FOSTER PEPPER PLLC

Direct Phone	(206) 447-4697
Direct Facsimile	(206) 749-1920
E-Mail	mcclp@foster.com

August 14, 2006

Honorable Charles Johnson
Washington State Supreme Court
Temple of Justice Bldg.
P. O. Box 40929
Olympia, WA 98504-0929

Re: Rules of Professional Responsibility, 1.15A Safeguarding Property

Dear Justice Johnson:

As members of the Executive Committee of the Real Property Probate and Trust Section of the Washington State Bar Association, we are writing to you to share our concerns about newly adopted Rule 1.15A of the Rules of Professional Responsibility ("RAP 1.15A"). Steve Crossland, Chair of the Section, discussed this with you in a recent telephone conversation.

The concerns we wish to address in this letter are the cost to implement this rule properly, the impossibility of actually implementing it fully in a reasonable period of time, and whether implementation of the rule will actually provide benefits to our clients commensurate with the additional cost. A copy of the rule, together with the "comments" section, is attached for easy reference.

RPC 1.15A replaces former Rule 1.14 "Preserving Identity of Funds and Property of a Client," and was adopted as part of Washington's adoption of the Model Rules of Professional Responsibility. The Rules Committee, however, declined to adopt Model Rule 1.15 "Safekeeping Property," and instead created a new and significantly different rule. RPC 1.15A, former Rule 1.14 and Model Rule 1.15 all address an attorney's responsibility with regard to funds or property belonging to a client or a third party. However, RPC 1.15A(e) requires a lawyer to "provide at least annually a written accounting to a client or third person for whom the lawyer is holding property;" and, in Paragraph [5] of the "Washington Comments," defines property to include "original documents affecting legal rights such as wills or deed."

Neither former Rule 1.14 nor the Model Rule defines "property" so broadly and neither requires an annual accounting to the client. In fact, the references to a client's "papers and property" in Model Rule 1.16 and in our new RPC 1.16, "Declining or Terminating Representation," imply that "papers," which would, in the context of that rule, include original documents and files, are something different from "property." "Property" has previously been

thought to refer to stock certificates and other tangible items that could be placed in a safe deposit box or vault.

A brief review of the Rules of Professional Responsibility for other states revealed that only North Carolina requires an annual accounting of property in an attorney's possession. However, that requirement applies only to property held by an attorney as a fiduciary and, furthermore, the definition of property does not expressly include original documents. North Carolina, Revised Rules of Professional Conduct (2003), 1.15.

A law firm that has been in existence for any significant period of time can be expected to have thousands of clients and former clients and their files. Any number of original documents falling within RPC 1.15A's broad definition of "property" could be in those files. Because there was no previous rule requiring an annual accounting to the client, the only way to begin the process of providing a complete accounting would be to go through every file, page by page. The cost would be astronomical. Even with several people to do the inventory, it would take years.

One 100 year old firm asked about the difficulties of complying with the new Rule, reported having over 25,000 boxes of files held off site in addition to the equivalent of another 7,500 boxes of files held on-site. A file by file search of only the off-site files to identify and inventory all documents falling within the new definition of "property" would conservatively take five employees over eighteen months and would cost in excess of $250,000. The cost of the annual report to the clients is impossible to estimate until the inventory has been completed.

Another 25 year old firm reported having spent the last two years working on a detailed inventory of its estate planning and corporate files. As complete as that inventory is, it did not involve a file by file search for other documents that would fall with in RPC 1.15A's broad definition of "property" but are neither estate planning nor corporate in nature.

The administrative expenses associated with compliance with Rule 1.15A as drafted would clearly be astronomical. Some of the larger firms may be able to absorb the added costs. It is extremely unlikely that mid-sized and smaller firms have the staffing to accomplish the task without suffering economic hardship. There is little doubt that the additional expenses would ultimately be passed on to clients in the form of increased fees or as "document retention" fees.

For all the reasons discussed above, immediate compliance with the Rule is virtually impossible. The file by file search required for strict compliance could take years to complete. In the meantime, the attorney and his or her firm would be in violation of the RPC 1.15A, despite their best intentions.

Presumably, the intent of RPC 1.15A is to provide a benefit to clients by imposing certain enlarged duties and obligations on attorneys. Instead, it is likely to result in increased fees or diminished service, or both. When an attorney holds a client's original documents it is often at

the request of the client. Under RPC 1.15A many attorneys may determine it is in their best interest to eliminate this service and discontinue holding any original documents.

Estate Planning documents are excellent examples of original documents that are held by attorneys as a service to their clients. The typical will vault provides a secure, fire-proof place to hold the documents until needed. An attorney can quickly pull a document, such as a power of attorney or living will, when a family member calls from the hospital. This is often greatly preferred over sending the family member to search through the client's records at home or to obtain access to a client's safe deposit box. The responsibility of safeguarding the documents of an elderly and vulnerable client resides with the attorney, not the client. Furthermore, once the client executes the documents and receives copies and a letter advising the client that the original's are in the attorney's will vault, there is little need for an additional burden of providing this same information to the client on an annual basis. Traditionally, attorneys have not charged their clients for this service. Faced, with the burdens imposed by RPC 1.15A, many attorneys may discontinue offering the service altogether or may decide they must charge the clients.

Original corporate records and similar organizational documents are often kept by attorneys in the organization's minute book. Maintaining the records is an important service provided by attorneys to their business clients. As part of this service, most business organization clients are contacted at least annually in relation to annual meetings or other filings. Again, there would be little need for annual notice to the client that the attorney is continuing to hold the original documents, although in this case it would be relatively simple and inexpensive. On the other hand, RPC 1.15A requires that notices and accountings be sent to third persons for whom an attorney is holding property. Strict compliance would require that the attorney send the annual accountings to all of the shareholders or members of the organization, as well as to the "client."

Unfortunately, the definition of "property" under RPC 1.15A goes far beyond estate planning and business organization documents. Under the Rule, the term is defined broadly to include all "original documents affecting legal rights." This could include a residential lease, an employment agreement, a settlement agreement, or, in its broadest sense, merely a letter from opposing counsel - - all of which a client could reasonably have asked his or her attorney to retain for safekeeping. The broad definition has raised particular concerns for real property lawyers. Under the Rule, for example, the term expressly includes deeds, which would in turn include conformed copies of deeds, easements, etc., which are technically original documents, but have no real significance as original documents because they have been recorded.

Before RPC 1.15A goes into effect, we strongly urge that something be done to address these concerns. An appropriate remedy would include a revised (more narrow) definition of "property." In addition, the anticipated harm would be mitigated if the Rule could be limited to apply prospectively only, i.e. to "property" received and retained by an attorney after September 1, 2006. In that case, attorneys and law firms could be more selective in deciding what should be retained, inventory it immediately and determine exactly which "clients" and/or "third persons"

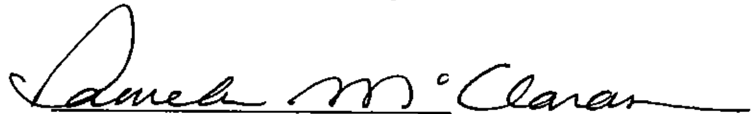
were entitled to notice. We also propose that the Rule be amended to provide that a client (or third person) could waive the requirement for an annual accounting.

The problems inherent in complying with the RPC 1.15A as adopted go far beyond the issues raised in this letter. We ask that the Supreme Court direct the Office of Disciplinary Counsel of the WSBA to not pursue any violations of RPC 1.15A as they arise from the broad definition of "property" found in the comments section or the annual accounting referred to in RPC 1.15(e) until further notice from the Supreme Court. We also request that we be given until January 2007 to make specific recommendations to the Supreme Court as to how the address the issues that we have raised in this letter.

Please let us know what else we can do to assist in resolving these issues in a timely and constructive manner.

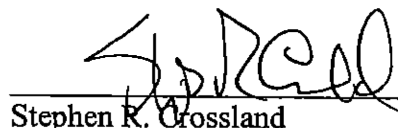
Sincerely,

FOSTER PEPPER PLLC



Pamela McClaran
Chair, RPPT Subcommittee on Rule 1.15A

CROSSLAND LAW OFFICE



Stephen R. Crossland
Chair, Real Property Probate Trust Section, WSBA

cc: Brooke Taylor
Ellen Dial
Jan Michels
Robert Weldon

A. RULE 1.~~14~~15A: ~~PRESERVING IDENTITY OF FUNDS AND~~ SAFEGUARDING PROPERTY ~~OF A CLIENT~~

~~(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:~~

~~(1) Funds reasonably sufficient to pay bank charges may be deposited therein;~~

~~(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, 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.~~

~~(b) A lawyer shall:~~

~~(1) Promptly notify a client of the receipt of his or her funds, securities, or other properties;~~

~~(2) Identify and label securities and properties of a client 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 coming into the possession of the lawyer and render appropriate accounts to his or her client regarding them;~~

~~(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.~~

lawyer must take reasonable action to resolve the dispute, including, when appropriate, interpleading the disputed funds.

~~(c) Each trust account referred to in section (a) shall be an interest-bearing trust account in any bank, credit union or savings and loan association, selected by a lawyer in the exercise of ordinary prudence, authorized by federal or state law to do business in Washington and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Washington Credit Union Share Guaranty Association, or the Federal Savings and Loan Insurance Corporation, or which is a qualified public depository as defined in RCW 39.58.010(2), which bank, credit union, savings and loan association or qualified public depository has filed an agreement with the Disciplinary Board pursuant to rule 15.4 of the Rules for Enforcement of Lawyer Conduct. Interest-bearing trust funds shall be placed in accounts in 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 reserve by law or regulation.~~

~~(1) A lawyer who receives client funds shall maintain a pooled interest-bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of reasonable check and deposit processing charges which shall only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, shall be paid to The Legal Foundation of Washington, as established by the Supreme Court of Washington. All other fees and transaction costs shall be paid by the lawyer. A lawyer may, but shall not be required to, notify the client of the intended use of such funds.~~

~~(2) All client funds shall be deposited in the account specified in subsection (1) unless they are deposited in:~~

~~(i) a separate interest-bearing trust account for the particular client or client's matter on which the interest will be paid to the client; or~~

~~(ii) a pooled interest-bearing trust account with sub-accounting that will provide for~~

~~in which the report is made, with a copy of such statement to be transmitted to the depositing lawyer or law firm.~~

~~(5) The Foundation shall prepare an annual report to the Supreme Court of Washington that summarizes the Foundation's income, grants and operating expenses, implementation of its corporate purposes, and any problems arising in the administration of the program established by section (c) of this rule.~~

~~(6) The provisions of section (c) shall not relieve a lawyer or law firm from any obligation imposed by these rules with respect to safekeeping of clients' funds, including the requirements of section (b) that a lawyer shall promptly notify a client of the receipt of his or her funds and shall promptly pay or deliver to the client as requested all funds in the possession of the lawyer which the client is entitled to receive.~~

(h) A lawyer must comply with the following for all trust accounts:

(1) No funds belonging to the lawyer may be deposited or retained in a trust account except as follows:

(i) funds to pay bank charges, but only in an amount reasonably sufficient for that purpose;

(ii) funds belonging in part to a client or third person and in part presently or potentially to the lawyer must be deposited and retained in a trust account, but any portion belonging to the lawyer must be withdrawn at the earliest reasonable time; or

(iii) funds necessary to restore appropriate balances.

(2) A lawyer must keep complete records as required by Rule 1.15B.

agreement required by ELC 15.4. Trust account funds must not be placed in mutual funds, stocks, bonds, or similar investments.

(1) When client or third-person funds will not produce a positive net return to the client or third person because the funds are nominal in amount or expected to be held for a short period of time the funds must be placed in a pooled interest-bearing trust account known as an Interest on Lawyer's Trust Account or IOLTA. The interest accruing on the IOLTA account, net of reasonable check and deposit processing charges which may only include items deposited charge, monthly maintenance fee, per item check charge, and per deposit charge, must be paid to the Legal Foundation of Washington. Any other fees and transaction costs must be paid by the lawyer.

(2) Client or third-person funds that will produce a positive net return to the client or third person must be placed in one of the following unless the client or third person requests that the funds be deposited in an IOLTA account:

(i) a separate interest-bearing trust account for the particular client or third person with earned interest paid to the client or third person; or

(ii) a pooled interest-bearing trust account with sub-accounting that allows for computation of interest earned by each client or third person's funds with the interest paid to the appropriate client or third person.

(3) In determining whether to use the account specified in paragraph (i)(1) or an account specified in paragraph (i)(2), a lawyer must consider only whether the funds will produce a positive net return to the client or third person, as determined by the following factors:

(i) the amount of interest the funds would earn based on the current rate of interest and the expected period of deposit;

implementation of its corporate purposes, and any problems arising in the administration of the program established by paragraph (i) of this Rule.

~~(d) Escrow and other funds held by a lawyer incident to the closing of any real estate or personal property transaction are client funds subject to this rule regardless of whether the lawyer, the law firm, or the parties view the funds as belonging to clients or non-clients.~~

~~COMMENT RPC 1.14~~

~~Escrow or other funds incident to the closing of real or personal property transactions are subject to this rule regardless of whether the lawyer views the funds as belonging to clients.~~

Washington Comments

[1] A lawyer must also comply with the recordkeeping rule for trust accounts, Rule 1.15B.

[2] Client funds include, but are not limited to, the following: legal fees and costs that have been paid in advance, funds received on behalf of a client, funds to be paid by a client to a third party through the lawyer, other funds subject to attorney and other liens, and payments received in excess of amounts billed for fees.

[3] This Rule applies to property held in any fiduciary capacity in connection with a representation, whether as trustee, agent, escrow agent, guardian, personal representative, executor, or otherwise.

[4] The inclusion of ethical obligations to third persons in the handling of trust funds and property is not intended to expand or otherwise affect existing law regarding a Washington lawyer's liability to third parties other than clients. See, e.g., *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999).

[5] Property covered by this Rule includes original documents affecting legal rights such as wills or deeds.

institution will not have recourse to the trust account to obtain the funds to reimburse the financial institution. A lawyer must never use one client's money to pay for withdrawals from the trust account on behalf of another client who is paid subject to the lawyer's guarantee. The trust account financial institution must agree that the institution will not seek to fund the guaranteed withdrawal from the trust account, but will instead look to the lawyer for payment of uncollectible funds. Any such agreement must ensure that the trust account funds or deposits of any other client's or third person's money into the trust account would not be affected by the guarantee.

[12] The Legal Foundation of Washington was established by Order of the Supreme Court of Washington.

[13] A lawyer may, but is not required to, notify the client of the intended use of funds paid to the Foundation.

[14] If the client or third person requests that funds that would be deposited in a separate interest-bearing account instead be held in the IOLTA account, the lawyer should document this request in the lawyer's trust account records and preferably should confirm the request in writing to the client or third person.

[15] A lawyer may not receive from financial institutions earnings credits or any other benefit from the financial institution based on the balance maintained in a trust account.