



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUNSEL

MEMORANDUM

January 28, 2020

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on the Proposed Amendment of Rules to Prohibit Overdraft Protection on Attorney Trust Accounts and to Expand the Dishonored Check Notice Reporting Rule

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The Administrative Board of the Courts is seeking public comment on a proposal, proffered by The Lawyers' Fund for Client Protection ("Lawyers' Fund") and modified by the Administrative Board, to amend 22 NYCRR Part 1200, Rule 1.15 and Part 1300.1 to expand attorney trust account reporting rules and further enhance the detection of mismanagement or misuse of client funds. The Lawyers' Fund recommended amending Rule 1.15(b) of the Rules of Professional Conduct to prohibit overdraft protection on an attorney trust, special, or escrow account, as overdraft protection constitutes "commingling" credit that the bank extends to the attorney with client funds. After further review, the Administrative Board has added language to Rule 1.15(b) to read: "No special account or trust account aforementioned may have overdraft protection; neither shall a trust or escrow account be linked to a lawyer's personal account." (Att. A. – in blue and italics)

The Lawyers' Fund also recommended that 22 NYCRR Part 1300.1 be amended so that the Lawyers' Fund is notified by banks of any overdraft of an attorney trust, special or escrow account. (Att. B – Letter from the Lawyers' Fund with proposed amendments.) The Lawyers' Fund believes that the expansion of the reporting rule will not be unduly burdensome and will offer greater protection to the public. The Administrative Board further modified Rule of Professional Conduct 1.15(a) to require attorneys to maintain accounts only in banking institutions that have agreed to provide dishonored check and overdraft reports. (Att. A.)

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than February 28, 2020.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

ATTACHMENT A

Proposed Amendments to Rule 1.15 and Section 1300.1 (new language in bold and underlined, deleted language in strike-through. Board changes in blue and italicized)

Proposed Amendment to Rule 1.15 of the Rules of Professional Responsibility

Rule 1.15: Preserving identity of funds and property of others; fiduciary responsibility; commingling and misappropriation of client funds or property; maintenance of bank accounts; record keeping; examination of records.

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

- (1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check **and overdraft** reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained. **No special account or trust account aforementioned may have overdraft protection; neither shall a trust or escrow account be linked to a lawyer's personal account.**
- (2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

- (3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.
- (4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, 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 or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

Part 1300. Dishonored Check **and Overdraft** Reporting Rules for Attorney Special, Trust and Escrow Accounts

Section 1300.1

Dishonored **and overdraft** check reports.

- (a) Special bank accounts required by rule 1.15 of the Rules of Professional Conduct (22 NYCRR 1200.0) shall be maintained only in banking institutions which have agreed to provide dishonored check **and overdraft** reports in accordance with the provisions of this section.
- (b) An agreement to provide dishonored check **and overdraft** reports shall be filed with the Lawyers' Fund for Client Protection, which shall maintain a central registry of all banking institutions which have been approved in accordance with this section, and the current status of each such agreement. The agreement shall apply to all branches of each banking institution that provides special bank accounts for attorneys engaged in the practice of law in this State, and shall not be cancelled by a banking institution except on 30 days' prior written notice to the Lawyers' Fund for Client Protection.
- (c) A dishonored check **and overdraft** report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, **irrespective of whether the instrument is honored**~~and the banking institution dishonors the instrument for that reason~~. A properly payable instrument means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of New York.

- (d) A dishonored check **and overdraft** report shall be substantially in the form of the notice of dishonor which the banking institution customarily forwards to its customer, and may include a photocopy or a computer-generated duplicate of such notice. **In the case of an instrument that is presented against insufficient funds but which instrument is honored, 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, as well as the amount of overdraft created thereby.**
- (e) Dishonored check **and overdraft** reports shall be mailed to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within five banking days after the date of presentment against insufficient available funds.
- (f) The Lawyers' Fund for Client Protection shall hold each dishonored check **and overdraft** report for 10 business days to enable the banking institution to withdraw a report provided by inadvertence or mistake; except that the curing of an insufficiency of available funds by a lawyer or law firm by the deposit of additional funds shall not constitute reason for withdrawing a dishonored check report.
- (g) After holding the dishonored check **and overdraft** report for 10 business days, the Lawyers' Fund for Client Protection shall forward it to the attorney disciplinary committee for the judicial department or district having jurisdiction over the account holder, as indicated by the law office or other address on the report, for such inquiry and action that attorney disciplinary committee deems appropriate.
- (h) Every lawyer admitted to the Bar of the State of New York shall be deemed to have consented to the dishonored check **and overdraft** reporting requirements of this section. Lawyers and law firms shall promptly notify their banking institutions of existing or new attorney special, trust, or escrow accounts for the purpose of facilitating the implementation and administration of the provisions of this section.

ATTACHMENT B

The Lawyers' Fund for Client Protection

of the State of New York

119 Washington Avenue • Albany, New York 12210

Telephone: 518/434-1935 • 800/442-FUND • Fax: 518/434-5641

www.nylawfund.org



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August 7, 2019

Hon. John P. Asiello
Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

Michael J. Knight,
Executive Director

Gabriel Huertas,
Assistant Counsel

Keri Cleveland,
Investigator

RE: Proposed Court Rule Amendments
22 NYCRR Part 1200 (Rule 1.15)
22 NYCRR Part 1300.1

Dear John:

I write to inform you of our Board of Trustees' proposed amendments to court rules that govern Dishonored Check Reporting Rules for Attorney Special, Trust and Escrow Accounts.

As you know, a shortfall in an attorney escrow account is a clear indicator of the possible misuse of client funds. In 1992, as a client protection measure, the Trustees recommended a version of the ABA's model overdraft reporting rule that the Appellate Division adopted effective January 1, 1993.¹ As a compromise with the banking industry, New York's rule was intentionally limited to reporting only attorney escrow account checks returned for insufficient funds.

Since 1993, this "Bounced Check Rule" has been remarkably effective and has detected over 310 lawyers who had been misusing client funds. Grievance Committees credit the dishonored check reporting rule with identifying dishonest conduct as well as providing an opportunity to educate the bar on proper trust accounting and recordkeeping practices.

¹ 22 NYCRR 1200 (Rule 1.15), 22 NYCRR Part 1300.1.



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Currently, overdrafts on attorney escrow accounts are not reportable under New York's rule.² Since 2016, our Trustees have proposed two amendments to expand and further strengthen attorney trust account reporting rules and eliminate an attorney's ability to circumvent detection of mismanagement or misuse of client funds.

Prohibit Overdraft Protection on Attorney Trust Accounts

The Trustees recommend an amendment to Rule 1.15 (b) of the Rules of Professional Conduct which will prohibit attorneys from having overdraft protection on their attorney trust, special or escrow accounts. Attached as **Exhibit A** is our Trustees' proposed amendment to Rule 1.15(b).

There should never be an overdraft on an attorney trust, special or escrow account. An overdraft on these fiduciary bank accounts is a sign of an attorney's mismanagement of these accounts, or worse, the misuse of funds belonging to clients or other persons. Present court rules do not prohibit overdraft protection on an attorney trust, special or escrow account. There is no legitimate reason why these fiduciary accounts should have overdraft protection.

Attorney Grievance Committees view an overdraft on an attorney escrow account as a 'commingling', i.e., the funds extended by the bank as credit to the attorney are considered a personal loan, commingled with client funds (Rule 1.15(a)). For years, the Grievance Committees have viewed overdraft protection as a loophole in concealing otherwise reportable misconduct.

Expand the Dishonored Check Notice Reporting Rule

Whether or not the Trustees' first recommendation is adopted, the Trustees propose that New York's Dishonored Check Notice Reporting Rule be expanded to require that banks include written notice to the Lawyers' Fund of any

² An overdraft occurs when a bank extends credit to a depositor to cover any deficiency in the account.

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overdraft on an attorney trust, special or escrow account. Attached as ~~Exhibit B~~ is our Trustees' proposed amendments to 22 NYCRR Part 1300.1.

Presently, 38 states have some form of trust account overdraft notification. The Lawyers' Fund analyzed bounced check reports received in New York from 2016 through 2018 to determine whether overdrafts were already being reported by some banks. We received 214 overdraft notice reports from 17 separate banks³ involving 143 attorneys/law firms with a face amount of over \$7.5 million. This demonstrates that most major banking institutions already have the capacity to expand their reporting ability to include overdrafts, and that expansion of the reporting rule will not be unduly burdensome.

We strongly believe that these amendments to expand the scope of the Dishonored Check Reporting Rule to include overdraft notification, and prohibit overdraft protection on attorney trust accounts, will offer substantially greater protection to the public.

On behalf of the Trustees, we greatly appreciate the Court's direction and assistance in advancing these recommendations.

If it would be helpful, I will be pleased to meet or discuss with you these proposed amendments and address any questions or concerns you may have.

Very truly yours,



Michael J. Knight
Executive Director

MJK/jk
Enclosures

³ The 17 banking institutions are: Bank of America, BNB Bank, Capital One, Citibank, Citizens Bank, First Republic Bank, Investors Bank, JPMorgan Chase, Key Bank, M&T Bank, NBT Bank, PNC Bank, Santander Bank, Sterling National Bank, TD Bank, Valley National Bank and Wells Fargo.

RULE 1.15.

Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained. **No trust account required by this rule may have overdraft protection.**

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, 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 or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

- (1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;
- (2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;
- (3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and
- (4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

- (1) A lawyer shall maintain for seven years after the events that they record:
 - (i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as the date, payee and purpose of each withdrawal or disbursement;
 - (ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;
 - (iii) copies of all retainer and compensation agreements with clients;
 - (iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;
 - (v) copies of all bills rendered to clients;
 - (vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;
 - (vii) copies of all retainer and closing statements filed with the Office of Court Administration; and
 - (viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies,

microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of

the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

**Dishonored Check and Overdraft Reporting Rules for Attorney Special,
Trust and Escrow Accounts
(22 NYCRR Part 1300)**

Sec. 1300.1 Dishonored and overdraft check reports.

- (a) Special bank accounts required by Disciplinary Rule 9-102 (22 NYCRR 1200.46) shall be maintained only in banking institutions which have agreed to provide dishonored check and overdraft reports in accordance with the provisions of this section.
- (b) An agreement to provide dishonored check and overdraft reports shall be filed with the Lawyers' Fund for Client Protection, which shall maintain a central registry of all banking institutions which have been approved in accordance with this section, and the current status of each such agreement. The agreement shall apply to all branches of each banking institution that provides special bank accounts for attorneys engaged in the practice of law in this State, and shall not be cancelled by a banking institution except on 30 days' prior written notice to the Lawyers' Fund for Client Protection.
- (c) A dishonored check and overdraft report by a banking institution shall be required whenever a properly payable instrument is presented against an attorney special, trust or escrow account which contains insufficient available funds, irrespective of whether the instrument is honored [and the banking institution dishonors the instrument for that reason]. A properly payable instrument means an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of the State of New York.
- (d) A dishonored check and overdraft report shall be substantially in the form of the notice of dishonor which the banking institution customarily forwards to its customer, and may include a photocopy or a computer-generated duplicate of such notice. In the case of an instrument that is presented against insufficient funds but which instrument is honored, 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, as well as the amount of overdraft created thereby
- (e) Dishonored check and overdraft reports shall be mailed to the Lawyers' Fund for Client Protection, 119 Washington Avenue, Albany, NY 12210, within five banking days after the date of presentment against insufficient available funds.
- (f) The Lawyers' Fund for Client Protection shall hold each dishonored check and overdraft report for 10 business days to enable the banking institution to withdraw a report provided by inadvertence or mistake; except that the curing of an insufficiency of available funds by a lawyer or law firm by the deposit of additional funds shall not constitute reason for withdrawing a dishonored check report.
- (g) After holding the dishonored check and overdraft report for 10 business days, the Lawyers' Fund for Client Protection shall forward it to the attorney disciplinary committee for the judicial department or district having jurisdiction over the account holder, as indicated by the law office or other address on the report, for such inquiry and action that attorney disciplinary committee deems appropriate.
- (h) Every lawyer admitted to the Bar of the State of New York shall be deemed to have consented to the dishonored check and overdraft reporting requirements of this section. Lawyers and law firms shall promptly notify their banking institutions of existing or new attorney special, trust, or escrow accounts for the purpose of facilitating the implementation and administration of the provisions of this section.