

# **Ethics and Professional Conduct:** ***Trust Accounts and Fees***

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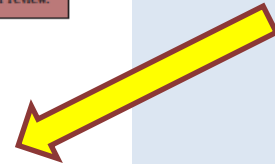
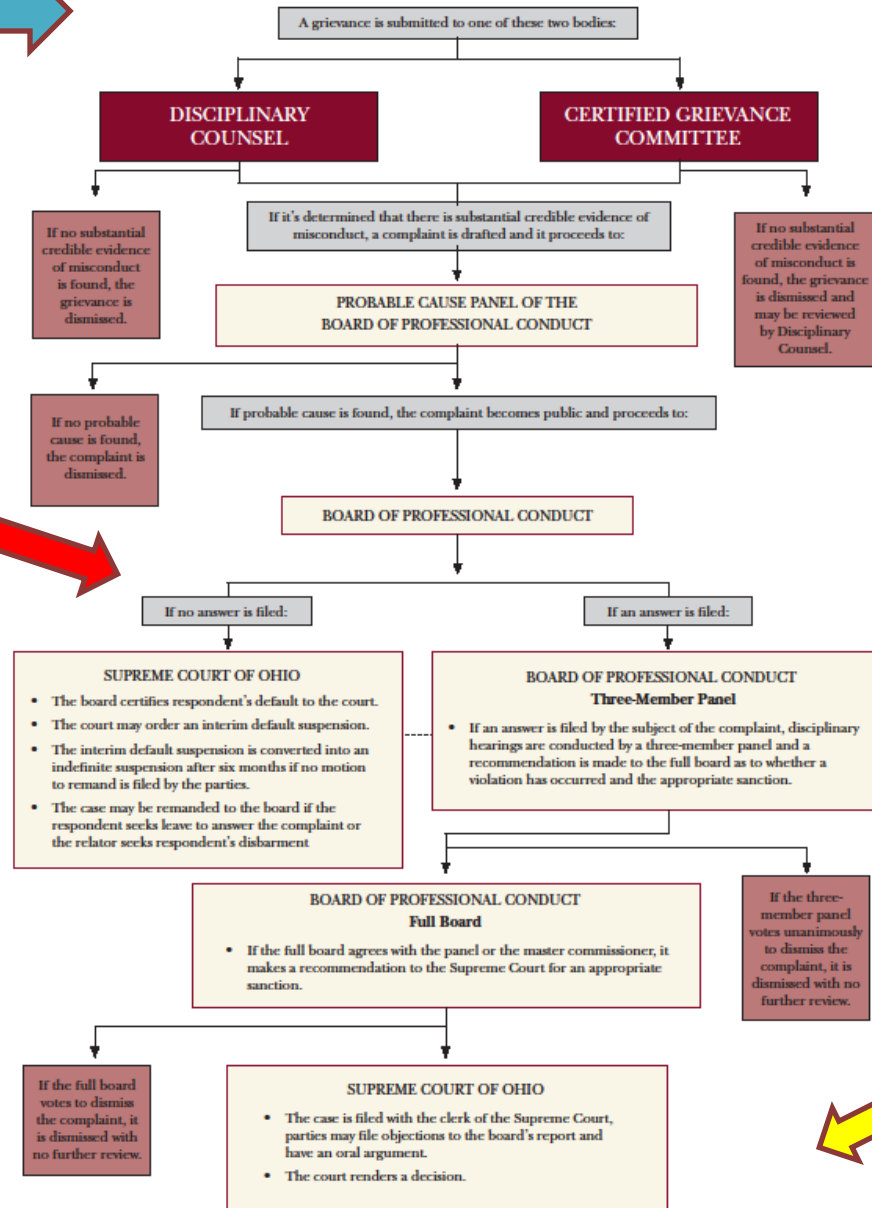
# OVERVIEW

- Disciplinary Process
- Trust Account Basics
- Trust Accounts—What Not To Do
- Commingling, Overdrafts, and Other Trust Account Issues
- Flat Fees
- Pop Quiz

# Disciplinary Process

- Disciplinary Counsel / Certified Grievance Committees
  - Investigate
  - Letters of Inquiry
- Board of Professional Conduct
  - Adjudicate Cases
- Supreme Court of Ohio
  - Final Decision

A grievance against a judge or attorney may be submitted to the Disciplinary Counsel or a certified grievance committee of a local bar association. If either of those bodies determines that there exists substantial credible evidence of professional misconduct, a formal complaint is drafted. It then moves to a probable cause panel of the Board of Professional Conduct, which determines if there is probable cause. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board of Professional Conduct. Hearings are then conducted by the board and if it finds a violation, a recommendation is made to the Supreme Court of Ohio. The Supreme Court of Ohio makes the final decision as to findings of misconduct and issues an appropriate sanction.



# What To Do If You Get A Grievance

- Don't panic. Open it.
- Be responsive whether it concerns you or not
- Seek help if necessary



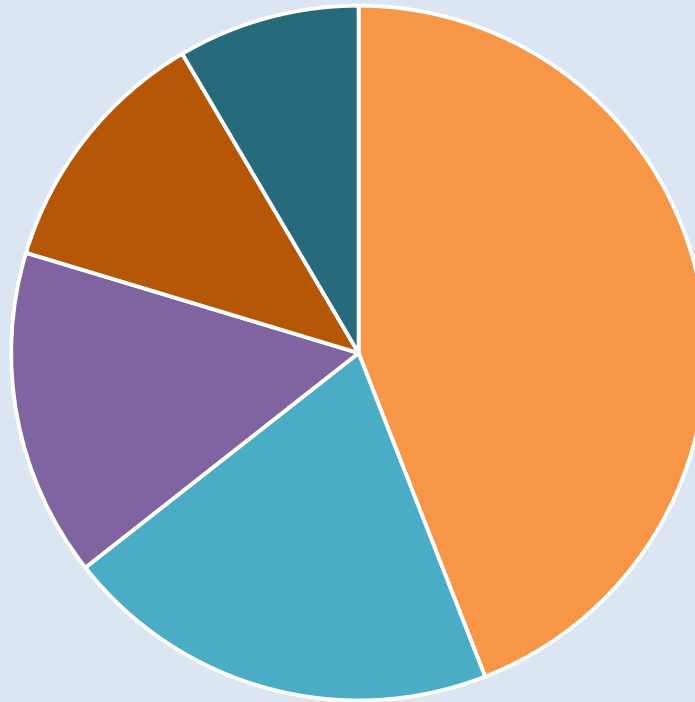
# DISCIPLINARY STATISTICS

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- Approximately 44,000 lawyers (active)
- Average 4,200 grievances/year
  - Somewhat even division between ODC and CGCs
- Approximately half dismissed on intake; half proceed to investigation
- Average 80-90 formal complaints/year

# TOP 5 DISCIPLINARY OFFENSES

2015



■ Neglect   ■ IOLTA   ■ Excessive Fees   ■ Personal Misconduct   ■ Judicial Misconduct

# TRUST ACCOUNT BASICS

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# IOLTA DEFINED

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- Client Trust Account: checking or savings account that lawyer establishes to hold funds belonging to clients & others
- Lawyer with office in Ohio must have client trust account in bank physically in Ohio
- IOLTA: “interest on lawyers’ trust accounts”
- All interest goes to legal aid society

# IOLTA OVERVIEW & REQUIREMENTS

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## Key Rules:

- Prof.Cond.R. 1.5: Fees and Expenses
- Prof.Cond.R. 1.15: Safekeeping of Funds and Property



# 3 FUNDAMENTAL REQUIREMENTS

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1. Identify funds held in trust
  - Deposit slips & checks must identify as IOLTA/trust
2. Separate funds belonging to clients from lawyer's funds (2 accounts)
  - Complete separation of funds required
3. Accounting for trust funds
  - 1.15(d): requires prompt accounting upon request
  - Duty on lawyer, alone (not 3<sup>rd</sup> parties)

# 6 AFFIRMATIVE DUTIES FOR LAWYER TRUST ACCOUNTS

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1. Notify client promptly upon receipt of funds
2. Identify & label property subject to trust obligations
3. Place funds in trust account
4. Maintain complete, accurate records
5. Provide accounting to client
6. Pay or deliver promptly the funds back to the client



# IOLTA KEY POINTS

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- Keep your funds and your clients' funds & property separate
- Keep client funds in IOLTA & appropriately safeguard client property
- Promptly notify & deliver funds, and provide accounting upon request



# IOLTA KEY POINTS

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- Maintain documentation: ledgers, bank statements, deposit slips, cancelled checks (or equivalent)
- Avoid scams



# IOLTA KEY POINTS

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- Don't let your balance go negative
  - May deposit own funds to cover bank fees
- Perform and maintain monthly reconciliation
- Deposit flat fees appropriately.
- Be sure funds are actually available before withdrawal

# TRUST ACCOUNT TIPS





# TRUST ACCOUNT TIPS

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- Keep trust account checks separate from all other checks:
  - Make checks a different color
  - Use a different bank
  - Use different numbering sequence
- Can keep check records electronically

# TRUST ACCOUNT TIPS

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Trust account check register tracks all checks written from account

- Tracks all deposits into account
- Keeps a running balance
- Must keep it up to date
- Sloppiness = red flag

# TRUST ACCOUNT TIPS

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## General Ledger:

- Lists all transactions in trust account in separate client & administrative ledgers
- Deposits & withdrawals are recorded in general ledger
- Deposits & withdrawals for each client are recorded on each client ledger sheet
- Every transaction must be recorded

# COMMINGLING, OVERDRAFTS, & OTHER TRUST ACCOUNT ISSUES

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# OVERDRAFT NOTIFICATION

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- Banks notify ODC pursuant to R.C. 4705.10(A)(4)
- ODC will send letter of inquiry based on overdraft notification & ask for written explanation and records



# OVERDRAFT NOTIFICATION

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- Records sought:
  1. Monthly bank statements;
  2. Individual client ledgers;
  3. Proof overdraft and fees paid and the source of payment
- Mistakes happen



# OVERDRAFT NOTIFICATION

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- How NOT to respond to a letter of inquiry:
- “I would once again emphasize to you, and state that you are missing the point. \* \* \*.” *ODC v. Eichenberger*
- “\* \* \*, it is very unfair to attempt to blame the situation on me, or to attempt to state that I caused a deficiency in the bank account balance.” *Id.*
- “I find your threats to subpoena my bank records to be totally out of line and offensive. The authority of your office in this simple and easily explained matter surely can not extend to such overly broad and invasive limits.” *Id.*

# COMMINGLING

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- R. 1.15(a): lawyer must keep client and third party funds in interest-bearing account separate from that of lawyer's business and personal property
- Accounts must be completely separate





# COMMINGLING

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## Hypo 1:

- Lawyer is afraid that he will make bookkeeping error & his trust account will go below zero.
- As result, lawyer keeps a cushion of \$500 in trust account.
- Is this appropriate?



# COMMINGLING

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## Answer:

- This is not appropriate & is commingling lawyer's personal funds with client funds
- R. 1.15(b): allows lawyer to deposit own funds in trust account for sole purpose of paying or obtaining waiver of bank service charges, but only in amount necessary for that purpose

A **BUSINESS**  
IS NOT YOUR  
**PERSONAL**  
**PIGGY BANK**



# COMMINGLING & OVERDRAFT CASE

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- *Columbus Bar Assn. v. Eichenberger, 2016-Ohio-3332*: commingled funds, no records, noncooperation and misstatements in disciplinary process; 2-year suspension, 1 year stayed (4-3 decision)



# COMMINGLING CASE

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- *Columbus Bar Assn. v. McCord*, 2016-Ohio-3298:  
all funds deposited in one account; treated all fees as earned even if no work done; 1-year stayed suspension



# ADVANCED FEES AND EXPENSES

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## Hypo 2:

- Client gives lawyer check for advance retainer of \$2,500, as well as \$200 in cash for filing costs. Fee agreement is for hourly fee of \$200.
- How should lawyer handle these funds?



# ADVANCED FEES AND EXPENSES

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## Answer:

- Deposit ALL funds in trust (\$2,500 + \$200)
- Lawyer then will have to write check from trust account to clerk of court for filing costs.
- As lawyer earns fees, lawyer may withdraw them from the trust account



# ADVANCED FEES AND EXPENSES

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Trust Account Sub Ledger for Client	Transaction	Deposit	Withdrawal	Balance
March 1, 2019	Retainer	\$2,500.00		\$2,500.00
March 1, 2019	Costs	\$200.00		\$2,700.00
March 1, 2019	Filing fee, Check No. 2415 to Clerk		\$200.00	\$2,500.00



# ADVANCED FEES AND EXPENSES

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Ledger for Client	Transaction	Deposit	Withdrawal	Balance
March 1, 2019	Retainer	\$2,500.00		\$2,500.00
March 1, 2019	Costs	\$200.00		\$2,700.00
March 1, 2019	Filing fee, Check No. 2415 to Clerk		\$200.00	\$2,500.00
March 31, 2019	Earned fees, Check No. 2420 to Office Acct.		\$1,200.00	\$1,300.00

# ADVANCED FEES AND EXPENSES

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- Communicate with client when you disburse from trust account to office account
- Best practice is to send monthly statement
- Send bill showing disbursement and balance of account





# DUTY TO PROMPTLY DELIVER FUNDS

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- Rule 1.15 requires lawyers to “promptly” deliver funds to client or third party
- If disburse client funds from IOLTA before check clears, risk using funds belonging to another client to pay the check if check not honored.
- May hold client’s funds for *reasonable* period of time
  - Ensure check clears and funds available to distribute
- “Reasonable period of time” = one week to 10 days, given federal banking regulations and modern banking practices. Adv. Op. 2016-7



# DUTY TO PROMPTLY DELIVER FUNDS

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- Prudent, prior to disbursing funds, to contact bank to ensure funds actually in IOLTA and available for distribution
- Explain to clients that cannot immediately write check to them when settlement check received
- Helps to avoid a scam situation where asked to deposit a check in IOLTA and then provide funds from that deposit to third party, before check is later determined to be fraudulent.



# DUTY TO PROMPTLY DELIVER FUNDS

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## Hypo 3:

- Lawyer represents plaintiff and settles personal injury case with insurance company
- Lawyer gets \$100,000 check, of which she is owed \$33,000 as contingent fee. She also advanced \$3,000 in costs to client
- If the \$33,000 plus costs is earned, then is it appropriate to deposit entire check into IOLTA?



# DUTY TO PROMPTLY DELIVER FUNDS

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- Yes—lawyer and the client both endorse the check & it is deposited into the IOLTA
- When lawyer knows that funds available, she can then disburse check proceeds to herself and the client
- Important to ensure check is honored, or could result in taking money from other clients

# UNABLE TO LOCATE/IDENTIFY CLIENT

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- Follow statutory procedure for the disposition of unclaimed funds to the state set forth in R.C. Chapter 169. Adv.Op. 2008-3
- Lawyer reporting unclaimed funds of client whose identity or whereabouts is unknown does not violate ethical duties of safekeeping a client's funds under Rule 1.15 or to protect a client's confidentiality under Rule 1.6.

***Unclaimed Funds!***



# LAWYER SCAMS

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- Avoid scams:
  - *ODC v. Denicola, Bd. Case. No. 2014-007*
  - *Iowa Disciplinary Board v. Wright*, 840 N.W.2d 295 (2013)







# CREDIT CARDS

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- Attorneys can accept payment of costs and expenses by client via credit card. Adv. Op. 2007-3
- Attorney responsible for any brokerage charges or fees associated with the use of a credit card
  - Fee, like other service charges, must be paid from operating account, not IOLTA.
- If client gives attorney \$10,000 using a credit card, then \$10,000 must remain in the client's trust account for the agreed upon use of these funds
- Use caution with app payments, such as Venmo

# IOLTA AND ESTATE ADMINISTRATION

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- Cmt. [1] to Rule 1.15: “A lawyer should maintain separate trust accounts when administering estate moneys.”
- *Best Practice*: set up separate trust account for the estate. Protects confidentiality of clients.
  - R.C. 2109.41.
- Recommended attorney consult with Probate Court to determine Court’s position on this issue.

# REQUIRED RECORDS

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- R. 1.15: must maintain all of the following:
1. Copy of fee agreements with each client;
  2. Record for each client's funds;
  3. Record for each bank account with name, date, amount, client credit/debit, and balance;
  4. All bank statements, deposit slips, & cancelled checks for each account;
  5. Perform & retain monthly reconciliation of above.

# TRUST ACCOUNT GENERAL LEDGER

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Date	Client	Transaction	Check No.	Received	Paid	Balance
3-01-19	Smith	Retainer		\$2,500.00		\$2,500.00
3-01-19	Smith	Costs		\$200.00		\$2,700.00
3-01-19	Blue	Retainer		\$2,500.00		\$5,200.00
3-01-19	Smith	Clerk Dist. Ct.	2415		\$200.00	\$5,000.00
3-31-19	Blue	Firm Off. Acct. Earned Fees	2418		\$1,800.00	\$3,200.00
3-31-19	Smith	Firm Off. Acct. Earned Fees	2420		\$1,200.00	\$2,000.00

# CLIENT LEDGER FOR EACH CLIENT

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Ledger for Client	Transaction	Deposit	Withdrawal	Balance
March 1, 2019	Retainer	\$2,500.00		\$2,500.00
March 1, 2019	Costs	\$200.00		\$2,700.00
March 1, 2019	Filing fee, Check No. 2415 to Clerk		\$200.00	\$2,500.00
March 31, 2019	Earned fees, Check No. 2420 to Office Acct.		\$1,200.00	\$1,300.00

# FEES

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# ADVANCED FEES AND EXPENSES

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- R. 1.15(c): required to deposit into trust account legal fees & expenses paid in advance & withdraw only as fees earned or expenses incurred



# ADVANCED FEES AND EXPENSES

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- Earned fees should be disbursed from trust account into office count promptly
- Disbursement should be done on a regular billing cycle of 30 days
  - Can be done more often
- If earned fees are not disbursed, then risk commingling



# FLAT FEES

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- Flat fee = legal service billed at fixed amount
- Lawyer can enter flat fee agreement with client. Adv. Op. 2016-1
- R. 1.15(c):
  - Deposit flat fee & expenses paid in advance into IOLTA, unless designated “earned upon receipt”
  - Only may withdraw as fees earned
- R. 1.5: Return any unearned portion of fee

# FLAT FEES

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## Hypo 4:

- Lawyer receives \$5,000 flat fee from mother of defendant (i.e. client) in criminal case on December 1. Lawyer has done no work. Lawyer puts all of fee in the office account.
- Is this proper?



# FLAT FEES

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- No.
- The \$5,000 does not yet belong to the lawyer
- Until lawyer conveys some benefit/service to the client, lawyer has not earned any fee.
- \$5,000 must go in trust account.



# IOLTA CASES

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# IOLTA CASES

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- ODC v. Barbera, 2017-Ohio-882: misunderstood trust account and “washed” all money through it—even if already earned.
- ODC v. Corner, 2016-Ohio-359: misused client funds and improper use of IOLTA; 2-year suspension, 1 year stayed

# NOTABLE IOLTA CASES

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- ODC v. Bricker, 2013-Ohio-3998: no understanding of IOLTA rules (“this is how I’ve always done it”); Public reprimand.
- Cleveland Metro. Bar Assn. v. Gruttadaurio, 2013-Ohio-3662: multiple acts of misconduct, including failure to place unearned fees in IOLTA & refund unearned fees; Indefinite suspension.
- Stark Cty. Bar Assn. v. Williams, 2013-Ohio-4006: misappropriation of client funds & IOLTA violations; Disbarment.



# IOLTA RED FLAGS

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- Checks written for clearly personal expenses (cable/internet bills, bar dues, liquor, country club dues, etc.)
- Account not titled as trust account or IOLTA
- Missing or inadequate records
- Using IOLTA to “hide” money from IRS, creditors, court, ex-spouse or soon-to-be ex-spouse

POP

QUIZ



# IOLTA POP QUIZ

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1. Lawyers are permitted to keep client funds in an office or personal safe.
2. IOLTA Rules do not apply to funds a lawyer holds to pay 3<sup>rd</sup> parties on behalf of clients.
3. Advance payments of fees do not need to be held in IOLTA.
4. When there is a dispute between the lawyer & client regarding disposition of funds, those funds must be held in IOLTA.
5. IOLTA records must be retained permanently.

# IOLTA POP QUIZ

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6. Interest from IOLTA is distributed to legal aid organizations.
7. Each Ohio lawyer is required to have an IOLTA.
8. Whether funds received from a client must be deposited into an IOLTA depends on how quickly the lawyer expects to complete the work necessary to earn the funds.
9. A lawyer may keep his/her own money in an IOLTA to ensure checks do not bounce.
10. Filing fees and costs are to be kept in an IOLTA until fees or costs are incurred.

# IOLTA RESOURCES

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- OLAF: <https://www.olaf.org/lawyers/iolta-iota-for-lawyers/ioltaiota-faqs/>
- Board of Professional Conduct: <https://www.bpc.ohio.gov/>
- OBLIC: <https://www.oblic.com/>