Ethics Advisory Opinion

26-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

S.C. Rules of Professional Conduct: Rules 1.1, 1.6; 1.7(a)(2); 1.8(f); Rule 1.15(g)

S.C. Appellate Court Rules: Rules 412 and 417

Facts: Lawyer uses a law practice-specific software program to handle real estate closings, including managing IOLTA funds. The software company ("Company") has offered Lawyer a discount on the subscription cost of the product if Lawyer will use one of Company's preferred banking partners for trust accounting. The banking partner is included in the South Carolina Bar Foundation's list of IOLTA eligible financial institutions. Additionally, the preferred banking partner is making an offer to offset the subscription cost of Company's software product by offering a credit for the software cost. The credit is based on the average deposit amount in Lawyer's trust account. Because of the amount of funds passing through Lawyer's trust account, the savings for lawyer could amount to mid-five figures annually. The banking partner would comply with IOLTA rules, and the partnership would not impact interest paid to IOLTA. No client funds would be used in Lawyer's software discount.

Question Presented: Does a lawyer violate the South Carolina Rules of Professional Conduct by selecting a specific financial institution for a mandatory Interest on Lawyers' Trust Account (IOLTA) because a third-party vendor offers the firm discounted practice management software as an incentive?

Summary: No. A lawyer does not violate South Carolina ethical or appellate court rules by choosing an eligible IOLTA institution based on a third-party business incentive, provided the bank meets all criteria of an "eligible institution" under Rule 412, interest is fully remitted to the South Carolina Bar Foundation, and the arrangement does not compromise the security or administration of client funds or the exercise of the lawyer's professional judgment.

Opinion:

<u>Safekeeping of Client Property and the Structure of IOLTA (Rules 1.15, 1.7 and 412)</u>

Rule 1.15(a) of the South Carolina Rules of Professional Conduct requires a lawyer to hold property of clients separate from the lawyer's own property, while Rule 1.7(a)(2) strictly

prohibits a lawyer from letting personal business interests materially limit their duty of loyalty to a client. When an attorney receives a private business perk tied directly to a client trust account, the core ethical danger is two-fold: the financial risk of converting or diverting value away from the client, and the relational risk of a conflict of interest where the lawyer's choice of depository is driven by personal gain rather than the client's best interests.

Under the South Carolina IOLTA framework, a client is not entitled to earn interest on these pooled funds. The rule applies exclusively to trust deposits that are nominal in amount or held for such a short duration that they cannot practically generate net interest for the client individually. For these specific, short-term funds, the client’s sole entitlement is the absolute security and immediate availability of their underlying principal. The arrangement here involves selecting an approved bank based on a vendor partnership that yields a volume-based financial credit to offset firm operating overhead.

Importantly, this credit does not pull from the interest earned on client funds, nor does it touch any client's principal balance. Because the South Carolina Bar Foundation still receives 100% of the required interest remittance, no public trust revenue or client property is misappropriated. Just as lawyers are allowed to accept standard commercial bank perks—like waived wire or statement fees—they can accept a non-cash vendor software credit under Rule 1.15, provided the arrangement causes absolutely zero economic harm to the client.

Conflict of Interest: Current Clients (Rule 1.7(a)(2))

Under SCRPC Rule 1.7(a)(2), a concurrent conflict of interest exists if there is a significant risk that the representation of a client will be “materially limited... by a personal interest of the lawyer.” A lawyer naturally possesses a personal business interest in reducing firm operating expenses and mitigating administrative overhead.

The administrative selection of an authorized financial institution does not impact the quality, strategy, or execution of legal services rendered to a client, provided the bank can execute fundamental banking services adequately. If the chosen financial institution allows immediate fund withdrawal, protects deposits up to standard regulatory limits, and has no operational impediments, the lawyer's personal interest in utilizing this specific banking arrangement does not materially limit the representation. An attorney would cross the line into a Rule 1.7 conflict only by choosing a sub-standard, insecure, or unapproved bank just to get a discount—effectively trading the safety or accessibility of client funds for a personal business perk.

Furthermore, because the software credit scales with the volume of trust deposits, the attorney must strictly adhere to the independent duty under Rule 412, SCACR, to determine whether a client's funds belong in an IOLTA account or a separate, interest-bearing account for the client's individual benefit. A lawyer faces a conflict of interest if they intentionally place or retain client funds within the pooled IOLTA account—contrary to the client's economic interest—solely to increase the firm's average trust balance and maximize the software discount. The decision to place funds in an IOLTA account must always be driven by the size and short-term nature of the deposit, never by a desire to optimize a personal business incentive.

<u>The Use of Trust Balances for Non-Cash Earnings Credits (Rules 1.8(f) and 1.15(g))</u>

Because the preferred banking partner intends to calculate the financial credit based directly on the average deposit amounts maintained within the Inquirer's pooled IOLTA account, the Committee must specifically address whether this volume-based structure impermissibly diverts an economic benefit derived from client funds.

To evaluate a balance-based credit of this nature, the Committee finds persuasive guidance in N.Y. St. Bar Assn. Eth. Op. 764 (2003). There, the Committee on Professional Ethics evaluated a comparable arrangement where a bank used a firm's aggregate IOLTA balances to calculate an "earnings credit" that reduced or eliminated monthly fees on the firm's separate operating accounts. The Committee concluded that such arrangements are ethically permissible, provided the bank continues to remit the mandatory cash interest to the state's public legal aid fund.[1]

The arrangement described by the Inquirer functions on this exact principle. Even though the commercial credit scales with the volume of the trust deposits—potentially reaching the mid-five figures annually—the framework remains ethically sound because of three distinct structural safeguards:

- Full Interest Remittance Maintained: The bank continues to compute and remit 100% of the actual interest generated by the IOLTA account to the South Carolina Bar Foundation. The software credit does not cut into, reduce, or offset that mandatory public interest sweep under Rule 412, SCACR. Whether the credit is funded by the financial depository, the software vendor, or an independent corporate partnership between the two, the public interest stream remains entirely intact.
- No Economic Loss to the Client: Because the funds placed in an IOLTA account are nominal or short-term, they cannot practically or lawfully earn net interest for individual clients. Consequently, the client suffers no economic deprivation, and their sole entitlement—the absolute safety and immediate availability of their underlying principal—is fully preserved.

---

[1] The Committee explicitly declines to adopt the client consent requirement found in the New York opinion. Under South Carolina's Rule 1.8(f), consent is meant to prevent third-party payors from interfering with a lawyer's independent judgment. A non-cash commercial credit applied directly to a vendor invoice poses no threat to a lawyer's professional independence. Furthermore, because this mid-five-figure credit is calculated against a fluid pool of hundreds of short-term closing deposits, the funds are mathematically anonymous. Because it is impossible to trace any specific part of the credit back to an individual client, and because no client suffers any economic loss, affirmative client consent is not required.

- Non-Cash Character of the Benefit: The incentive is structured strictly as a non-cash ledger credit applied directly to an operating vendor invoice to offset a legitimate law firm business expense. The lawyer is not converting client balances into liquid cash payouts or pocketing a personal windfall over and above actual business expenditures.

Accordingly, utilizing aggregate trust balances to calculate a standard commercial earnings credit to offset practice-specific overhead does not violate Rule 1.15(g).

The Committee also reminds lawyers of their obligations under Rule 1.1, cmt. 8, and Rule 1.6.