

VBA OPINION 2011-4

SYNOPSIS

An attorney acting as the trustee of a trust funded upon a spouse's death for the benefit of the surviving spouse and upon that spouse's death to be distributed to other family members is governed by the Vermont Rules of Professional Conduct (the "VRPC") and also the Vermont codification of the Uniform Prudent Investor Act, so must maintain a diversified portfolio and is not required to hold the funds in a "pooled interest" (IOLTA) account under VRPC 1.15B whereby interest or dividends would be paid to the Vermont Bar Foundation to support legal services to the needy or public education on legal matters only in financial institutions approved by the Vermont Professional Conduct Board.

FACTS

Without soliciting such appointment, Attorney A was named as the sole trustee of a client's unfunded irrevocable trust. Years later, the client died and the trust was funded. Under the terms of the trust, income is to be paid to the surviving spouse during that spouse's lifetime. Payments of the trust's principal may also be made to the surviving spouse in the trustee's discretion. Upon the surviving spouse's death, the remaining assets of the trust are to be distributed to other family members.

Attorney A, as the trustee, plans to invest the trust's assets in one or more mutual funds and arrange to have the income directly deposited to the surviving spouse's bank account to maintain a diversified portfolio and otherwise to conform with the Vermont codification of the Uniform Prudent Investor Act, 14A V.S.A. Chapter 9. These mutual fund investments may not be in financial institutions approved by the Vermont Professional Conduct Board ("VPCB"), but would be in compliance with the trust's terms and the Vermont Uniform Prudent Investor Act.

ANALYSIS

VRPC 1.15, 1.15A, and 1.15B impose particular requirements on safekeeping client property, trust/fiduciary accounting systems, and pooled interest bearing accounts, respectively. If Attorney A were required to administer the trust in accordance with the pooled interest bearing account (IOLTA) rules, all interest and dividend income would be payable to the Vermont Bar Foundation, not as required by the trust. Until June 17, 2009 the VRPC also included Rule 1.15C which could have been interpreted to force an attorney to make a choice between complying with the VRPC rules governing trust funds and the Vermont Uniform Prudent Investor Act as well as a trust's particular terms which would require a diversified portfolio. (In 2006, this committee addressed the application of Rule 1.15C as well as Rules 1.15 and 1.15B in another context.)

The June 2009 amendments to the VRPC, however, eliminated the Rule 1.15C provision that would have established the arguable conflict. Some of the terms of former Rule 1.15C were included in other Rules. But the result of the amendment makes clear that the VPCB

approved financial institution requirement applies to “trust” accounts and that “fiduciary” accounts are separate.

Rule 1.15A defines the “trust” and “fiduciary” accounts separately as follows:

An account in which funds are held that are in the lawyer’s possession as a result of a representation in a lawyer-client relationship shall be clearly identified as a “trust” account. An account in which funds are held that are in the lawyer’s possession as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment shall be clearly identified as a “fiduciary” account.

Rule 1.15B(a) covers which funds must go into the “pooled interest” (IOLTA) account. It is clear that those are funds held as a result of a lawyer’s representation of a client in the defined “trust” capacity under Rule 1.15A(a)(1) not otherwise or as a result of the lawyer’s acting as fiduciary of a separate trust as is the case on the facts presented here.

Every lawyer or law firm holding funds in one or more trust accounts in accordance with Rule 1.15A(a) shall create and maintain a pooled interest-bearing trust account in a financial institution in Vermont that has been approved by the Professional Responsibility Board. Funds so held that are not reasonably expected to earn net interest or dividends, as defined in paragraph (2) of this subdivision, for the client or other person for whom they are held shall be deposited in that account. The interest or dividends accruing on this account, net of any transaction costs, as defined in paragraph (2) of this subdivision, shall be paid over to the Vermont Bar Foundation by the financial institution. No earnings of the account shall be made available to the lawyer or law firm.

The explicit application of the “pooled interest” (IOLTA) account rules to relationships defined only as “trust” (created “as a result of a representation in a lawyer-client relationship”) not as fiduciaries, in combination with the clear requirements of the trust’s terms, the clear legal requirements of the Vermont Uniform Prudent Investor Act, historical practice, and the absence of any clear intent to have the VRPC interpreted so as to conflict with the legal requirements in a lawyer’s acting as a fiduciary of a trust, as well as the elimination of any possible conflict with old Rule 1.15C as a result of the 2009 amendments to the VRPC 1.15C language, makes clear that Attorney A is not restricted to holding the trust’s assets in VPCB approved financial institutions. Attorney A must comply with the Vermont Uniform Prudent Investor Act, and distribute income as required by the trust over which he is acting as a fiduciary. The applicability of the Rule 1.15B requiring deposits only in VPCB approved financial institutions or only in “pooled interest” (IOLTA) accounts only to “trusts” as defined in Rule 1.15A is also clear from the separate Rules for other types of fiduciary relationships. If for example, a trust were established for a family member or third party with stock paying dividends instead of funds to be deposited, the Rules are clear on what an attorney must do and those Rules do not include the Rule 1.15B pooled interest (IOLTA) provisions. Obviously, Attorney A must also comply with the rest of the VRPC and Vermont law provisions governing maintenance of fiduciary accounts.