Iowa Trust Accounts 2017
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Why is the subject important? Because you can get in a lot of trouble for "minor" violations:

> **See In Re Disciplinary Action Against Tigue (Minn. Aug. 16, 2017) (Lawyer suspended for two years due to multiple trust account "shortages [that] were typically small and were eventually cured" and $400 dispute.)**
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> https://mn.gov/law-library-stat/archive/supct/2017/OPA160694-081617.pdf

Part 1: A look at the Rules Governing Trust Accounts

Rule 32:1.15: 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.

> **Usually, we're talking about money, but this applies to all property belonging to a client. See the comments regarding safe deposit boxes.**

Funds shall be kept in a separate account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be **preserved for a period of six years** after termination of the representation.

> **Practice pointer: Since those records are confidential (see Rule 1.6), care must be taken in how they are stored.**
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> **See Rule 45 and other materials for the specific recordkeeping requirements.**

(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 that purpose.

> **Practice Pointer: $100 is probably a good number for funds to meet this requirement. Religiously watch this amount every month, especially if the bank charges a monthly service charge. If there is a monthly service charge, it would be a very wise practice to make a deposit to cover the charge every single month. While that is not specifically required, it will prevent very unpleasant surprises.**
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> According to the Commission (2015 ed.) **"**Where a minimum balance requirement exists for the account, it is permissible to deposit funds sufficient to maintain the minimum balance." So if the bank has a minimum balance to avoid a service charge, it would be reasonable to maintain a deposit of that amount, particularly if there are times when your account would otherwise have a low balance.
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> **If your friendly banker doesn't have a service charge on lawyer trust accounts, be sure to thank them. This helps you because it greatly minimizes the risks of inadvertent overdrafts. And it also makes sure that the Iowa Trust Account Commission is fully funded. If all banks**

started charging a monthly service charge, the commission would probably soon be out of business!

Court Rule 45.1 includes the following exception/requirement of one other time when your money should be in the trust account:

Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited in this account, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. (See the Tigue case for what happens if this last sentence is not followed, even if it's just $400)

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

We will go into more detail when we look at Rule 45.

(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 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 a full accounting regarding such property.

(e) When in the course of representation a lawyer 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 all portions of the property as to which the interests are not in dispute.

(f) All client trust accounts shall be governed by chapter 45 of the Iowa Court Rules.

ABA and Iowa Comments to Rule 1.15

[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.

Can one safe deposit box contain property belonging to a client and property belonging to the attorney? Or is this comingling? The Wisconsin version of the rule makes clear that a separate safe deposit box is required, with the name "Trust Account" on the signature card. Iowa does not have this specific rule, but beware of whether this might be considered "comingling," and seek an opinion as to how to proceed.

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, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies 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 comply with any recordkeeping rules established by law or court order. See, Iowa Ct. R. ch 45.

There is no prohibition on having more than one trust account, although this is rarely necessary. Some cases might be:

1. **Multi-state practice where the two states have conflicting rules.**
2. **Individual (non-IOLTA) trust account (see below)**

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

*3+ Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to 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.

[4] 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 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.

[5] 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.

See also Rule 5.7:

Rule 32:5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Iowa Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided: (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to ensure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist. (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

*6+ A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Such a fund has been established in Iowa, and lawyer participation is mandatory to the extent required by chapter 39 of the Iowa Court Rules.

CHAPTER 45 CLIENT TRUST ACCOUNT RULES

Rule 45.1 Requirement for client trust account. Funds a lawyer receives from clients or third persons for matters arising out of the practice of law in Iowa shall be deposited in one or more identifiable interest-bearing trust accounts located in Iowa. The trust account shall be clearly designated as "Trust Account." No funds belonging to the lawyer or law firm may be deposited in this account except:

> **Practice Pointer: A lawyer must have a trust account if he or she ever "receives funds from clients or third persons for matters arising out of the practice of law." Even if you do not routinely do things like personal injury settlements, there might be occasions when you are holding someone else's money. Therefore, having a trust account, even if you rarely use it, is probably a must for almost any attorney in private practice.**
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> **Does your bank statement/checkbook/signature card use the words "Trust Account"? The Wisconsin version of this rule makes clear that these exact words must be used, and that abbreviations cannot be used on statements, checks, signature cards, etc. While Iowa/Nebraska/Minnesota do not have that provision, it is probably a good practice, since the rule specifies "clearly designated" and uses quotation marks around the words "trust account."**
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> **For many years, the bank statement for my trust account came addressed to "MN LTAB," which wouldn't meet the Wisconsin requirement, and might be problematic in other states. My bank has since started addressing the statements to "Trust Account."**

1. Funds reasonably sufficient to pay or avoid imposition of fees and charges that are a lawyer's or law firm's responsibility, including fees and charges that are not "allowable monthly service charges" under the definition in rule 45.5, may be deposited in this account; or

See the discussion above. This generally means $100.

2. Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited in this account, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved. Other property of clients or third persons shall be identified as such and appropriately safeguarded. [Court Order April 20, 2005, effective July 1, 2005]

The rule says that funds "may" be disbursed. But if the funds are earned, then they are yours, and if left in the trust account, this would result in comingling. Related question: When should funds be disbursed? See below.

Rule 45.2 Action required upon receiving funds, accounting, and records.

45.2(1) *Authority to endorse or sign client's name.* Upon receipt of funds or other property in which a client or third person has an interest, a lawyer shall not endorse or sign the client's name on any check, draft, security, or evidence of encumbrance or transfer of ownership of realty or personalty, or any other document without the client's prior express authority. A lawyer signing an instrument in a representative capacity shall so indicate by initials or signature.

> **Practice Pointer: As a lawyer, you often have implied authority to sign things on behalf of your client. But you may not sign the endorsement unless specifically authorized. And if doing so, the endorsement must be clear as to your role.**

45.2(2) *Accounting and returning funds or property.* Except as stated in this chapter or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and shall promptly render a full accounting regarding such property.

> **The client must be promptly given an accounting of any disbursements. According to the Commission: "When a lawyer withdraws funds from the trust account to pay earned fees or expenses, the client must be provided written notice of the time, amount and purpose of the withdrawal, along with a complete accounting. This notice and accounting must be transmitted no later than the date the withdrawal is made."**
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> **This means that in the case of small expenses, it might be easier to pay it yourself, bill for the amount, and then write yourself a check at the end of the month. There's no prohibition against, for example, writing a check at the post office to pay the postage for that client. But if you do that, you need to send a notice to the client immediately.**

45.2(3) *Maintaining records.*

a. A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these rules and required by Iowa R. of Prof'l Conduct 32:1.15 and shall retain the following records for a period of six years after termination of the representation:

(1) Receipt and disbursement journals containing a record of deposits to and withdrawals from 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) Ledger records for all client trust accounts 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) Copies of retainer and compensation agreements with clients as required by Iowa R. of Prof'l Conduct 32:1.5;

(4) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(5) Copies of bills for legal fees and expenses rendered to clients;

(6) Copies of records showing disbursements on behalf of clients;

(7) The physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, prenumbered canceled checks, and substitute checks provided by a financial institution;

(8) 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 the trust account name or number from which money is withdrawn;

(9) Copies of monthly trial balances and monthly reconciliations of the client trust accounts maintained by the lawyer; and

(10) Copies of those portions of client files that are reasonably related to client trust account transactions.

We'll go into detail on the recordkeeping requirements below.

b. With respect to trust accounts required by Iowa R. of Prof'l Conduct 32:1.15:

(1) 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 or authorize transfers from a client trust account;

(2) Receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and

(3) Withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized bank transfer.

c. Records required by this rule may be maintained by electronic, photographic, computer, or other media provided that the records otherwise comply with these rules and that printed copies can be produced. These records shall be accessible to the lawyer.

d. Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of the records specified in this rule.

e. Upon the sale of a law practice, the seller shall make appropriate arrangements for the maintenance of the records specified in this rule.

Who can sign checks? Only an Iowa attorney or person under his or her direct supervision.

What if the lawyer is absolutely incompetent as an accountant?

1. **Find someone who is competent and trustworthy.**
2. **At the very minimum, open the bank statement when it comes in the mail and look at all of the checks!**
3. **The Iowa Client Security Commission recommends employee dishonesty insurance if a non-lawyer has authority to sign checks.**

If you are incompetent when it comes to accounting, then it is very important to have a trustworthy bookkeeper! There's still a possibility that you will become the victim of a sophisticated embezzlement. But there is good news! Most embezzlement is unsophisticated! If there are checks that are cashed at the casino, then this probably means trouble. And most cases of embezzlement involve such obvious acts. Simply by opening the envelope when it arrives and looking at the checks, you can keep yourself out of trouble!

See Rule 5.3: "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer"

Is it permissible to have a debit card for the trust account? Some states (for example, Wisconsin) specifically say no. Iowa does not specifically *prohibit* debit cards, but it does not specifically *permit* them. The rule states: "Withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized bank transfer**." The Iowa Court Commissions (2015) seem to take the position that debit cards are permissible, since they are mentioned as a way of paying court filing fees when e-filing. If you follow this approach, be extremely careful!**

- **You must notify the client the same day of disbursements from their sub-account, so you will need to send a statement immediately.**
- **The trust account debit card probably looks exactly the same as the debit card for your personal or office account! I would write "Trust Account" on the front with magic marker to make sure you don't get them mixed up.**
- **I wouldn't keep this card in my wallet. I would keep it locked up at the office.**

[Court Order April 20, 2005, effective July 1, 2005; February 20, 2012]

Rule 45.3 Type of accounts and institutions where trust accounts must be established. Each trust account referred to in rule 45.1 shall be an interest-bearing account in a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company selected by the law firm or lawyer in the exercise of ordinary prudence. The financial institution must be authorized by federal or state law to do business in Iowa and insured by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund. Interest bearing trust funds may be placed in accounts at credit unions only to the extent that each individual client's funds are eligible for insurance. Interest-bearing trust funds shall be placed in accounts from which withdrawals or transfers can be made without delay when such funds are required, subject only to any notice period which the depository institution is required to observe by law or regulation. [Court Order April 20, 2005, effective July 1, 2005; April 25, 2008]

The requirements:

-bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company.

- authorized to do business in Iowa. In other words, you cannot use an out-of-state bank for your Iowa trust account.

-selected in the exercise of ordinary prudence

-federally insured

-willing and able to comply with Rule 45.4 below

What does this mean: "Interest-bearing trust funds may be placed in accounts at credit unions only to the extent that each individual client's funds are eligible for insurance." **This language is**

no longer relevant. Prior to 2014, in some situations, Credit Union deposit insurance was not "per depositor" to the same extent as bank deposits. This has now changed, however, and there is no difference between banks and credit unions.

One thing to remember about the "per depositor" rule is that if the client has an account at the same bank, then he or she might have less coverage than if your trust account were at a separate bank.

What about an attorney practicing in more than one state? Is it OK to have a trust account at an out-of-state bank? See Rule 8.5 for guidance:

> (b) Choice of Law. In any exercise of the disciplinary authority of Iowa, the rules of professional conduct to be applied shall be as follows:
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> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
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> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.
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> **Under this rule, I would say that if you have <u>any</u> Iowa clients or cases, then the account should be housed in an Iowa branch of a multi-state bank, even though you can transact business at a branch in another state. Depending on the other state's rule, this account might be permissible for that state's business as well, but you might need two trust accounts in some cases.**
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> **If you only occasionally hold funds from Iowa clients, remember that a separate trust account for that client is always permissible, as long as it is interest-bearing and the client receives the interest.**

Rule 45.4 Pooled interest-bearing trust account.

45.4(1) *Deposits of nominal or short-term funds.* A lawyer who receives a client's or third person's funds shall maintain a pooled interest-bearing trust account for deposits of funds that are nominal in amount or reasonably expected to be held for a short period of time. A lawyer shall inform the client or third person that the interest accruing on this account, net of any allowable monthly service charges, will be paid to the Lawyer Trust Account Commission established by the supreme court.

45.4(2) *Exceptions to using pooled interest-bearing trust accounts.* All client or third person funds shall be deposited in an account specified in rule 45.4(1) unless they are deposited in:

a. A separate interest-bearing trust account for the particular third person, client, or client's matter on which the interest, net of any transaction costs, will be paid to the client or third person; or

b. A pooled interest-bearing trust account with subaccountings that will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client or third person.

45.4(3) *Accounts generating positive net earnings.* If the client's or the third person's funds could generate positive net earnings for the client or third person, the lawyer shall deposit the funds in an account described in rule 45.4(2). In determining whether the funds would generate positive net earnings, the lawyer shall consider the following factors:

a. The amount of the funds to be deposited;

b. The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

c. The rates of interest or yield at the financial institution in which the funds are to be deposited;

d. The cost of establishing and administering the account, including service charges, the cost of the lawyer's services, and the cost of preparing any tax reports required for interest accruing to a client's benefit;

e. The capability of financial institutions described in rule 45.3 to calculate and pay interest to individual clients; and

f. Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

Remember: The money in the trust account belongs to the client, so any interest earned on that money also belongs to the client. We're taking that money away from them and sending it to the government. We can get away with this because it is such a *de minimus* amount. I've never had occasion to worry about it, but if the amounts and/or time periods are long enough, then a separate account should be used, and not the pooled trust account.

Examples: Assume interest rates of 2%. Should the following amounts be placed in the pooled IOLTA account, or should you set up a separate account?

1. **$1000 retainer that will be in your trust account for about one year.**
2. **$100,000 settlement that will be in your trust account for about one week.**
3. **$1,000,000 settlement that will be in your trust account for about one week.* 4. $100,000 from an estate that will be in your trust account for about six months.**

*** - And when dealing with large amounts, we also need to think about another issue, whether the funds are fully insured.**

45.4(4) *Directions to depository institutions.* As to accounts created under rule 45.4(1), a lawyer or law firm shall direct the depository institution:

a. To remit interest or dividends, net of any allowable monthly service charges, as computed in accordance with the depository institution's standard accounting practice, at least quarterly, to the Lawyer Trust Account Commission;

b. To transmit with each remittance to the Lawyer Trust Account Commission a copy of the depositor's statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the amount of allowable monthly service charges deducted, if any, and the account balance(s) for the period covered by the report; and

c. To report to the Client Security Commission in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds. In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument, if such a copy is normally provided to depositors. In the case of instruments that are honored when presented against insufficient funds, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, and the amount of overdraft. If an instrument presented against insufficient funds is not honored, the report shall be made simultaneously with, and within the time provided by law for, any notice of dishonor. If the instrument is honored, the report shall be made within five banking days of the date of presentation for payment against insufficient funds. [Court Orders April 20, 2005, and July 1, 2005, effective July 1, 2005]

The lawyer is required to provide instructions to the bank, which include the following:

Should an overdraft condition ever exist with respect to this account, you are required to provide the Client Security and Attorney Disciplinary Commission a copy of any notice issued the law firm regarding the overdraft condition. The mailing address of this commission is Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319.

Is this fair to small practitioners? After all, the large firm can "get away" with overdrafts in one sub-account, because there are enough funds in other accounts. Answer: No, it's not fair! But fair or not, this is the rule, and small practitioners need to be especially careful. And as the Tigue case shows, they won't get away with it forever, so they need to be careful too!

The bank is required to remit interest to the interest to the Lawyer Trust Account Commission. It's a lot easier for everyone if the bank waives the service charge for a trust account, and make their money elsewhere. But not all banks are willing to do that. The money for bank service charges needs to come from somewhere, and that can be one of three places:

1. **Your clients' money. This is generally not allowed! (Although there *might* be an exception if the particular charge is attributable to a particular client matter.)**
2. **Your money.**
3. **The interest which would otherwise go to the state.**

The last option is permissible, but only for the "allowable monthly service charge" as defined below. The Commission has made clear that this does not include per-transaction charges. So if the bank charges $15 per month for the trust account, plus 25 cents per check, then the bank can "net out" the $15 from the interest and submit only interest in excess of $15. However, it is not permissible for them to "net out" the 25 cents for each

check. This needs to come out of the $100 that you deposited, and you need to replenish this on a regular basis.

Example: The trust account earned $16 interest, and the monthly service charge for the account is $15. In addition, you wrote 5 checks, with a service charge of 25 cents each, for a total of $1.25. Thus, the total service charge is $16.25.

The bank is required to remit $1 to the Commission, which is $16 minus $15. You must subtract $1.25 from your "office" subaccount to cover the per-check charges.

I suspect that for the vast majority of law firms, the monthly interest on the trust account will never be more than what would be a reasonable service charge. So if the banks resisted, the IOLTA program would collapse. However, the waiver of the service charge is a great service to lawyer customers, since it helps ensure that they will never have overdrafts on what are often almost dormant accounts. So if the bank waives the service charge and makes its money elsewhere, everyone wins.

Here's the Trust Account Commission**'s explanation of its position on the monthly service charge:**

> The Supreme Court of Iowa recently revised the lawyer discipline rules to clarify what bank charges are a lawyer or law firm responsibility and what bank charges may be deducted from IOLTA interest. Prior to the rule change, the Lawyer Trust Account Commission had became aware that some banks are using interest otherwise payable to the Commission under the Interest on Lawyer Trust Account (IOLTA) program to pay fees and charges associated with particular account transactions, such as wire transfer fees incurred incident to real estate closings conducted by a law firm, or stop payment fees on checks issued by the law firm. Under the revised rule, the only fee or charge a bank or other depository institution may collect from IOLTA interest is the monthly fee customarily assessed by the institution against a depositor solely for the privilege of maintaining the type of account involved. Fees or charges assessed by a bank incident to transactions involving a lawyer's trust account, such as fees for wire transfers, stop payment orders or check printing, are a lawyer or law firm responsibility and may not be paid or deducted from interest or dividends otherwise payable to the Lawyer Trust Account Commission. Questions regarding the handling of fees and charges incident to trust account operations may be addressed to Commission staff at (515) 725-8029 or IOLTA@iowacourts.gov.

Rule 45.5 Definition of "allowable monthly service charges." For purposes of this chapter, "allowable monthly service charges" means the monthly fee customarily assessed by the institution against a depositor solely for the privilege of maintaining the type of account involved. Fees or charges assessed for transactions involving the account, such as fees for wire transfers, stop payment orders, or check printing, are a lawyer's or law firm's responsibility and may not be paid or deducted from interest or dividends otherwise payable to the Lawyer Trust Account Commission. [Court Order April 20, 2005, effective July 1, 2005]

In other words, things like check printing should be paid from the "office" sub-ledger (your $100), and you should then make a deposit to cover the expense and bring your sub-ledger back up to $100. But they can't come out of the interest remittance, and they definitely can't come out of any client's funds.

If you anticipate any fees of more than $100 (or close to that amount), then make that deposit promptly.

The rule seems slightly unclear to me regarding fees (wire transfer fees, stop payment fees, etc.) that are directly attributable to one client. My initial reaction is that these could be deducted from the client's sub-account. But because of the language above, I would initially pay these from the office account, and if appropriate, separately bill the client.

Rule 45.6 Lawyer certification. Every lawyer required to have a client trust account shall certify annually, in such form as the supreme court may prescribe, that the lawyer or the law firm maintains, on a current basis, records required by Iowa R. of Prof'l Conduct 32:1.15(a). [Court Order April 20, 2005, effective July 1, 2005]

In Minnesota, that is done as part of my annual attorney registration. That form includes an affidavit where I need to list the name of the bank and account number, even if it has not changed. Some years, that's the only time I get out the checkbook to look at the account number!

Rule 45.7 Advance fee and expense payments.

If you get money before you do the work, it's probably best to assume in most cases that it is an "advance fee". The requirements are more strict, but if you assume it's an "advance fee" and comply with these requirements, you are probably safe.

Practice pointer: You don't have to worry about this if you send a bill after the work is done. So in many cases, that practice can make your life a lot easier! It boils down to whether the stress of whether or not you're going to get paid outweighs the stress imposed by these rules!

45.7(1) *Definition of advance fee payments.* Advance fee payments are payments for contemplated services that are made to the lawyer prior to the lawyer's having earned the fee.

45.7(2) *Definition of advance expense payments.* Advance expense payments are payments for contemplated expenses in connection with the lawyer's services that are made to the lawyer prior to the incurrence of the expense.

45.7(3) *Deposit and withdrawal.* A lawyer must deposit advance fee and expense payments from a client into the trust account and may withdraw such payments only as the fee is earned or the expense is incurred.

Remember: If it's an "advance fee" then it goes into the trust account!

45.7(4) *Notification upon withdrawal of fee or expense.* A lawyer accepting advance fee or expense payments must notify the client in writing of the time, amount, and purpose of any withdrawal of the fee or expense, together with a complete accounting. The attorney must transmit such notice no later than the date of the withdrawal.

Remember: You still need to send statements, even though you already have the money, which is just as much work as sending a bill!

45.7(5) *When refundable.* Notwithstanding any contrary agreement between the lawyer and client, advance fee and expense payments are refundable to the client if the fee is not earned or the expense is not incurred.

And it's probably a bad idea to include this unenforceable agreement in your contract!

[Court Order April 20, 2005, effective July 1, 2005]

Is it an advance fee or a flat fee? To err on the side of caution, assume that it is an advance fee, and should be deposited into the trust account until earned. It's OK to have a flat fee, but make sure you follow all requirements of Rule 45.9!

Practice pointer: If charging either an advance fee or flat fee, consider how to deal with expenses. If those expenses are small and predictable, then it might save you a lot of work to simply pay them yourself as a cost of doing business.

For example, I do one service on a regular basis where my flat fee is about $100. It always includes one postage stamp, and it wouldn't be worth it to collect this separately. So I'm resigned to the fact that I'll really earn only $99.51. But if the client requires express mail, then I can bill them for the extra $20. Either way, I should put it in my trust account until earned.

In some cases, it can make your life easier to have your client pay expenses directly. For example, if filing Articles of Incorporation, you can ask them to write two checks: One payable to you, and another one payable to the Secretary of State. Of course, if the Secretary of State calls and tells you that the client's check bounced, this can put you in a difficult position. But it would be even worse if they bounced a check that was deposited in your trust account!

Rule 45.8 General retainer.

45.8(1) *Definition.* A general retainer is a fee a lawyer charges for agreeing to provide legal services on an as-needed basis during a specified time period. Such a fee is not a payment for the performance of services and is earned by the lawyer when paid.

45.8(2) *Deposit.* Because a general retainer is earned by the lawyer when paid, the retainer should not be deposited in the trust account. [Court Order April 20, 2005, effective July 1, 2005]

Rule 45.9 Special retainer.

45.9(1) *Definition.* A special retainer is a fee that is charged for the performance of contemplated services rather than for the lawyer's availability. Such a fee is paid in advance of performance of those services.

45.9(2) *Prohibition.* A lawyer may not charge a nonrefundable special retainer or withdraw unearned fees.

Practice pointer: If you use the word "retainer" in an agreement, it's probably a good idea to be specific as to whether it is a "general retailer" or "special retainer."

[Court Order April 20, 2005, effective July 1, 2005]

Rule 45.10 Flat fee.

45.10(1) *Definition.* A flat fee is one that embraces all services that a lawyer is to perform, whether the work be relatively simple or complex.

45.10(2) *When deposit required.* If the client makes an advance payment of a flat fee prior to performance of the services, the lawyer must deposit the fee into the trust account.

45.10(3) *Withdrawal of flat fee.* A lawyer and client may agree as to when, how, and in what proportion the lawyer may withdraw funds from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client's right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees.

[Court Order April 20, 2005, effective July 1, 2005]

In other words, be careful. If the flat fee covers various tasks that are done over a period of time, it's probably a good idea to specify how they are broken down. The client has the absolute power to discharge you at any point (see Rule 1.16), and if there's an agreement in place, then you can document more easily how much you have "earned".

For example, if you have a flat fee for trademarks, there are various tasks that are done over time: Filing the initial application, replying to any requests from the trademark office, notifying the client when issued, etc. If the fee agreement reasonably specifies the percentage for each of these tasks, then you have a safe harbor to pay yourself as each task is completed.

For more guidance on advance fees, see Board of Professional Ethics and Conduct v. Apland, 577 N.W.2d 50 (Iowa 1998).

Reminder: You need to inform your clients about the trust account rules! Rule 45.1 states: "A lawyer shall inform the client or third person that the interest accruing on this account, net of any allowable monthly service charges, will be paid to the Lawyer Trust Account Commission established by the supreme court."

There is no requirement of exactly where this notification must be given. But it needs to be given to any client who has money in the trust account. So be sure to include this language in

retainer agreements, fee schedules, or some other place where the client will get this information prior to a deposit being made into the trust account.

How Long to Wait Before Depositing a Check

When can funds be disbursed? The answer is simple. They can be disbursed as soon as they "clear". And when do the funds "clear"? That answer is not as simple! Funds never "clear." What they actually do is "fail to clear." Depending on the banks involved, that might take weeks.

Your bank will generally make the funds available immediately or almost immediately. So if you deposit a check, unless the bank suspects a problem, you can withdraw the money immediately, or at least within one business day. But the check might still be returned to you, which would then result in an overdraft. You must use caution! If you're depositing a real cashier's check, a check from a bank or insurance company, a real postal money order, etc., then you probably don't have reason to worry.

If you're depositing a check from an unknown person, then you need to be much more cautious. You can't disburse those funds until you're certain that they are good. But, on the other hand, you can't delay unreasonably. You need to use your judgment.

Be particularly cautious of authentic looking cashier's checks, money orders, etc. **If in doubt, call the bank that issued the check!**

One common scam works like this: You are contacted by a new potential client in another state or country, and they have what sounds like a legitimate need for legal services in your state. You ask for a retainer, and they agree to send one. The next morning, the FedEx truck shows up, and you receive a cashier's check from a reputable bank for the full amount of the agreed retainer. You deposit it in your account.

A few days later, your new "client" calls you again with some perfectly reasonable sounding request. Perhaps they sent you a check for $10,000. You will need a deposition that has previously been taken in another state. First, you need to send the court reporter a check for $500. Since you have $10,000 in your trust account, you figure you have nothing to worry about. So you mail the court reporter a check from the trust account, confident in the knowledge that you still have $9500 to cover your fees.

A few days later, the court reporter cashes the check. Perhaps you hear from the client again, or perhaps that's the end of it. But a few weeks later, you get a notice from your bank that the cashier's check was a forgery. They've debited your account $10,000, meaning that you now have an overdraft of $500. That same morning, the state bar gets a copy of the same notice. The "court reporter" was actually just a mail drop in some other state, and the police there aren't particularly concerned about a crime that they wouldn't be able to solve anyway. The "court reporter" is long gone with your money. And you, as the victim, have the added problem of having to explain an overdraft in your trust account.

To prevent this, you need to be suspicious of otherwise legitimate looking instruments! With modern printers, it is trivially simple to produce a very valid looking forgery of a cashier's check. In this scenario, you should call the issuing bank before depositing the check and/or allow extra time for the check to "clear."

There have been reports of counterfeit checks purportedly drawn on out-of-state law firms. These transactions probably sound reasonable: A firm in another state needs you to do some task locally,

which might involve your disbursing funds. Before depositing such a check, it's probably a good idea to look up the other attorney on that state's attorney registration website and give him or her a call at the phone number listed on that site.

Should you accept deposits into your trust account with a credit card? In general, there's no reason why lawyers can't accept credit cards for amounts owed. But it's problematic to accept credit cards for funds to your trust account. It's not impossible, but it's a lot of extra work.

If the funds are not earned, you can't use your normal credit card processing service. That money goes into your account, which is not allowed. The money needs to go directly to the trust account, never passing into your possession. So at a minimum, you need a separate credit card processing account for trust fund transactions.

Also, the credit card processing fees need to be paid by you, and not withheld from the amount deposited in the trust account. In other words, if you accept a credit card for $1000, then there needs to be an immediate $1000 deposit into your trust account. Most credit card processors are not set up to do this.

The other problem is that credit card charges can be disputed. You deposit the funds into your trust account, make disbursements, and then the client disputes the charge. This will result in the funds being frozen, which will result in an overdraft. Even if you successfully challenge the dispute, you will still have an overdraft. If you do decide to accept credit cards in your trust account, please read this guidance from the Board.

So even though it is not specifically prohibited, I would not allow clients to use credit cards to fund a trust account. If they really need to use a credit card, then send them to the bank to get a cash advance or take the money out of an ATM. Otherwise, it's just too risky and time-consuming for the occasional need.

Useful Forms:

Bank's quarterly remittance form:

http://www.iowacourts.gov/wfdata/frame9439-1215/bankreport.rtf

Instructions to Bank When Opening Account:

http://www.iowacourts.gov/wfdata/frame9439-1215/bankpackage.rtf

Part 2: Examples of How To Do The Accounting for Non-Accountants, or How to Comply with Rule 45.2(3)

Part 3: Quick Nebraska Overview

http://www.nltaf.org/faq_attorney/

Part 4: Other related rules

Rule 32:1.5: FEES

Rule 1.16:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by law.

Rule 32:5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER (a) A lawyer or law firm shall not share legal fees with a nonlawyer…..

This probably means that a non-lawyer cannot be a joint owner of a lawyer's office account.

Part 5: Other Ethics Topics

If time permits, we will cover Rules 3 and 4 of the Rules of Professional Conduct (or other rules, if there are requests). During our 2016 overview of the rules, we ran out of time and glossed over most of these rules.

Rule 3.1: Meritorious claims and contentions.

A lawyer shall not do any of the following in representing a client:

1. Knowingly advance a claim or defense that is unwarranted, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

2. Knowingly advance a factual position unless there is a non-frivolous basis.

3. File a suit, conduct a defense, or delay a trial if the lawyer knows (or it is obvious) that doing so would serve merely to harass or maliciously injure another person.

Exception: The lawyer for a defendant in a criminal case (or a case that could result in deprivation of liberty) may defend as to require that every element of the case be established.

Rule 3.2 Expediting litigation:

"A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

Rule 3.3: Candor toward the tribunal.

A lawyer shall not do any of the following:

1. Make a false statement of fact or law to a tribunal, or fail to correct a prior false statement.
2. Fail to disclose adverse legal authority if:
    a. it is from the controlling jurisdiction
    b. it is known to the lawyer
    c. it is directly adverse to the client's position
    d. it is not disclosed by opposing counsel.
3. Offer evidence known to be false. If a lawyer has offered material evidence and he or she comes to know of its falsity, the lawyer shall take reasonable remedial measures. This might include disclosure to the tribunal. (If a lawyer knows evidence to be false, then he or she may refuse to offer that evidence, except in the case of a criminal defendant's testimony.)

If a lawyer in an adjudicative proceeding knows that a person has engaged or will engage in criminal or fraudulent conduct, then the lawyer must take reasonable remedial measures. If necessary, this can include disclosure to the tribunal.

The Minnesota and Iowa rules state that these duties continue until "the conclusion of the proceeding". Wisconsin does not include this language. Therefore, presumably, the duty in Wisconsin is continuing, even after the case has been concluded. Wisconsin has specifically rejected the ABA comment that a "practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established."

The duties set forth in this rule take precedence over Rule 1.6. Therefore, under this rule, a lawyer might be **required** to disclose otherwise confidential information.

In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts necessary to make an informed decision, whether or not those facts are adverse.

Rule 3.4 Fairness to opposing party and counsel.

A lawyer shall not do any of the following:

1. Unlawfully obstruct another party's access to evidence, or unlawfully alter, destroy or conceal documents or other items having potential evidentiary value. A lawyer may not counsel or assist another person in doing so.

2. Falsify evidence, or counsel or assist a witness to testify falsely, or offer a witness an inducement that is prohibited by law.

3. Knowingly disobey obligations under court rules, except for an open refusal based upon an assertion that no such obligation exists.

4. Make frivolous discovery requests or fail to diligently comply with proper discovery requests.

5. Allude at trial to matters that the lawyer does not believe are relevant or supported by evidence, or assert personal knowledge unless actually testifying, or state personal opinions.

6. Request that someone other than a client not voluntarily give information to another party. There is an exception to this rule if both of the following conditions are met:

a. The person is a relative, employee, or agent of a client, and

b. The lawyer believes that the person's interests will not be adversely affected.

Rule 3.5: Impartiality and decorum of the tribunal

Note: The Minnesota rule, while expressing the same general principles, departs somewhat from the Model Rule adopted in other states..

With respect to contact with the jury, the rule is broken down by time: Before the trial, during the trial, and after the trial.

1. Before the trial, a lawyer shall not communicate with anyone the lawyer knows to be a member of the venire.

2. During the trial, a lawyer connected with the case may not communicate with any member of the jury. Even a lawyer who is not connected with the case is prohibited from communicating with a juror concerning the case.

3. After the jury has been discharged, a lawyer shall not ask questions or make comments to a juror that are "calculated merely to harass or embarrass the juror" or influence the juror's actions in future cases.

In addition to these rules, a lawyer is prohibited from conducting (or having other persons conduct) vexatious or harassing investigations of jurors or prospective jurors.

If a lawyer has knowledge of misconduct by a juror or prospective juror, or if a lawyer knows of improper conduct toward a juror, prospective juror, or family member, then the lawyer must promptly reveal this information to the court.

In an adversary proceeding, a lawyer may not communicate with the judge (or other official) with respect to the merits of the case, except in the following circumstances:

1. In the course of the official proceedings.
2. In writing, if the writing is promptly given to the adverse party.
3. Orally, if adequate notice is given to the other attorney.
4. As otherwise authorized by law.

In addition, "a lawyer shall not engage in conduct intended to disrupt a tribunal."

Rule 3.6 Trial publicity.

If a lawyer participates in the investigation or litigation of a matter, then he or she shall not make an extrajudicial statement if the lawyer knows or reasonably should know that it will be publicly disseminated, and there will be a substantial likelihood of prejudicing the matter.
In jury cases and criminal cases, the following kinds of statements are presumed to have such an effect:

1. Character, credibility, reputation, or criminal record of a party, suspect, or witness, or the identity of a witness, or the expected testimony.
2. In a criminal case, the possibility of a guilty plea, or the contents of any confession or statement, or the refusal to make a statement.
3. The performance or results of tests, or refusal or failure to take a test.
4. An opinion as to guilt or innocence
5. Evidence that is likely to be inadmissible.
6. The fact that the defendant has been charged, unless it is also stated that this is merely an accusation, and that the defendant is presumed innocent.

The prohibition under this rule applies to other lawyers associated in a firm or government agency.

Rule 3.7 Lawyer as witness.

If it is likely that a lawyer will be a necessary witness, then he or she shall not act as an adocate. There are the following exceptions:

1. The testimony relates to an uncontested issue.
2. The testimony relates to the nature and value of legal services rendered in the case.
3. There would be a substantial hardship to the client

It is permissible for a lawyer to be a n advocate, even though an attorney in his or her firm will be a witness. However, he or she might be precluded because of confidential information, under Rules 1.7 or 1.9.

Rule 3.8 Special responsibilities of a prosecutor

A prosecutor may not prosecute a criminal case if he or she knows that the case is not supported by probable cause.

The obligation with respect to the accused's right to counsel is broader than in some other states, and it is not limited to situations involving a communication. In Minnesota and Iowa, the prosecutor must make reasonable efforts to assure that the accused has been advised of his right to obtain counsel and the procedure for obtaining counsel.

The prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing". Note, this is in contrast to the Wisconsin rule which specifically authorizes waiver in some circumstances.

The prosecutor must timely disclose mitigating evidence.

In general, a prosecutor should not subpoena a lawyer in a grand jury proceeding regarding the lawyer's past or present client. However, there are limited exceptions.

Minnesota imposes specific duties upon a prosecutor with regard to pretrial publicity.

Rule 3.9 Advocate in nonadjudicative proceedings

A lawyer representing a client before a legislative body or administrative agency shall disclose that the appearance is on behalf of a client. Most of rules 3.3, 3.4, and 3.5 apply to such a representation.

Rule 4.1 Truthfulness in statements to others

In the course of representing a client, a lawyer may not make a false statement of material fact or law to a third party.

Under the model rule adopted in other states, a lawyer shall not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act. The Minnesota rule does not contain this provision.

Rule 4.2 Communication with person represented by counsel

In representing a client, a lawyer shall not communicate about the subject with a person the lawyer knows to be represented by another lawyer. There is an exception if the other lawyer consents, or if authorized by law or court order.

Rule 4.3 Dealing with unrepresented person

In dealing on behalf of a client with a person who is not represented by counsel, if the person misunderstands the lawyer's role, the lawyer has an affirmative duty to correct the misunderstanding.

The lawyer shall not give legal advice (other than the advice to secure counsel, if the lawyer believes the interests are likely to be in conflict.)

A lawyer shall not state or imply that he or she is disinterested.

Rule 4.4 Respect for rights of 3rd persons.

In representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden third parties. A lawyer must not use methods of obtaining evidence that violate a third person's rights.

If a lawyer accidentally receives a document and reasonably knows that it was inadvertently sent, then the lawyer shall promptly notify the sender.