Ethically Speaking

By Charles Slanina, Esquire

New Books and Records Rules For the New Year

The year's end is bringing lots of changes to the attorney record keeping requirements just in time for the Annual Registration Statement and Certificate of Compliance. Previous columns have noted the dilemma that firms face with regard to the deposit of client escrow funds. The current financial crisis and the failures of numerous banks created an initial uncertainty as to whether attorney escrow funds were covered by the Federal Insurance Deposit Commission ("FDIC") insurance. That question was resolved, but there remained an issue as to whether the attorney would be viewed as the depositor, limiting the coverage to $100,000 for the entire account or whether each client would be separately viewed as a depositor entitled to the same maximum coverage individually. The FDIC made it clear that each client would be entitled to that coverage and, later that coverage was raised to $250,000 per depositor as part of the Federal Government's response to the financial woes of the nation.

More recently, the American Bar Association urged the FDIC to increase coverage on interest-bearing deposit accounts beyond $250,000 noting that the increased insurance may still not be sufficient to protect funds in lawyer trust accounts. The ABA leadership and the ABA's Governmental Affairs Office met with FDIC officials and members of Congress to attempt to convince them that such a regulation would benefit both those served by non-profit legal aid programs and the bank industry itself. They urged the FDIC to either treat IOLTA accounts like payment-processing accounts or to expressly include IOLTA's among bank accounts that will qualify for unlimited FDIC insurance.

The FDIC had already announced that unlimited insurance would be available to non-interest bearing accounts. The ABA is now requesting that the FDIC recognize that because neither lawyers nor their clients receive interest from funds in IOLTA accounts, it would be appropriate to extend the unlimited insurance to such accounts.

Locally, an October 20, 2008 order of the Delaware Supreme Court has amended the Delaware Lawyer's Rules of Professional Conduct effective January 1, 2009. Books and Records requirements found in Rule 1.15 have received significant tweaks.

There's a big change which will affect Delaware offices of out-of-state firms. Those offices were previously permitted to have their escrow funds maintained out-of-state by the same firm as long as the Delaware office maintained an escrow account in a Delaware bank participating in the Overdraft Notification Program. A recent amendment to Rule 1.15(a) may close that loophole. Those funds must now be kept in a separate account "designated solely for funds held in connection with the practice of law in this jurisdiction." (Emphasis added.) As a result, although it is still permissible for an out-of-state firm with a Delaware office to maintain the books and records and for those funds to be deposited out-of-state, the Delaware office will no longer be able to permit their funds to be commingled with the funds of the out-of-state office of the same firm. A separate escrow account outside of Delaware used solely for the Delaware escrow funds and maintained in compliance with all of the Delaware Rules will be required. Placement of these funds out-of-state is still only permitted with the consent of the client or third person.

Rule 1.15(d) is the bookkeeping records retention requirement that all financial books and records relating to the law practice be preserved for at least five years. Previously, this rule extended to all lawyers "engaged in the private practice of law in this jurisdiction." The rule has been amended to now include attorneys engaging in the private practice of law "whether in an office situated in this jurisdiction or otherwise."

Rule 1.15(d) has also been amended to reflect the changes in the banking law. Banks are no longer required to return canceled checks to their clients. The rule previously required attorneys to preserve bank statements, canceled checks, and deposit slips. The rule change permits attorneys to maintain images or copies of canceled checks if that is all that is provided by the bank.

Perhaps as a result of numerous findings of non-compliance in LFCP compliance audits, the options for titling firm accounts have been significantly expanded. The current rules seem simple enough describing the various names that are permitted for attorney trust and escrow accounts and the requirement that those limited name options appear on the checks, account title, deposit slips, and other documents. However, as my previous column "Misplaced Trust: Don't Rely on Your Bank to Keep Your Firm's Books and Records in Compliance" noted, banks have proven themselves unwilling or unable to accommodate these requirements even where the attorney has been aware of them.

The latest amendment to Rule 1.15(d)

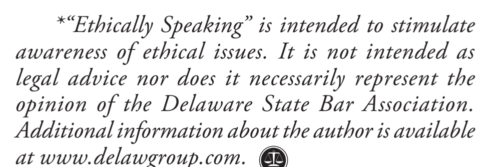
brings a substantial change to the current Rule 1.15A(a) by expanding the permissible title options. Fiduciary accounts may now be titled "Rule 1.15A Attorney Trust Account;" or "1.15A Trust Account;" or "1.15A Attorney Escrow Account;" or "1.15A Escrow Account." One of those variations must appear in the account title on the bank statement while other related statements, checks, deposit slips must now only contain, as a minimum, a designation of the account as "Attorney Trust Account" or "Attorney Escrow Account."

There is a new Rule 1.15(G) which states, "No funds which should have been disbursed shall remain in the account, including but not limited to, earned legal fees, which must be transferred to the lawyer's non-fiduciary account on a prompt and timely basis when earned." This rule change merely incorporates what had been a long prohibition against commingling which had been previously interpreted to include allowing earned fees to remain unswept from the escrow account.

Fellow tree-huggers rejoice. Rule 1.15(d)(10) has been deleted. That subsection required that a paper copy of all monthly journals, ledgers, reports and reconciliations be printed monthly and maintained with the books and records by firms using computer systems to maintain their financial books. The new subsection (10) now permits the option of creating a monthly electronic backup of the same documents to be stored in a manner making them accessible to review by both the lawyer and/or the auditor from the LFCP.

The end of the year is a perfect time to start thinking about the Certificate of Compliance which is due by February 1, 2009. As you know from previous columns, firms are permitted to pre-certify their compliance by having an independent CPA apply the audit program contained in the LFCP rules and on-line at the Delaware Supreme Court website. That audit program has been substantially revised to reflect these and other rule changes. Make sure that any CPA you select for this job is aware of these rule changes, as well as, the changes to the audit program. Firms that pre-certify have the option of noting their partial reliance on the accountant's pre-certification as part of their own certification to the Court of the compliance of their books and records. Don't forget to send a copy of that pre-certification to the LFCP as well, so that they can take that into account when they are drawing up their annual list of who will receive a "random" audit in the upcoming year. As always, I strongly recommend that you line up this pre-certification now.

Happy Holidays to all of my readers. Best wishes to you and your firm in achieving total books and records compliance in the New Year.



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