

Maintaining A Trustworthy Trust Account



TRUST ME: IT'S NOT YOUR MONEY

WHAT GOES WRONG . . .

- ✘ Inadequate training.
- ✘ Inadequate recordkeeping.
- ✘ Inadequate internal controls and safeguards.
- ✘ No written confirmation signed by the client on how money held in trust will be utilized and disbursed.

FLORIDA BAR RULES RELATING TO TRUST ACCOUNTS

- × RRTFB 4-5.1**
 - + Responsibilities of Partners, Managers, and Supervisory Attorneys**
- × RRTFB 4-1.5**
 - + Fees and Costs for Legal Services**
- × RRTFB 4-1.15**
 - + Safekeeping Property**
- × RRTFB 4-8.4**
 - + Misconduct**
- × RRTFB Chapter 5**
 - + (all of it)**

FLORIDA STATUTES RELATING TO TRUST ACCOUNTS

- **F.S. 626.8473**
 - Title agents escrow accounts.

- **F.S. 717**
 - × Escheating money to the state's unclaimed property section.

DON'T OVERLOOK ETHICS OPINIONS

- × **Ethics opinions offer guidance;**
- × **Are important tools in helping to explain the rules; and**
- × **Show us how to *effect* compliance.**

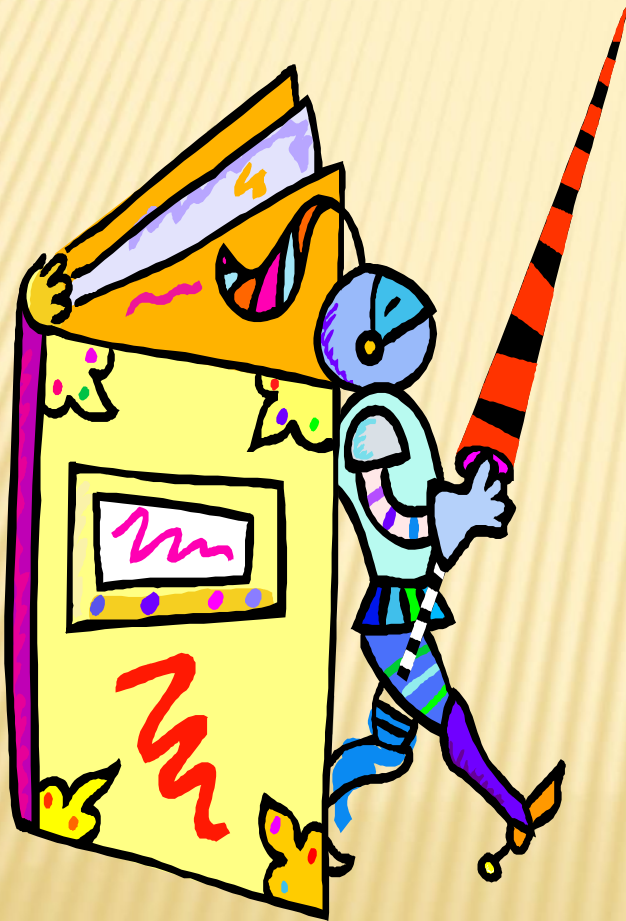
FLORIDA BAR ETHICS OPINIONS RELATING TO TRUST ACCOUNTS

- **TFB EO 60-26, 63-14, 70-13, 02-8 - relationships with banks, investment houses**
- **TFB EO 60-34 – confidentiality in holding funds**
- **TFB EO 61-15 - unable to locate client**
- **TFB EO 63-3 - missing clients, file retention**
- **TFB EO 64-40 (reconsidered) – signatories**
- **TFB EO 72-3 – IRS**
- **TFB EO 72-37 – FDIC/FSLIC/NCUSIF**
- **TFB EO 73-5 - misappropriation of funds by partner**
- **TFB EO 82-2 - funds held for specific purpose**
- **TFB EO 88-11 (reconsidered) - file ownership**
- **TFB EO 93-2 – retainers**
- **TFB EO 00-2 (reconsidered) - settlement proceeds**
- **TFB EO 02-4 – statutory liens**
- **TFB EO 02-6 – purchase agreement deposits**
- **TFB EO 93-5, 12-4 - title insurance, trust account records**

ON OBTAINING BANK FAVORS BY A “STRATEGIC” PLACEMENT OF CLIENT TRUST ACCOUNTS

- ✘ TFB E.O. 63-14 - “No attorney is permitted to make a secret commission on placement of a client’s funds or to obtain commissions from an outside source without the full knowledge, approval and consent of the client.”
- ✘ TFB E.O. 70-13 - “An attorney may receive a fee for referring a client to a financial institution provided that the client consents after full disclosure and the client receives the benefit of the referral fee.”

IT'S THE LAWYER'S PERSONAL AND FIDUCIARY RESPONSIBILITY



- ✘ The Lawyer cannot delegate or transfer
- ✘ The Lawyer is responsible for the acts of law firm employees
- ✘ The Lawyer is responsible for providing adequate training and supervision

- **Rule 4-5.1: Responsibilities of a Partner, Managers, and Supervisory Lawyers**

- “. . . shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers therein conform to the Rules of Professional Conduct.”

- **“Institutional Lack of Control?”**

- **Duty to report**

ARE ALL TRUST ACCOUNTS IOTA ACCOUNTS?

- ✘ No. See RRTFB 5-1.1(a)(2) Compliance with Client Directives
 - ✘ Establish separate interest-bearing trust accounts when funds are not nominal, not short-term, and do not have to be held in an on-demand account.
 - ✘ Use the tax ID number of the entity/person of the funds' owner.
 - ✘ Funds may be held in an eligible institution other than a bank, or S&L, or credit union if the lawyer receives written direction from the client to do so.

TRUST ACCOUNTS - ELIGIBLE INSTITUTIONS

- ✘ In the state of Florida:
 - + FDIC insured bank.
 - + FSLIC insured savings & loan association
 - + NCUSIF insured credit union
- ✘ Investment company registered to do business in Florida, with offices in Florida, and registered with the SEC.
- ✘ Must offer the highest rate of interest that is offered to non-IOTA accounts meeting minimum balance requirements.

SO, WHAT IS AN IOTA TRUST ACCOUNT AND WHAT GOES IN IT?

- ✘ A trust account enrolled in The Florida Bar Foundation's Interest On Trust Accounts Program
- ✘ “Nominal amounts of money held for short periods of time.”
 - + Lawyer's discretion – “best judgment”
 - ✘ That is, situations where it is not practicable to invest the money for the client, such as:
 - ✘ Interest return not worthwhile
 - ✘ Must be kept liquid

OPENING A TRUST ACCOUNT – WHAT IS SPECIFICALLY REQUIRED?

- ✘ Separate bank account clearly labeled as a trust account.
 - + e.g., “John Smith, Attorney, Trust Account.”
 - + By itself, “IOTA” label insufficient & incorrect.
 - + “Escrow Account” is incorrect.

OPENING A TRUST ACCOUNT – WHAT IS SPECIFICALLY REQUIRED? (CON'T)

- ✘ Must instruct the banking institution in writing to notify TFB if a trust account check is returned NSF.
- ✘ No ATM access.
- ✘ No automatic overdraft protection.
- ✘ Initial deposit, e.g., \$100 of your firm's money, which is then posted to a ledger in the new trust account labeled, "Firm Miscellaneous Ledger."
 - + "Reasonably sufficient" to pay bank charges and other account maintenance charges.

OPENING A TRUST ACCOUNT

- ✘ “Eligible Institution” - FDIC or FSLIC or NCUSIF insured institution authorized by law to do business in the State of Florida.
 - + RRTFB 5-1.1(g)(1)(D).
 - + Must be in the State of Florida.
 - + In accordance with client directives.

ADDITIONAL PRECAUTIONS

- ✘ The Florida Bar Recommends:
 - + Open account downtown.
 - + Use different check colors for operating and trust accounts.
 - + Never order ink stamps of authorized signatories.
- ✘ Who can be a signer? Who should be a signer?
- ✘ Be certain The Florida Bar Foundation Tax ID is used when opening IOTA account.
 - + 59-1004604
- ✘ Notify the bank in writing: NO disbursements, transfers or wires without specific written authorization of an authorized signatory.

HOLDING CLIENT PROPERTY

+ Safe Deposit Boxes.

- × Same record keeping requirements as the trust account.
- × Notify the bank that SDB holds client property.
- × No commingling.
- × See also RRTFB 4-1.15.

+ Protect your firm.

- × Independent appraiser or notary.
- × Photographs, descriptions.

HANDLING TRUST ACCOUNT FUNDS

- ✘ Promptly notify the client (or third person with an interest) *in writing* when trust funds or property are received.
- ✘ Make only those disbursements authorized by your client.
- ✘ Promptly return trust funds/property if the client requests it.

HANDLING TRUST FUNDS

- ✘ Don't commingle! Keep operating account money separate from trust account money.
- ✘ Disputed fees cannot be withdrawn.
- ✘ Provide a written accounting to clients when requested.
- ✘ Withdraw earned fees immediately.
 - + Cannot defer the firm's taxable income.
 - + True retainers, non-refundable fees and/or flat fees are never placed in the trust account.

WHEN MUST YOU MAKE DISBURSEMENTS?

- ✘ Immediately upon the client's request.
- ✘ Per the written agreement between you and the client.
- ✘ The Florida Bar recommends: If handling several matters for one client, do not transfer funds from one matter to another without *specific* permission from the client.



RULE 5-1.1(C)

× Liens Permitted

- + This subchapter does not preclude the retention of money or other property upon which the lawyer has a valid lien for services nor does it preclude the payment of agreed fees from the proceeds of transactions or collections.

CAN'T FIND YOUR CLIENT?

- ✘ Unclaimed or unidentified client funds/property should be escheated to the State per F.S. 717
 - + Contact the Department of Financial Services
 - + <http://www.fltreasurehunt.org/>
 - + Bureau of Unclaimed Property
 - ✘ 1-888-258-2253
 - ✘ Floridaunclaimedproperty@myfloridacfo.com

ACH TRANSFERS & ELECTRONIC PAYMENT SYSTEMS

- ✘ What is an ACH? It is a **process whereby an account holder authorizes a third party** to remove funds from the account (e.g., a person's mortgage payment or other monthly obligation).
- ✘ There are concerns about using an ACH in conjunction with a trust account. While not prohibited, ACH transactions will not provide adequate documentation about disbursements.
- While it is permissible to remit court e-portal filing charges via ACH from the lawyer's trust account, a safer way is to run the e-filing charge through the lawyer's operating account as a client cost advanced. Then the lawyer can reimburse the firm from the client's funds in the trust account after the payment of e-portal charges is completed from the operating account.

ACH TRANSFERS & ELECTRONIC PAYMENT SYSTEMS

- ✘ **E-Filing. Fees for the Courts' E-Portal.**
 - + The lawyer can pass along the e-filing charge to the client.
 - + Note that this e-filing charge is treated as an Automated Clearing House (ACH) transaction. Third party access to the trust account is not prohibited, but it does raise concerns.
 - + TFB auditors are aware of the e-filing portal fees via ACH, and at this time, are not troubled by the arrangement.
- ✘ The Bar recommends that the law firm open an additional low-balance operating account, or low-limit credit card, to handle e-filing or other ACH transactions. In this way, accounts holding large sums are not exposed to the “cloud.”

TITLE INSURANCE AGENTS. FLORIDA STATUTES 626.8473(8)

- ✘ “An attorney shall deposit and maintain all funds received in connection with transactions in which the attorney is serving as a title or real estate settlement agent into a separate trust account that is maintained exclusively for funds received in connection with such transactions and permit the account to be audited by its title insurers, unless maintaining funds in the separate account for a particular client would violate applicable rules of The Florida Bar.”

HOW MANY IOTA TRUST ACCOUNTS?

- ✘ A lawyer/law firm may have as many trust accounts as it needs to efficiently and properly operate.
- ✘ The Bar recommends that you have a separate IOTA account for each title company for whom the lawyer is an agent.
- ✘ It is more efficient to submit the records to the title agency auditor for review if they are contained in a separate IOTA account.

INSUFFICIENT FUNDS IN A TRUST ACCOUNT

- ✘ As previously mentioned, the bank is required to report to The Florida Bar any instance of insufficient funds to cover a disbursement, absent bank error.
- ✘ The lawyer should also report the situation to Staff Counsel at The Florida Bar.

INSUFFICIENT FUNDS, SHORTAGES, & THEFTS

- ✘ RRTFB 5-1.1(a)(1)(B) allows lawyers to replace missing funds.
- ✘ However, if a client's funds go missing from the trust account, the event **must** be reported to Bar Staff Counsel.
- ✘ Seek guidance from Bar staff auditors.

TRUST ACCOUNT THEFTS

- ✘ A theft of trust account funds should be reported immediately to:
 - + The Bank.
 - + The Police.
 - + The Florida Bar Staff Counsel.
 - + The law firm's general liability insurance carrier, and professional liability insurance carrier.
 - + The affected client(s).

TRUST ACCOUNT MANAGEMENT PLANS

- ✘ RRTFB 5-1.2(c). This June 1, 2014, rule amendment requires all law firms with more than one lawyer to have in place a written trust account management plan for each of the firm's trust accounts.
- ✘ The trust account management plan must be disseminated to each lawyer in the firm.

TRUST ACCOUNT MANAGEMENT PLANS

- ✘ The plan must include:
 - + Names of all the signatories to the trust account(s);
 - + Names of all the lawyers who review and approve trust account disbursements and deposits;
 - + Names of all the lawyers who have oversight of the trust account reconciliation process; and
 - + Names of all the lawyers who are the point of contact for the other lawyers in the firm who may have questions about the firm's trust account(s).
 - + In a small law firm, these duties may fall to just two lawyers.
 - + In a large law firm, some of these duties may fall to the law firm administrator, controller, or CPA. However all law firm staff, outside agents, such as a CPA, and the supervising lawyers must be named in the plan.

WHY A TRUST ACCOUNT MANAGEMENT PLAN?

- ✘ Each lawyer with managerial or supervisory responsibility, and/or an ownership interest (e.g., partner or shareholder or member) is responsible for the trust account and each lawyer in the law firm is responsible for his or her own actions relating to the trust account.
- ✘ A trust account management plan that is circulated to all the firm's lawyers should help lawyers spot irregularities so they can be corrected and reported.

TRUST ACCOUNT MANAGEMENT PLANS

- ✘ A new plan must be prepared and distributed to all of the firm's lawyers whenever there is a material change to the existing plan, such as the removal or addition of a signatory.
- ✘ The plan must include the name of an owner of the law firm (e.g., partner/shareholder/member) who is ultimately responsible for the firm's trust accounts and the management plan, or any part of the plan.
- ✘ The requirement to have in place a trust account management plan applies to all law firms with a Florida office including interstate law firm partnerships.

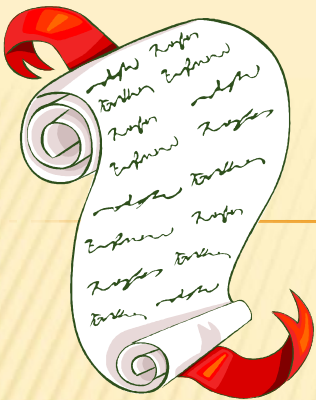
“RULE OF SIX”

1. Cash Receipts and Disbursements Journal
2. Ledgers
 - + An individual ledger for each client/matter.
3. Bank Statement, Cancelled Deposit Slips, Proofs of Wires & Cancelled Checks
4. Monthly Reconciliation
5. Monthly Comparison
6. Hold Records and supporting documentation for six years.

RECORD KEEPING REQUIREMENTS

- ✘ Whether your trust account records are digital, or whether the lawyer prefers a paper accounting method, The Bar recommends that you be certain that you can recreate the records during the entire six-year retention period.
- ✘ The six-year retention period is from the last transaction on each trust ledger not just six calendar years of reconciliation reports.
- ✘ Does this requirement coincide with your firm's file retention policy?





THE BAR RECOMMENDS

- ✘ Gather all documentary support, copy or scan it, and keep it with the month's reconciliation report. Examples are:
 - + Source documents supporting why disbursements and deposits were made.
 - + Invoices from vendors and service providers, signed internal check requests.
 - + Law firm invoices to clients with supporting detail.

RECORDKEEPING REQUIREMENTS

- ✘ **Electronic Disbursements.** Must maintain other documentary support for all disbursements and transfers from the trust account, including records of all electronic transfers from client trust accounts, as well as:
 - + (A) the name of the person authorizing the transfer;
 - + (B) the name of the recipient;
 - + (C) confirmation from the banking institution confirming the number of the trust account from which money is withdrawn; and
 - + (D) the date and time the transfer was completed.

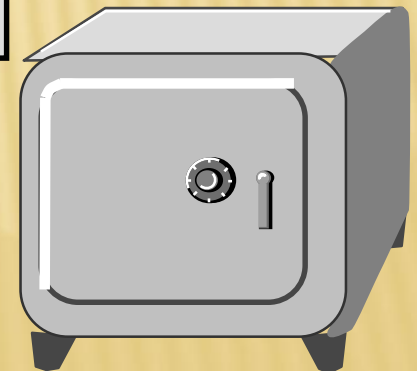
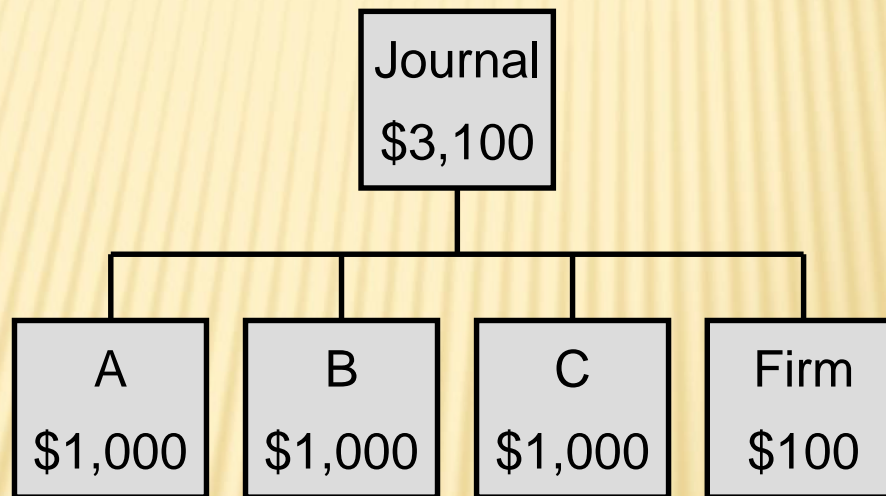
RECORDKEEPING REQUIREMENTS

- ✘ **Wire Transfers. 5-1.2(d)** “Authorized electronic transfers from a lawyer or law firm’s trust account shall be limited to:
- ✘ (1) money required to be paid to a client or third party on behalf of a client;
- ✘ (2) expenses properly incurred on behalf of a client, such as filing fees or payment to third parties for services rendered in connection with the representation;
- ✘ (3) money transferred to the lawyer for fees which are earned in connection with the representation and which are not in dispute; or
- ✘ (4) money transferred from one trust account to another trust account.”

RECORD KEEPING REQUIREMENTS (CONT)

- ✘ Cash Receipts & Disbursements Journal
 - + Checkbook stubs insufficient
- ✘ Client ledgers
 - + For not just each client, but also for each client's matter, if applicable
 - + Show all transactions for each client's matter and balance owed to each client on each matter
 - + Show month end and beginning of the month totals

The Cash Receipts & Disbursements Journal and the Client Ledgers



RECORD KEEPING REQUIREMENTS (CONT)

- ✘ Monthly bank reconciliation.
 - + The monthly bank statement is reconciled to the monthly cash receipts and disbursements journal.

- ✘ Monthly comparison. Total of a list of the client ledger month end balances, which is compared to the reconciled bank statement balance.

- ✘ Annual listing of client balances.

RECORD KEEPING REQUIREMENTS (CONT)

- ✘ Original Monthly Bank Statements
 - + Keep a detailed record of deposits (slips) that must include this information:
 - ✘ Date and source of funds. Example:
 - ✘ Date
 - ✘ Name of the remitter of the funds
 - ✘ Type of funds
 - ✘ Name of client/matter
 - ✘ Copy of check or cash receipt
 - + Original canceled checks
 - ✘ Bank-made (electronic or paper) copies allowed if copies of the backs of checks are included showing all endorsements.

Monthly Bank Reconciliation

- Balance per bank statement
- From the monthly journal: **XX,XXX.XX**
 - List and add deposits in transit **+ XXX.XX**
 - List and deduct outstanding checks **- XXX.XX**
 - Date, check #, amount
- Reconciled bank balance
 - Agrees with the month-end balance of the cash receipts and disbursements journal and total of the client ledgers **XX,XXX.XX**

MONTHLY COMPARISON

| | |
|-----------------|---------------|
| Law Firm Misc | xx.xx |
| Client/Matter A | xx.xx |
| Client/Matter B | xx.xx |
| Client/Matter C | xxx.xx |
| Client/Matter D | <u>xxx.xx</u> |
| Total | x,xxx.xx |



Total of all individual ledgers agrees with the monthly cash receipts and disbursements journal

CREDIT CARD RECEIPTS



- ✘ RRTFB 4-1.5(h) (effective 2019) - Credit Plans, including credit cards:
A lawyer or law firm may accept payment under a credit plan. Lawyers may charge clients the actual charge the credit plan imposes on the lawyer for the client's transaction.
- ✘ Extra bookkeeping, but often the firm receives fees and costs payments faster.

RETAINERS & ADVANCE FEES AND COST DEPOSITS

- ✘ Types of Retainers
 - + True Retainers
 - + Flat fees & Non-refundable retainers
 - + Advance fee and cost payments to be applied to fees and costs incurred in the future. Some people call this a “refundable retainer.”
 - + See TFB E.O. 93-2
- ✘ Retainer or Fee Agreements
- ✘ Representation Letters
- ✘ Guess what type of retainer you have if you don’t have a fee agreement?

DISBURSEMENTS AGAINST UNCOLLECTED FUNDS

- ✘ Wait until funds are collected.
- ✘ Be careful – Rule 5-1.1(j) states “may disburse” not shall disburse.
- ✘ YOU are still the guarantor.



6 EXCEPTIONS ALLOWING IMMEDIATE DISBURSEMENT



1. Certified checks and cashiers' checks
2. Loan proceeds from bank or institutional lender
3. Bank checks; official checks; money orders; and within the State of Florida, credit union checks

6 EXCEPTIONS ALLOWING IMMEDIATE DISBURSEMENT (CONT)

4. Federal or State Government checks
5. Checks on another FL lawyer's trust account or the escrow account of a licensed real estate broker
6. Checks issued by insurance companies licensed by the State of Florida



TRUST ACCOUNTING AND YOUR EMPLOYEES

- ✘ Who should sign trust account checks?
- ✘ See TFB E.O. 64-40
 - + Owners of the firm.
 - + Trusted employees? Don't!
 - + Consider two signers for large amounts.



TRUST ACCOUNTING AND YOUR EMPLOYEES

- ✘ Check employee references.
 - + FDLE criminal background check.
 - ✘ Contingent offers to employ.
- ✘ Fiduciary bonds of all law firm personnel.
- ✘ Review your firm's internal controls.



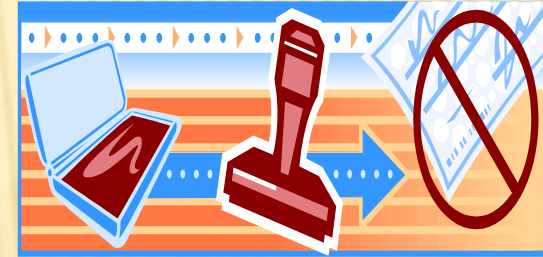
ADDITIONAL PRECAUTIONS

- ✘ Maintain control!
- ✘ No blank checks.
- ✘ Store checks in a secure location.
- ✘ Pre-print checks with “void after 90 days.”
- ✘ Sequentially numbered checks.



AND MORE...ADDITIONAL PRECAUTIONS

- ✘ Never allow a stamp of your signature.
- ✘ Never make checks payable to “cash.”
- ✘ The requirement to report large sums of cash to the IRS.
- ✘ *Receive trust account bank statement unopened.*



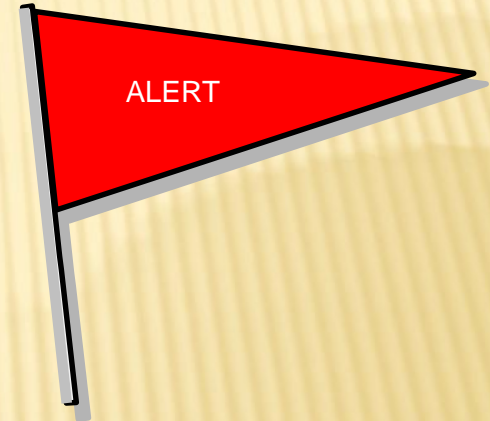
DON'T CREATE INVITATIONS TO STEAL

- ✘ Separate duties:
 - + At least two people:
 - ✘ One person makes deposits, another person posts the deposits.
 - ✘ One person writes the checks, another person signs the checks.
 - ✘ One person makes journal and ledger entries.
 - ✘ Another person prepares the bank reconciliation and monthly comparison.
- ✘ Cross-train your support staff.



RED FLAGS OF EMBEZZLEMENT

- Personality Changes
- Family Crisis
- Sudden unemployment of household members
- Extravagant Living
- Over Protective of Work
- Vacation Time Limited
- Addictions discovered (gambling, drugs, alcohol)
- Law firm owners do not review trust account records



ASK Questions



- ✘ If the lawyer or legal administrator does not understand the bank statement reconciliation process, the trust account management plan, or the information on the reconciliation report, demand answers from the persons responsible for preparing the reconciliation report,
- ✘ For help, call a Florida Bar Auditor in the Bar branch closest to you, the Ethics Hotline (850-561-5780, or acaptrust@floridabar.org).
- **Key words: Personal Oversight**