

STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

NOTICE OF PROPOSED RULES CHANGES

The Rules Committee has submitted a Letter Report to the Court of Appeals, transmitting thereby proposed new Rule 16-606.1 (Attorney Trust Account Record-Keeping) and proposed amendments to Rules 16-602 (Definitions) and 16-609 (Prohibited Transactions) and Appendix: Maryland Lawyers' Rules of Professional Conduct, Rule 1.15 (Safekeeping Property).

The Committee's Letter Report and the proposed new rule and amendments are set forth below.

Interested persons are asked to consider the Committee's Report and proposed rules changes and to forward on or before March 5, 2007 any written comments they may wish to make to:

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ALEXANDER L. CUMMINGS
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receipt and distribution of property other than funds, change the retention period for records of attorney trust account funds and other property to "at least five years after the date the record was created," and conform the provisions of Rule 1.15 (b) to the anti-commingling provisions of Rule 16-607 b.

The Rules in Title 16, Chapter 600 are proposed to be changed by the addition of new Rule 16-606.1, Attorney Trust Account Record-Keeping, and amendments to two existing Rules in the Chapter.

Proposed new Rule 16-606.1 sets forth minimum record-keeping requirements for an attorney trust account to help assure that funds of clients and third parties are being maintained by the lawyer consistent with the care required of a professional fiduciary. Section (a) lists the records that must be created as to (1) identification of attorney trust accounts, (2) deposits and disbursements, (3) client matter records, and (4) funds of the lawyer held in an attorney trust account as permitted by Rule 16-607 b. Section (b) requires a monthly reconciliation of the lawyer's records with the financial institution's month-end statement. Section (c) requires that whenever the records required by the Rule are created or maintained using electronic means, there must be an ability to print a paper copy of the records. A Committee note following section (c) reminds practitioners about the importance of regularly backing up electronically stored records. Section (d) requires that records created in accordance with section (a) of the Rule and records pertaining to an attorney trust account that are provided by the financial institution be maintained by the lawyer for a period of at least five years after the date the record was created.

Proposed amendments to Rule 16-609 expand upon the prohibition against cash disbursements from an attorney trust account and make clear that the only means of disbursement from the account is by check or electronic transfer. New section (c), proposed to be added to the Rule, prohibits any disbursement from an attorney trust account that would create a negative balance with respect to all client matters in the aggregate or with respect to any individual client matter.

The proposed amendments to Rule 16-602 are stylistic only.

For the guidance of the Court and the public, following each proposed rules change is a Reporter's Note describing the reasons for the proposal and any changes that would be effected in current law or practice. We caution that these Reporter's Notes were prepared initially for the benefit of the Rules Committee;

they are not part of the Rules and have not been debated or approved by the Committee; and they are not to be regarded as any kind of official comment or interpretation. They are included solely to assist the Court in understanding some of the reasons for the proposed changes.

Respectfully submitted,

Joseph F. Murphy, Jr.
Chairperson

Linda M. Schuett
Vice Chairperson

JFM/LMS:cdc

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

AMEND Rule 1.15 to add to paragraph (a) a reference to the records creation and maintenance provisions proposed to be added to the Rules in Title 16, Chapter 600; to require the creation and maintenance of records pertaining to the receipt of property other than funds; to change the records retention period set forth in paragraph (a); to conform paragraph (b) to Rule 16-607 b; and to make stylistic changes to paragraphs (c), (d), and (e); as follows:

Rule 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained pursuant to Title 16, Chapter 600 of the Maryland Rules, and records shall be created and maintained in accordance with the Rules in that Chapter. Other property shall be identified specifically as such and appropriately safeguarded, and records of its receipt and distribution shall be created and maintained. Complete records of ~~such~~ the account funds and of other property shall be kept by the lawyer and shall be preserved for a period of at least five

years after ~~termination of the representation~~ the date the record was created.

(b) A lawyer may deposit the lawyer's own funds in a client trust account ~~for the sole purpose of paying bank service charges on that account but only in an amount necessary for the purpose~~ only as permitted by Rule 16-607 b.

(c) Unless the client gives informed consent, confirmed in writing, to a different arrangement, a lawyer shall deposit legal fees and expenses that have been paid in advance into a client trust account ~~legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer~~ and may withdraw those funds for the lawyer's own benefit only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall ~~promptly~~ deliver promptly to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall ~~promptly~~ render promptly a full accounting regarding such property.

(e) When a lawyer in the course of ~~representation~~ a lawyer representing a client is in possession of property in which two

or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall ~~promptly~~ distribute promptly all portions of the property as to which the interests are not in dispute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property ~~that is the property~~ of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if ~~monies~~ money, in one or more trust accounts. Separate trust accounts may be warranted when administering estate ~~monies~~ money or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and the Rules in Title 16, Chapter 600 and comply with any other record-keeping rules established by law or court order.

[2] ~~While normally~~ Normally it is impermissible to commingle the lawyer's own funds with client funds, and paragraph (b) provides that it is permissible ~~when necessary to pay bank service charges on that account~~ only as permitted by Rule 16-607 b. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Paragraph (c) of Rule 1.15 permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer. Unless the client gives informed consent, confirmed in writing, to a different arrangement, the Rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16 (d).

[4] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit the client funds that the lawyer reasonably believes represent fees owed.

However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed promptly.

[5] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the funds or property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[6] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

Model Rules Comparison.-- Rule 1.15 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of changes to Rule 1.15 (c), the addition of Comment [3], and the omission of ABA Comment [6].

REPORTER'S NOTE

The proposed amendments to Rule 1.15 make three changes to paragraph (a). First is the addition of a reference to the records creation and maintenance provisions proposed to be added to the Rules in Title 16, Chapter 600 (Attorney Trust Accounts). Second is the addition of a requirement that records be kept with respect to a lawyer's receipt and distribution of property, other than funds, of clients and third parties. Third is a change of the records retention period from a period of "five years after termination of the representation" to "at least five years after the date the record was created."

Paragraph (b) currently conflicts with the provisions of Rule 16-607 b and is proposed to be amended to conform to that Rule.

Paragraphs (c), (d), and (e) contain stylistic changes.

MARYLAND RULES OF PROCEDURE
TITLE 16 - COURTS, JUDGES, AND ATTORNEYS
CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-602 to make a stylistic change, as follows:

Rule 16-602. DEFINITIONS

In ~~these rules~~ this Chapter, the following definitions apply, except as expressly otherwise provided or as necessary implication requires:

a. Approved Financial Institution.

"Approved financial institution" means a financial institution approved by the Commission in accordance with these Rules.

b. Attorney.

"Attorney" means any person admitted by the Court of Appeals to practice law.

c. Attorney Trust Account.

"Attorney trust account" means an account, including an escrow account, maintained in a financial institution for the deposit of funds received or held by an attorney or law firm on behalf of a client or third person.

d. Bar Counsel.

"Bar Counsel" means the person appointed by the Commission as the principal executive officer of the disciplinary system

affecting attorneys. All duties of Bar Counsel prescribed by these Rules shall be subject to the supervision and procedural guidelines of the Commission.

e. Client.

"Client" includes any individual, firm, or entity for which an attorney performs any legal service, including acting as an escrow agent or as a legal representative of a fiduciary. The term does not include a public or private entity of which an attorney is a full-time employee.

f. Commission.

"Commission" means the Attorney Grievance Commission of Maryland, as authorized and created by Rule 16-711 (Attorney Grievance Commission).

g. Financial Institution.

"Financial institution" means a bank, trust company, savings bank, or savings and loan association authorized by law to do business in this State, in the District of Columbia, or in a state contiguous to this State, the accounts of which are insured by an agency or instrumentality of the United States.

h. Law Firm.

"Law firm" includes a partnership of attorneys, a professional or nonprofit corporation of attorneys, and a combination thereof engaged in the practice of law. In the case of a law firm with offices in this State and in other

jurisdictions, ~~these~~ the Rules in this Chapter apply only to the offices in this State.

Source: This Rule is derived from former Rule BU2.

REPORTER'S NOTE

The proposed amendments to Rule 16-602 are stylistic only.

MARYLAND RULES OF PROCEDURE
TITLE 16 - COURTS, JUDGES, AND ATTORNEYS
CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

ADD new Rule 16-606.1, as follows:

Rule 16-606.1. ATTORNEY TRUST ACCOUNT RECORD-KEEPING

(a) Creation of Records

The following records shall be created and maintained for the receipt and disbursement of funds of clients or of third persons:

(1) Attorney Trust Account Identification

An identification of all attorney trust accounts maintained, including the name of the financial institution, account number, account name, date the account was opened, date the account was closed, and an agreement with the financial institution establishing each account and its interest-bearing nature.

(2) Deposits and Disbursements

A record for each account that chronologically shows all deposits and disbursements, as follows:

(A) for each deposit, a record made at or near the time of the deposit that shows (i) the date of the deposit, (ii) the amount, (iii) the identity of the client or third person for whom the funds were deposited, and (iv) the purpose of the deposit;

(B) for each disbursement, including a disbursement made by electronic transfer, a record made at or near the time of disbursement that shows (i) the date of the disbursement, (ii) the amount, (iii) the payee, (iv) the identity of the client or third person for whom the disbursement was made (if not the payee), and (v) the purpose of the disbursement;

(C) for each disbursement made by electronic transfer, a written memorandum authorizing the transaction and identifying the attorney responsible for the transaction.

Cross reference: See Rule 16-609 c, which provides that a disbursement that would create a negative balance with respect to any individual client matter or with respect to all client matters in the aggregate is prohibited.

(3) Client Matter Records

A record for each client matter in which the attorney receives funds in trust, as follows:

(A) for each attorney trust account transaction, a record that shows (i) the date of the deposit or disbursement; (ii) the amount of the deposit or disbursement; (iii) the purpose for which the funds are intended; (iv) for a disbursement, the payee and the check number or other payment identification; and (v) the balance of funds remaining in the account in connection with the matter; and

(B) an identification of the person to whom the unused portion of a fee or expense deposit is to be returned whenever it is to be returned to a person other than the client.

(4) Record of Funds of the Attorney

A record that identifies the funds of the attorney held in each attorney trust account as permitted by Rule 16-607 b.

(b) Monthly Reconciliation

An attorney shall cause to be created a monthly reconciliation of all attorney trust account records, client matter records, records of funds of the attorney held in an attorney trust account as permitted by Rule 16-607 b, and the adjusted month-end financial institution statement balance. The adjusted month-end financial institution statement balance is computed by adding subsequent deposits to and subtracting subsequent disbursements from the financial institution's month-end statement balance.

(c) Electronic Records

Whenever the records required by this Rule are created or maintained using electronic means, there must be an ability to print a paper copy of the records upon a reasonable request to do so.

Committee note: Electronic records should be backed up regularly by an appropriate storage device.

(d) Records to be Maintained

Financial institution month-end statements, any canceled checks or copies of canceled checks provided with a financial institution month-end statement, duplicate deposit slips or deposit receipts generated by the financial institution, and

records created in accordance with section (a) of this Rule shall be maintained for a period of at least five years after the date the record was created.

Committee note: An attorney or law firm may satisfy the requirements of section (d) of this Rule by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, electronic records, or any other medium that preserves the required data for the required period of time and from which a paper copy can be printed.

Cross reference: Rule 1.15 (Safekeeping Property) of the Maryland Lawyers' Rules of Professional Conduct.

Source: This Rule is new.

REPORTER'S NOTE

Proposed new Rule 16-606.1 sets forth minimum record-keeping requirements to help assure that funds of clients and third parties are being maintained by the lawyer consistent with the care required of a professional fiduciary.

MARYLAND RULES OF PROCEDURE
TITLE 16 - COURTS, JUDGES, AND ATTORNEYS
CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-609 to expand upon the prohibition of cash disbursements, to prohibit a disbursement that would create a negative balance, and to make stylistic changes, as follows:

Rule 16-609. PROHIBITED TRANSACTIONS

a. Generally.

An attorney or law firm may not borrow or pledge any funds required by ~~these~~ the Rules in this Chapter to be deposited in an attorney trust account, obtain any remuneration from the financial institution for depositing any funds in the account, or use any funds for any unauthorized purpose.

b. No Cash Disbursements.

An instrument drawn on an attorney trust account may not be drawn payable to cash or to bearer, and no cash withdrawal may be made from an automated teller machine or by any other method. All disbursements from an attorney trust account shall be made by check or electronic transfer.

c. Negative Balance Prohibited.

No funds from an attorney trust account shall be disbursed if the disbursement would create a negative balance with regard to an individual client matter or all client matters in the

aggregate.

Source: This Rule is derived in part from former Rule BU9 and is in part new.

REPORTER'S NOTE

The proposed amendments to Rule 16-609 divide the Rule into three sections.

In section a, the proposed change is stylistic, only.

The proposed amendment to section b expands upon the prohibition of cash disbursements from attorney trust accounts by adding a reference to automated teller machines and by adding a second sentence that states the only two ways, by check or by electronic transfer, that a disbursement from an attorney trust account may be made.

New section c prohibits any disbursement from an attorney trust account that would create a negative balance with regard to an individual client matter or all client matters in the aggregate.