

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion 1990-91/3
Donation to IOLTA of Interest Accrued on
Trust Account Prior to Joining IOLTA
Amended by Committee May 9, 1991

RULE REFERENCES:

*Rule 1.15

SUBJECTS:

*Client Funds and Property

*Law Firms

*Trust Accounts

SUPREME COURT RULE REFERENCE:

!!!Rule 50

ANNOTATIONS:

Rule 1.15 imposes a mandatory obligation on New Hampshire Attorneys to safeguard clients' property and deliver such property to the clients unless another disposition is permitted by law or agreed to by the clients. (Rule 1.15)

An attorney must take steps to allocate accrued pre-IOLTA interest among the affected clients and return it to them unless the clients agree to its donation to IOLTA. (Rule 1.15; NH Supreme Court Rule 50).

FACTS:

Prior to becoming a member of the Interest On Lawyer's Trust Account (IOLTA) program, the inquiring attorney placed various clients' funds in an interest-bearing trust account. The attorney would like to donate the resulting accrued interest to IOLTA.

QUESTION:

May an attorney donate interest accrued on clients' funds prior to the attorney's membership in IOLTA, to IOLTA?

BRIEF RESPONSE:

Rule 1.15 makes it plain that all New Hampshire attorneys must safeguard client's property and, except as otherwise permitted by law or agreement with the client, must deliver to the client

any funds or property which the client is entitled to receive. Accordingly, the inquiring attorney must obtain the clients' permission before donating any of the funds to IOLTA. In the absence of such permission, the attorney must allocate the accrued interest among the affected clients and deliver to each such client his or her share of the funds.

RESPONSE:

Rule 1.15 provides, in pertinent part:

"(a) (1) Property of clients or third persons which a lawyer is holding in the lawyer's possession in connection with a representation shall be held separate from the lawyer's own property. Funds shall be deposited in one of more clearly designated trust accounts in accordance with the provisions of the New Hampshire Supreme Court Rules. All other property shall be identified as property of the client, promptly upon receipt, and safeguarded.

(2) Records shall be maintained by the lawyer of the handling, maintenance and disposition of all funds and other property of the client at any time in the lawyer's possession from the time of receipt to the time of final distribution and shall be preserved for a period of six years after final distribution of such funds or other property or any portion thereof. The lawyer shall maintain the minimum financial records specified in the New Hampshire Supreme Court Rules and shall comply with every other aspect of those Rules.

(b) Upon receiving funds or other property in which a client has an interest, a lawyer shall promptly notify the client. 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 any funds or other property that the client is entitled to receive."

This provision imposes a mandatory obligation on New Hampshire attorneys to safeguard clients' property and deliver such property to the clients unless another disposition is permitted by law or agreed to by the clients. In recognition of the stringent requirements imposed on lawyers to safeguard clients' property, the Ethics Committee in interpreting the analogous provision in the prior Code of Professional Responsibility, held that where an attorney died leaving money in an undesignated trust account and the attorney appointed to take over the account exhausted all reasonable steps to determine the rightful owner, the proper course was to dispose of the funds in accordance with New Hampshire law on lost property NH Op 82-3/9.

Rule 50 of the Supreme Court authorize attorneys to donate to the New Hampshire Bar Foundation interest accrued on clients' funds which are nominal in amount or to be held for a short period of time. The Court has ruled that the so-called IOLTA program does not unconstitutionally deprive any client of any property right since the program creates a source of income that would not be available for return to clients nor would otherwise exist. Petition of New Hampshire Bar Association, 122 NH 971 (1982).

N. H. ETHICS OPINIONS ANNOTATED

However, the inquiring attorney concedes that the funds which are the subject to this inquiry were accrued before the attorney became a member of IOLTA. Therefore, Rule 50 would not appear to apply.

With Rule 50 inapplicable, the Committee concludes that the inquiring attorney must treat the accrued interest as belonging to the clients whose funds generated the interest. Therefore, the attorney must take steps to allocate the accrued interest among the affected clients and return it to them unless the clients agree to its donation to IOLTA.

The Committee recognizes that allocation of the accrued interest could be an administrative burden. We are also mindful that the Rules of Professional conduct are to be interpreted in the light of reason. See Scope, P. 1. However, while the inquiring attorney may not have had any fiduciary obligation to place clients' funds in an interest bearing account, having done so, the resulting interest belongs to the client. Therefore, the Committee concludes that strict adherence to ethical standards regarding the safe-keeping of client property does not permit donation of these funds to IOLTA, absent the clients' consent.

However, if due to the passage of time or other circumstances, accounting for and distributing the interest to clients is extremely burdensome, the inquiring attorney might consider petitioning the Supreme Court for permission to donate the accrued funds to IOLTA. The Committee understands that the Court has authorized such donations in situations where distribution to clients could not reasonably be made. The Committee, of course, expresses no opinion as to how the Court would rule in the present case.

* Note: The amendment to this opinion is the addition of the final paragraph.