

# Ethically Speaking



By Charles Slanina, Esquire

## Misplaced Trust: Don't Rely on Your Bank to Keep Your Firm's Books and Records in Compliance

**M**ultiple previous "Ethically Speaking" columns have dealt with Rule 1.15 books and records compliance and the compounding issues of "false" certification of that compliance. I have touted the advantages of pre-certification of compliance and I have pointed out the common mistakes. The Office of Disciplinary Counsel has also used many of their speaking engagements to offer guidance and warnings on these same points. Nevertheless, the Lawyers' Fund for Client Protection random audits continue to find non-compliance.

The Bar may have been lulled into a false sense of security. The LFCP has recently switched accounting firms for the audits as well as switching Chairmen. The number and frequency of the compliance audits abated for awhile, but they now appear to be ramped back up to a normal schedule. Obviously, I only get to see reports in which non-compliance is found due to the nature of my disciplinary defense and professional responsibility practice. However, based on those reports, it appears that the same typical findings of non-compliance persist. The most common of these findings include improperly titled attorney escrow and operating accounts.

Lest there be any doubt, attorney operating accounts must be titled "Attorney Operating Account" or "Attorney Business Account." Attorney trust accounts must be titled "Rule 1.15A Attorney Escrow Account" or "Rule 1.15A Attorney Trust Account." The title must appear on the account, deposit slips, statements, and checks. The trust account must be in a bank participating in the Overdraft Noti-

fication Program. A copy of the overdraft notification agreement or acknowledgment provided by the bank must be maintained with the firm's books and records.

Sounds simple enough. All of these requirements are detailed in Rule 1.15 and 1.15A of the Delaware Lawyer's Rules of Professional Conduct. The Certificate of Compliance itself asks the managing attorney certifying the firm's compliance whether or not the accounts are so entitled. Nevertheless, attorneys and firms continue to have problems with these issues.


While attorneys obviously bear the final responsibility for compliance, based on my own experiences and anecdotally, banks are not helping matters. At one time, all Delaware banks, with the exception of MBNA, agreed to participate in the overdraft notification program. With the demise of MBNA, now all banks may be participating, but it does not appear that there are any prerequisites placed on that participation beyond the agreement to notify the LFCP of overdrafts of the attorney trust accounts.

I continue to see examples where banks permit firms to open up improperly titled accounts. Frequently bank officers misinform their attorney customers that the accounts simply need to be titled as "IOLTA" or "non-IOLTA" accounts. I have personally been told by a bank officer that the bank's computer field does not accept enough characters to enter the full and required account title. They seem oblivious of the requirement that the trust account include the terms "Rule 1.15A" and "Trust" or "Escrow" account. This raises an obvious question as to whether or not an overdraft of an improperly titled account

would be reported if it occurred. I often send my clients back to the bank to insist that they be provided a copy of an overdraft notification agreement which they were not asked to sign when the account was opened and, notwithstanding their agreement to participate in the program, I still hear of banks offering firms overdraft protection on escrow accounts.

Banks want your business. Law firms are responsible for substantial bank deposits. Banks can and do make more money from deposited funds than they do on loaned funds. It is the modest proposal of "Ethically Speaking" that the attorney operating and trust accounts be standardized by the LFCP and as part of the price banks pay to participate in the overdraft notification program (and thereby become eligible to receive the coveted law firm deposits) that they be required to offer an approved attorney trust and operating account package including the correct titling of the accounts and a standardized overdraft notification agreement between the bank and the attorney.

If you are opening an account, take a copy of Rule 1.15 and 1.15A with you and be prepared to either educate or argue with your bank. If you have already certified your firm's books and compliance of an existing account, don't rely to your detriment on your bank's assistance in opening those accounts.

*"Ethically Speaking" is intended to stimulate awareness of ethical issues. It is not intended as legal advice nor does it necessarily represent the opinion of the Delaware State Bar Association. Additional information about the author is available at [www.delawgroup.com](http://www.delawgroup.com). *