited to, a subpoena duces tecum. Personally identifying information in records produced upon request by the client or third person or by disciplinary authority shall remain confidential and shall be disclosed only in a manner to ensure client confidentiality as otherwise required by law or court rule."

[2] Rule 28 of the Model Rules for Lawyer Disciplinary Enforcement provides for the preservation of a lawyer's client trust account records in the event that the lawyer is transferred to disability inactive status, suspended, disbarred, disappears, or dies.

D. RULE 4. DISSOLUTION OF LAW FIRM

Upon dissolution of ~~any partnership of lawyers~~ a law firm or of any legal professional corporation, the partners ~~or shareholders~~ shall make ~~appropriate~~ reasonable arrangements for the maintenance of the client trust account records specified in ~~Paragraph A of this Rule~~ Rule 1 of these rules.

Comment

~~5~~[1] ~~Paragraph D and E~~ Rules 4 and 5 provide for the preservation of a lawyer's client trust account records in the event of dissolution or sale of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm", "partner", and "reasonable" are defined in accordance with Rules 1.0 (c), (g), (h) of the Model Rules of Professional Conduct.

E. RULE 5. SALE OF LAW PRACTICE

Upon the sale of a law practice, the seller shall make ~~appropriate~~ reasonable arrangements for the maintenance of the records specified in ~~Paragraph A of this Rule~~ Rule 1 of these rules.

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Standing Committee on Client Protection

Submitted By: Hon. Daniel J. Crothers, Chair

1. Summary of Recommendation(s).
The recommendation seeks to substitute the Model Rules for Client Trust Account Records for the Model Rule on Financial Recordkeeping. The new Model Rules clarify recordkeeping requirements for lawyers following changes in banking laws, increases in form and volume of electronic transactions from client trust accounts, changes in law office management and advances in methods of record maintenance since the Model Rule on Financial Recordkeeping was originally adopted. The proposed Model Rules do not increase a lawyer's regulatory obligations, but merely clarify established recordkeeping requirements.
2. Approval by Submitting Entity.
The Standing Committee on Client Protection approved this recommendation at its February 6, 2010 business meeting.
3. Has this or a similar recommendation been submitted to the House or Board previously?
The proposed recommendation has not been previously submitted to the House of Delegates or the Board of Governors.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
The recommendation would replace the Model Rule on Financial Recordkeeping, adopted in February 1993. The proposed Model Rules for Client Trust Account Records delineate the types of records a lawyer must maintain to satisfy the requirements of Rule 1.15 of the Model Rules of Professional Conduct that a lawyer must preserve "complete records" with respect to trust accounts and render a "full accounting" for the receipt and distribution of trust account property. The recommendation does not alter the requirements of Model Rule 1.15.
5. What urgency exists which requires action at this meeting of the House?
Due to changes in banking laws and advances in technology that affect both norms in banking practice and lawyer practice, lawyers are inadvertently running afoul of their jurisdiction's recordkeeping requirements. Clarifying recordkeeping requirements will eliminate that risk for lawyers.

6. Status of Legislation. (If applicable.)
N/A
7. Cost to the Association. (Both direct and indirect costs.)
There are no costs associated with this recommendation.
8. Disclosure of Interest. (If applicable.)
N/A
9. Referrals.
On February 26, 2010, the proposed Model Rules for Client Trust Account Records were referred to all Chairs and Directors of ABA Standing Committees and Commissions, all ABA Section and Division Delegates, state supreme court justices, presidents of state and local bar associations through *The Bridge*, and affiliated organizations including the Association of Professional Responsibility Lawyers, the National Organization of Bar Counsel, and the National Client Protection Organization. The proposal was posted on the ABA Center for Professional Responsibility (Center) website and circulated on various Center list serves.
10. Contact Person. (Prior to the meeting.)

Selina S. Thomas
Associate Client Protection Counsel
American Bar Association
321 N. Clark Street, 15th Floor
Chicago, IL 60654
Tel: 312/988-6721
e-mail: thomass@staff.abanet.org
11. Contact Person. (Who will present the report to the House.)
Justice Daniel J. Crothers
Chair, Standing Committee on Client Protection
e-mail: dcrother@ndcourts.gov

EXECUTIVE SUMMARY

1. Summary of the Recommendation

The Standing Committee on Client Protection (the “Committee”) recommends that the American Bar Association adopt the Model Rules for Client Trust Account Records to replace the Model Rule on Financial Recordkeeping.

2. Summary of the Issue that the Resolution Addresses

The proposed Model Rules for Client Trust Account Records delineate a lawyer’s recordkeeping requirements for client trust accounts in light of changes in banking laws, methods of lawyer practice, and advances in technology that have developed since the Model Rule on Financial Recordkeeping was adopted in February 1993. The proposed Model Rules for Client Trust Account Records do not increase the lawyer’s regulatory obligation.

3. Please Explain How the Proposed Policy Position will Address the Issue

The Model Rules on Client Trust Account Records are now organized into five separate Rules. This new organization increases the readability of each Rule and the associated comments. The proposed Model Rules also address a lawyer’s recordkeeping requirements following the electronic transfer of funds from client trust accounts and clarify who can authorize transactions from client trust accounts. The proposal addresses issues related to record maintenance and outlines necessary safeguards that a lawyer must have in place when using electronic record storage systems.

4. Summary of Minority Views

There are no minority views at this time.