DC BAR
DISTRICT OF COLUMBIA BAR

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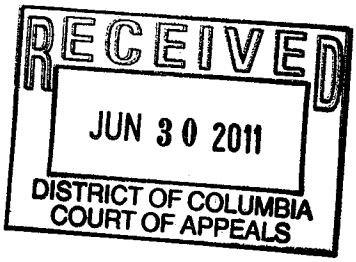
[June 30, 2011]

June 29, 2011



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The Honorable Eric T. Washington
Chief Judge
District of Columbia Court of Appeals
Historic Courthouse
430 E Street, N.W.
Washington, D.C. 20001

Re: Transmittal of Proposed Rule XIV of the District of Columbia Court of Appeals Rules Governing the Bar

Dear Chief Judge Washington:

On behalf of the District of Columbia Bar, I am pleased to transmit to you for the Court's consideration a proposed new Rule XIV (the "Rule") of the District of Columbia Court of Appeals Rules Governing the Bar. This recommendation to the Court was approved by the Board of Governors at its meeting on June 15, 2011.

As proposed, Rule XIV would establish the authority of the District of Columbia Bar Foundation ("Bar Foundation") to develop a plan, subject to the review and approval by the D.C. Bar's Board of Governors, under which the Bar Foundation may periodically request that lawyers and law firms certify to the Bar Foundation their participation in the D.C. Interest on Lawyers Trust Account (IOLTA) program.[1] Under proposed Rule XIV, a lawyer or law firm would be expected to respond in good faith to such a request from the Bar Foundation. The Bar Foundation anticipates that the information gathered through IOLTA certification will assist it in tracking the accuracy of IOLTA interest remitted to it by banks, thus maximizing IOLTA revenues to be used for its access to justice initiatives.

[1] IOLTA funds are client funds that are nominal in amount, or to be held for a short period of time, in a single pooled client trust account, commonly known as an IOLTA account. The interest produced by such an account, which would amount to a small sum for each individual client, is distributed to the D.C. Bar Foundation, which in turn distributes a predominant amount of the interest revenue collected to legal services providers to help address the unmet legal needs of residents and families in the District.

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Summary and Purposes of Proposed Rule XIV of the Rules Governing the Bar

Proposed Rule XIV of the D.C. Court of Appeals Rules Governing the Bar is as follows.

> The D.C. Bar Foundation (Bar Foundation) administers the District of Columbia Court of Appeals' IOLTA program (D.C. IOLTA program). Consistent with its fundamental function of maximizing and collecting the interest revenue generated by D.C. IOLTA accounts, the Bar Foundation may periodically request lawyers and law firms to certify to the Bar Foundation their participation in the D.C. IOLTA program. A lawyer or law firm is expected to respond in good faith to such a request.
>
> If the Bar Foundation decides to administer an IOLTA certification program for lawyers and law firms, it shall develop a plan for the form and manner of such certification program (the "Plan"). The Plan, and any subsequent changes recommended thereto, shall be subject to review and approval by the District of Columbia Bar's Board of Governors. The Bar Foundation shall, at least once annually, submit a report about its certification program activities to the District of Columbia Court of Appeals and District of Columbia Bar Board of Governors.[2]

Under the proposed Rule, Bar members would be given clear notice that the D.C. Bar Foundation has the express authority to conduct a certification plan – authority that is not currently articulated in the IOLTA rules.[3] The Rule also would provide notice to members that the D.C. Bar has reviewed and approved any IOLTA certification plan (and any subsequent changes) developed by the Bar Foundation. The proposed Rule would thus authorize the Bar Foundation to conduct an IOLTA certification plan, if it so desires, while maintaining the responsibility and authority of the Bar to approve the form and manner of a plan designed to collect information about the compliance of Bar members with a Rule of Professional Conduct adopted by the Court of Appeals.

The proposed Rule results from a review by the District of Columbia Bar Regulations/Rules/Board Procedures Committee ("Regulations/Rules Committee" or "Committee")[4] of whether and how the Bar Foundation, pursuant to the revised IOLTA Rules[5]

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[2] Certification of compliance with, or exemption from, the IOLTA rules in various forms is used in the 42 jurisdictions that have mandatory IOLTA programs. Some jurisdictions request that members certify that they are in compliance with that jurisdiction's client trust account rules, of which IOLTA accounts are a subset.

[3] Although Section 20 of Rule XI describes the interaction between the Bar Foundation and financial institutions and requires the Bar Foundation to respond to inquiries from members about the information that it has collected about their IOLTA accounts, it is silent on whether the Bar Foundation may initiate IOLTA communications to lawyers and law firms. Rule XI, Section 20(g) and (h), attached as Exhibit A.

[4] This is a standing committee established by the Board of Governors in July 1999 to review the Bar's Rules, By-laws and procedures, and to propose changes as needed.

would have the authority to monitor[6] participation by D.C. Bar members in the D.C. IOLTA program.[7] After 17 months of study and analysis, the Committee issued a report proposing a monitoring rule. During the public comment period on the proposed rule, representatives of the Bar Foundation, the Committee, and D.C. Bar leadership met to attempt to address the Bar Foundation's two principal concerns about the Committee's proposed rule: (i) the implication, from the use of the word "monitoring," that the Bar Foundation would be precluded from conducting an appropriate certification program, and (ii) approval of a monitoring or certification program by the Bar Board of Governors.

Ultimately, the Board of Governors agreed to modify the Committee's recommendation and to use the term "certification" instead of "monitoring" in the proposed Rule, after the Bar Foundation agreed that it would not pursue a certification program as part of the D.C. Bar dues collection process, consistent with the recommendation of the Committee that such a procedure not be used in this jurisdiction.

This letter summarizes the work of the Committee, the Bar Foundation and the Board of Governors that resulted in proposed Rule XIV. Details about the Committee's work are provided in its final report of June 29, 2011, attached. A summary about the Bar Foundation's initial IOLTA certification proposal and its subsequent monitoring proposal is included in the Committee's report and in a September 16, 2009, transmittal letter to the Court of IOLTA Rules revisions.[8]

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[5] On March 22, 2010, the D.C. Court of Appeals issued amendments to the Rules Governing IOLTA. The essence of the revisions was to change the existing D.C. IOLTA program to a mandatory, from a mandatory/opt-out program, and requires that banks that wish to qualify as "Approved Depositories" provide interest rate comparability.

The revised IOLTA rules exempt a member from participating in the D.C. IOLTA program if the member is otherwise compliant with the contrary mandates of a tribunal; or when the member is fully participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the member is licensed and principally practices. The amendments, which revised Rule 1.15 of the D.C. Rules of Professional Conduct and added a new Section 20 of Rule XI of the D.C. Court of Appeals Governing the Bar, took effect on August 1, 2010. D.C. Court of Appeals Order, March 22, 2010, attached as Exhibit B.

[6] In 2009, in response to concerns raised by Bar headquarters staff about an IOLTA certification program conducted in conjunction with collection of mandatory D.C. Bar dues, the Bar Foundation withdrew its IOLTA certification proposal to the Board of Governors and instead submitted an IOLTA monitoring proposal to the Board. As a result, the charge to the Regulations/Rules/Board Procedures Committee uses the term "monitoring," and the Committee likewise uses that term in its report and proposed rule. In appearing before the Regulations/Rules Committee, the Bar Foundation recommended that the process be referenced as "certification" because it is the nomenclature that is generally recognized in IOLTA administration.

[7] D.C. Bar Board of Governors Charge to Regulations/Rules/Board Procedures Committee, IOLTA Monitoring (October 6, 2009), attached as Exhibit C.

[8] *D.C. Bar Regulations/Rules/Board Procedures Committee*, "Final Report on IOLTA" ("Regulations/Rules Committee Report"), at 3-7 (June 28, 2011); Letter from Kim Michele Keenan, President, District of Columbia Bar to the Honorable Eric T. Washington, Chief Judge, D.C. Court of Appeals, at 9-11 (Sept. 16, 2009), attached as Exhibit D.

Background and History of the Bar Foundation's IOLTA Certification Proposal

In 2007, the Bar Foundation proposed to the Bar that the IOLTA rules be revised to make participation in the D.C. IOLTA program mandatory, and to require that a banking institution seeking to open and maintain client trust accounts must provide certain interest rates on IOLTA accounts ("rate comparability"). The primary purpose of the revisions was to increase interest revenue derived from D.C. IOLTA accounts.

The Bar Foundation's 2007 proposal also included an additional amendment to the D.C. Rules of Professional Conduct in which lawyers would be required to advise the Bar Foundation of the opening and closing of D.C. IOLTA accounts, and also periodically to certify their compliance with, or exemption from, the IOLTA requirements. Noncompliance with the reporting and certification requirements would have been treated as a disciplinary violation.

The Foundation's 2007 proposal for a new Rule 1.20(j) stated:

> Every lawyer admitted to practice in the District of Columbia shall, personally or through the law firm with which the lawyer is associated, certify periodically, *in a form and manner approved by the District of Columbia Bar*, that all IOLTA-eligible funds are held in one or more IOLTA accounts or that the lawyer or law firm is exempt because the lawyer or the law firm does not hold IOLTA-eligible funds.[9] (Emphasis added.)

At the request of the Board of Governors, the Bar's Rules of Professional Conduct Review Committee ("Rules Review Committee") then conducted a study and analysis of the Bar Foundation's proposal. Because the Rules Review Committee was not asked to consider the specific "form and manner" of the certification requirement, it did not analyze this part of the Foundation's proposal and did not take a position on it. Thus, the Rules Review Committee's report and recommendations simply included the Bar Foundation's proposal as an amendment to Rule 1.15.

In its written comment, the Board on Professional Responsibility (BPR) commented that non-compliance with the IOLTA certification provisions should not subject a member to disciplinary suspension, but instead recommended enforcement through administrative suspension. The Office of Bar Counsel (OBC) submitted a separate comment in which it concurred with the comments of the BPR.[10] Bar headquarters staff took the position that non-

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[9] The 2007 proposal also included a new Rule 1.20(i) which stated that, "Lawyers or law firms shall advise the Foundation of the establishment and closing of an account for IOLTA-eligible funds. Such notice shall be given in a form and manner prescribed by the Foundation."

[10] *Certification* of one's participation in, or exemption from the D.C. IOLTA program is separate and distinct from the ethical requirements under D.C. Rule of Professional Conduct 1.15, to maintain client trust funds and IOLTA funds properly. A violation of Rule 1.15 could potentially lead to disciplinary consequences.

compliance with a certification requirement should not result in either disciplinary or administrative suspension.[11]

Over the course of several Board meetings during 2009, the Board of Governors considered the Bar Foundation's proposal.[12] On September 8, 2009, the Board of Governors approved proposed revisions to the IOLTA rules to be submitted to the Court of Appeals, but voted to reserve the transmittal to the Court of any proposed amendments about the monitoring of D.C. lawyers' participation in the D.C. IOLTA program – pending the outcome of further study by the Bar's Regulations/Rules/Board Procedures Committee. The Board communicated its action in its letter to the Court of September 16, 2009, which transmitted the proposed revisions to the IOLTA Rules to the Court. On March 22, 2010, the Court adopted the Board's recommendations for revisions to the IOLTA rules, which became effective on August 1, 2010.

<u>The Work of the Regulations/Rules /Board Procedures Committee</u>

In examining the necessity of an IOLTA monitoring or certification program, the Regulations/Rules Committee's goals were to make recommendations that would: (1) identify those segments of the Bar membership most likely to be required to establish and maintain IOLTA accounts due to their practice areas and settings; (2) continue to ensure the education of Bar members about how to comply with the IOLTA rules, including how to notify the Bar Foundation of their IOLTA account information, and the importance of such actions so the Bar Foundation can effectively monitor the accuracy of the interest being provide by banks and thus maximize revenues from IOLTA for the Bar Foundation; (3) ensure that any recommended monitoring/certification practices are clear, fair, legally defensible, and compatible with other D.C. Bar and Court programs (e.g., Pro Bono program, Bar sections); (4) avoid anything that would interfere with the timely return of Bar member dues and possibly increase the number of members subject to administrative suspension for non-payment; and (5) ensure the orderly development of guidelines for the administration of IOLTA by the Bar Foundation.

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[11] Comment of the Board on Professional Responsibility, (April 6, 2009) attached as Exhibit E; Concurring comment of the Office of Bar Counsel, (April 6, 2009) attached as Exhibit F; and D.C. Bar Headquarters staff memorandum to D.C. Bar Board of Governors, (June 8, 2009) attached as Exhibit G.

[12] At the June 9, 2009, meeting of the Board of Governors, the Bar Foundation withdrew its certification proposal. It subsequently proposed an IOLTA monitoring provision and notice to Bar members in a Comment to Rule of Professional Conduct 1.15 and Section 20(h) of Rule XI, respectively. At its meeting of July 21, 2009, the Board approved in principle provisions that would provide notice to Bar members that the Bar Foundation may monitor Bar members' participation in IOLTA. In written comments of July 30, 2009, the BPR raised several questions and concerns about the proposal. Among other things, the BPR commented that including the authority of the Bar Foundation to monitor lawyers' participation in the IOLTA program in Rule XI implies that the Bar Foundation is part of the disciplinary system and that a failure to provide information in response to an inquiry from the Bar Foundation may be grounds for discipline. The BPR recommended that, to avoid this interpretation, a new Court Rule be created to address the Bar Foundation's role in IOLTA monitoring. Minutes of the Board of Governors meeting, (selection) (July 21, 2009), attached as Exhibit H; and Comment from the Board on Professional Responsibility to Kim Michele Keenan (July 30, 2009), attached as Exhibit I.

The Regulations/Rules Committee received briefings from the President and the Executive Director of the Bar Foundation, and the Executive Attorney of the Board on Professional Responsibility and the Bar Counsel[13]; held telephone conferences with the Executive Director of the Florida Bar Foundation and the Executive Director of the Texas Equal Access to Justice Foundation, and gathered information from the bar executives of the Texas and Florida state bars.[14] The Committee also conferred with the Executive Director of the D.C. Bar Pro Bono Program and the Pro Bono Program's fundraising consultant. It also considered IOLTA certification programs in other jurisdictions. The Committee also reviewed the Bar's dues collection process, which has been streamlined as a result of recommendations previously made by the Committee. Bar staff briefed the Committee about the "Member IOLTA Rules Education Campaign" that was underway to educate members about the changes in the IOLTA rules. Lastly, the Committee analyzed data from the Bar about the number of members in the Washington, D.C. metropolitan area who would likely be required under the IOLTA rules to maintain IOLTA accounts.[15]

In response to recommendations from the Bar Foundation, the Committee considered in detail certification on or associated with the D.C. Bar's annual dues statement. The Committee concluded that mandatory membership-wide certification connected to the Bar's annual dues collection form was not desirable for a variety of reasons described in the report.[16]

New Court Rule Proposed by the Regulations/Rules Committee

The Regulations/Rules Committee proposed a new Court Rule authorizing the Bar Foundation to monitor lawyers' or law firms' participation in the D.C. IOLTA program. The Committee's proposed Rule provided that, if the Bar Foundation decided to engage in a

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[13] During their meeting with the Committee, the BPR and the OBC reiterated their view that a failure to certify should not result in disciplinary investigation or action by the OBC and that, therefore, any provisions on certification or monitoring should be outside the scope of Rule XI, Disciplinary Proceedings.

[14] The Regulations/Rules Committee looked to Texas and Florida because they are two jurisdictions with unified bars with membership sizes similar to that of the D.C. Bar.

[15] Membership data from the D.C. area showed that approximately 13,000 lawyers in the Washington, D.C. metropolitan area -- about 14 percent of the total membership – could be subject to mandatory IOLTA requirements. This figure does not include the approximately 15,000 attorneys who work for the 100 largest firms in the area and/or are employees of firms that participate in the Bar's firm billing program and who likely have administrators who manage the IOLTA requirements for the lawyers in their firms.

[16] One Committee member disagreed with this conclusion and filed a separate statement to the Board of Governors, which is included as Appendix 23 to the Regulations/Rules Committee report. The member proposed that certification be accomplished by the insertion of a statement on the annual dues statement that, by paying the annual dues, the member certifies that he or she has (1) read the rules pertaining to mandatory IOLTA; and (2) is in compliance with those rules. The Committee considered this proposal, but decided against it for reasons detailed in its report.

monitoring program, it should be required to develop a plan subject to review and approval by the Board of Governors; any subsequent changes would also be subject to approval by the Board.

In agreeing that the authority of the Bar Foundation to develop a monitoring plan should be included in a new Court rule governing the Bar, the Committee noted that the Rule would provide notice to members and clear authority for the Bar Foundation to conduct activities to monitor their participation in the D.C. IOLTA program, and would set out the respective roles and responsibilities of the Bar Foundation and the D.C. Bar in a monitoring plan.

In recommending a new Court rule governing monitoring activities (as opposed to inclusion of such a rule in the Rules of Professional Conduct or in Rule XI of the Rules Governing the Bar), the Committee agreed with the recommendation of the Board on Professional Responsibility that there should not be a disciplinary component to IOLTA monitoring.

The Committee also concluded that it was inadvisable to include specific details of a monitoring plan in the Court rule because any subsequent changes in the plan would necessitate amendments to the Rule, which would place burdens on the Bar Foundation and lead to delay in implementation. Under the proposed rule, changes to the plan would need to be approved only by the Board of Governors.

Public Comments on the Proposals of the Rules/Regulations Committee

The Bar published the Regulations/Rules Committee's draft report and proposed Rule for public comment from March 25 through April 25, 2011. Copies of the report were also made available to members and staff of the Board on Professional Responsibility and the Office of Bar Counsel. At the request of the Bar Foundation, the comment period was extended to May 17. The Bar received three written comments, which the Bar made available to the Bar Foundation. Because of ongoing discussion about the proposed Rule between leaders of the Bar and of the Bar Foundation, the Bar's leadership further extended the period for the Foundation to comment.[17]

Board on Professional Responsibility and the Office of Bar Counsel Comment

In their April 25, 2011, comment, the BPR and the OBC observed that:

> Under the Rules of the Court of Appeals Governing the Bar, the D.C. Bar's regulatory authority over attorney conduct is limited to the enforcement of compliance with the administrative requirements of Bar membership,

[17] Comment and rule proposal from the Bar Foundation to the D.C. Bar Board of Governors (June 9, 2011), attached as Exhibit J.

> through administrative suspension. *See* D.C. Bar R. II, [sec.] 2(3). The statement in the Committee report, however, is susceptible to a broader interpretation. It suggests that the D.C. Bar's core functions include "regulating the conduct of [ ] members on the rules." Report at 24. As such, the statement is inconsistent with D.C. Bar R. XI, which delegates the core function of attorney regulation to the Board on Professional Responsibility, which was established as an independent arm of the Court.[18]

It is, of course, true that the disciplinary system regulates attorneys. Discipline, however, is not the exclusive means through which members of the D.C. Bar are regulated. Both nationally and in the District of Columbia, it has long been recognized that attorney regulation systems must be multi-faceted in order to protect the public, improve attorney competence and resolve disputes between attorneys and their clients.[19]

As a result of rules adopted by the Court of Appeals and programs established by the Bar's Board of Governors, the attorney regulation system in the District of Columbia currently includes – in addition to the disciplinary system -- programs on rules education; a mandatory course for new and other covered members; recommendations on changes in ethical rules and rules governing the Bar; rules interpretation and legal ethics advice; a client restitution fund; mandatory arbitration of fee disputes and mediation of fee disputes; practice management assistance to lawyers; and counseling of attorneys, judges and law students with substance abuse, mental health and other problems that adversely affect their ability to practice their profession. All of these programs, except the disciplinary system, are managed by the Bar's headquarters and overseen by the Board of Governors.[20]

Texas Access to Justice Foundation and Florida Bar Foundation

In light of comments received from the Texas Access to Justice Foundation (Texas ATJ) and the Florida Bar Foundation, factual corrections were made to the draft report. These clarifications did not have any impact on the Committee's recommendations and conclusions.

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[18] Letter from the Board on Professional Responsibility and the Office of Bar Counsel to Ronald S. Flagg, President, District of Columbia Bar at 2 (Apr. 25, 2011) attached as Exhibit K.

[19] *E.g., The ABA Commission on Evaluation of Disciplinary Enforcement (McKay Commission)*, "Lawyer Regulation for a New Century" xv, xvi (Feb. 2, 1992); *Disciplinary System Review Committee (DSR Committee)*, "Report to the Board of Governors of the District of Columbia Bar on Changes in the Disciplinary System" 31, 40 (Feb. 1993).

[20] Although the trustees of the Clients' Security Fund are appointed by the D.C. Court of Appeals, the management and operations of the Fund are overseen by the Board of Governors.

Discussions between the Bar's Leadership and the Bar Foundation

As noted above, following the issuance of the Committee's draft report, the Bar Foundation raised two principal concerns: (i) the implication, from the use of the word "monitoring," that the Bar Foundation would be precluded from conducting an appropriate certification program, and (ii) approval of a monitoring or certification program by the Bar Board of Governors. In an effort to narrow the differences on these issues, the leaderships of the D.C. Bar Foundation and the D.C. Bar held numerous telephone conferences and met on May 17, 2011. At that meeting, the leaders discussed potential certification programs that would not be undertaken in conjunction with the D.C. Bar's collection of mandatory dues.

The next day, May 18, 2011, the Bar's leadership provided the Foundation with a draft rule that reflected some of the changes to the Regulations/Rules Committee's proposed Rule recommended by the Foundation. The principal change was to substitute the concept of certification for the Committee's concept of monitoring.

The Bar leadership used this May 18 draft in subsequent discussions with the Foundation and ultimately presented this draft to the Bar's Board of the Governors for its consideration.

Comment and Rule Proposal by the Bar Foundation

On June 9, 2011, the Bar Foundation transmitted its comments on the Regulations/Rules Committee's report (as modified by the discussions between the Bar Foundation and D.C. Bar leadership subsequent to the report), and proposed a new Rule of the D.C. Court of Appeals Governing the Bar. The text of the Foundation's proposed new rule was:

> The DC Bar Foundation (Bar Foundation) administers the District of Columbia Court of Appeals' IOLTA program (DC IOLTA program) The Bar Foundation shall report annually to the District of Columbia Court of Appeals on its administration of the DC IOLTA program.

The Foundation also submitted a new proposed comment to Rule of Professional Conduct 1.15:

> Lawyers may be requested to periodically certify or report on their compliance with the DC IOLTA program.

With the issue about the use of the term "certification" having been resolved, the Bar Foundation's comments focused on the issue of approval of any certification Plan by the D.C. Bar Board of Governors. The Bar Foundation's comments had two principal points: first, that the proposed rule recommended by the Committee (as amended after discussions with the Foundation) would "compromise[e] the independence of the Foundation;" and second, that approval by the D.C. Bar of an IOLTA certification plan by the Bar Foundation was unnecessary and ill-advised because the administration of an IOLTA certification program did not constitute

regulation of Bar members, but instead a continuation of the Foundation's implementation of the IOLTA program, functions that the Foundation has been performing since 1985.

Deliberations and Action of the D.C. Bar Board of Governors

Over the course of several meetings, the Board of Governors considered proposals for new rules governing monitoring of, or certification by, Bar members on their compliance with the new IOLTA rules. At its meeting on April 12, 2011, the Board received the March 25, 2011, report and recommendations of the Regulations/Rules Committee for a rule authorizing the Foundation to monitor members' participation in the IOLTA program. At that meeting, Bar Foundation leaders also briefly addressed the Board of Governors. On May 10, 2011, the Bar's leadership briefed the Board of Governors on the comment process and the status of ongoing discussions with the Bar Foundation.

At the Board's June 15, 2011, meeting, several Bar Foundation leaders made presentations and then answered questions from the Board. At that meeting, the Board considered three proposals for new rules:

- The Rules/Regulations Committee's proposal, under which the Foundation could "periodically monitor a lawyer's or law firm's participation in the D.C. IOLTA program;"

- The Bar leadership's proposal, under which the Foundation could "periodically request lawyers and law firms to certify to the Bar Foundation their participation in the D.C. IOLTA program;" and.

- The Bar Foundation's proposal, under which the Foundation "administers the District of Columbia Court of Appeals' IOLTA program (DC IOLTA program)" and "Lawyers may be requested to periodically certify or report on their compliance…"

In considering these alternatives, the Board was particularly sensitive to the potential impact of any rule on solo and small firm practitioners, who are most affected by any regulatory requirement related to the IOLTA rules. Because members who practice in these settings are the least likely to have resources in place to educate and inform themselves about steps for compliance, the Board wanted to ensure that any rule approved by the Board and proposed to the Court would not be unduly administratively burdensome, nor present a trap for the unwary.

After extensive discussion, the Board of Governors unanimously approved the rule proposed by the Bar's leadership as a new Rule XIV of the Rules Governing the Bar:

> The D.C. Bar Foundation (Bar Foundation) administers the District of Columbia Court of Appeals' IOLTA program (D.C. IOLTA program). Consistent with its fundamental function of maximizing and collecting the interest revenue generated by D.C. IOLTA accounts, the Bar Foundation may periodically request lawyers and law firms to certify to the Bar Foundation their participation in the D.C.

> IOLTA program. A lawyer or law firm is expected to respond in good faith to such a request.
>
> If the Bar Foundation decides to administer an IOLTA certification program for lawyers and law firms, it shall develop a plan for the form and manner of such certification program (the "Plan"). The Plan, and any subsequent changes recommended thereto, shall be subject to review and approval by the District of Columbia Bar's Board of Governors. The Bar Foundation shall, at least once annually, submit a report about its certification program activities to the District of Columbia Court of Appeals and District of Columbia Bar Board of Governors.

Before approving the proposed Rule, the Board of Governors discussed at length the arguments advanced by the Foundation about approval by the Board of a certification Plan. The proposed rule authorizes a Plan to require Bar members to certify whether and how they comply with a Rule of Professional Conduct. Although such certification is certainly related to the Bar Foundation's ongoing administration of IOLTA, requiring members to certify their compliance with a Rule of Professional Conduct plainly constitutes a regulatory activity – precisely the type of activity for which the Court of Appeals and D.C. Bar members hold the Bar and its Board of Governors accountable.[21] Accordingly, the Board of Governors believes that any program which seeks to gather information from Bar members about their compliance with a Rule of Professional Conduct should be subject to approval by the Bar.[22] It is worth noting that, when the Foundation itself initially proposed a certification plan in 2007, the Foundation recognized this principle, proposing certification "in a form and manner approved by the District of Columbia Bar."

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[21] The Rules Governing the Bar make this clear in stating that one of the Bar's purposes and obligations is "To safeguard the proper professional interest of the members of the bar." Rule I, Section 2 of the Rules Governing the Bar.

[22] In creating the D.C. Bar, the Court of Appeals made regulation of members' professional conduct one of the Bar's core functions. The Bar and its Board of Governors routinely engage in the development of recommended changes in rules governing the Bar, education of Bar members about the rules, interpretation of the rules, and answers to members' questions about the rules.

Good governance principles require that, when regulatory functions are performed, the entity performing that function be accountable for its regulatory actions and subject to oversight. Accordingly, the delegation of an attorney regulatory function to an entity that is neither an arm of the Court nor a component of the D.C. Bar should include a mechanism for assuring that there is ongoing oversight and accountability for actions undertaken in carrying out the regulatory function.

IOLTA certification is a regulatory function that the Bar proposes to share with the Bar Foundation in this instance because of the important role that the Bar Foundation plays in administering the D.C. IOLTA program. However, the Bar cannot abdicate its responsibility for oversight of a new member requirement.

The Board does not believe that the proposed rule undermines the Foundation's independence – independence that both the Board and the Foundation desire.[23] The proposed Rule in no way interferes with the Foundation's core functions of raising money (including through solicitation of charitable donations by individuals, law firms and other organizations or via appropriations from the D.C. government) or of grant-making with the funds the Foundation raises. Again, the fact that the Foundation itself originally proposed certification "in a form and manner approved by the District of Columbia Bar" undermines any claim that such approval impairs the Foundation's independence.

Nor does the Board believe that the proposed Rule interferes with or changes the Foundation's ongoing administration of IOLTA. Simply put, prior to the proposed Rule, the rules have not required Bar members to certify their compliance with the IOLTA rules. This would be a new regulatory requirement.

In addition to discussing the Foundation's comments on the versions of the rules proposed by the Committee and Bar leadership, the Board also considered the version of the rule proposed by the Foundation. The Board's concerns with the Foundation's proposed rule include: no provision for approval by the Bar of a certification program imposing regulatory requirements; placement of the certification requirement in the comments to the Rules of Professional Conduct, which inappropriately incorporates IOLTA certification within the disciplinary arena,[24] an outcome that was of concern to the Board on Professional Responsibility, the Office of Bar Counsel, and also the Committee; the requirement that lawyers periodically "certify *or report* their compliance" with no notice to lawyers or any explanation of what, if any, additional requirements were being imposed by the use of the word "report;" and elimination of the language that a lawyer or law firm "respond in good faith" to a certification request.

In sum, for the reasons outlined in this letter, the Bar respectfully asks that the Court consider the attached proposed Court Rule XIV.

Timing of the Implementation of IOLTA Rules

The Bar also respectfully asks that if the Court adopts the Bar's recommendations, the Court delay the effective date of the implementation of the new Court rule by at least three months after the date of the Court's adoption of the Rule. The delay will allow the Bar and the Bar Foundation to begin the process of notifying members about the new Rule and the members' obligations under it.

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[23] Although the Foundation operates independently from the Bar, the two organizations are related. The Bar created the Foundation in 1977, and, as pointed out in the Foundation's Comments, members of the Foundation's Board of Directors are appointed by the D.C. Bar's Board of Governors. Under the Foundation's Articles of Incorporation, the Bar's Board of Governors may, by a two-thirds vote, remove a member of the Foundation's Board of Directors or dissolve the Foundation.

[24] Although comments to the rules do not add ethical obligations, they assist in the interpretation of the ethics rules, and compliance with the ethics rules is enforced by the disciplinary system.

Please let me know if you or other members of the Court have any questions or require anything further. I can be reached at (202) 736-8171.

Respectfully yours,

Ronald S. Flagg

Enclosures

cc: Board of Governors
W. Mark Smith, Esq., President, D.C. Bar Foundation
Katherine L. Garrett, Esq., Executive Director, D.C. Bar Foundation
Members, Regulations/Rules/Board Procedures Committee
Katherine A. Mazzaferri, Esq.
Cynthia D. Hill, Esq.
Carla J. Freudenburg, Esq.
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Exhibits

Rule XI Section 20 of the D.C Court of Appeals Rules Governing the Bar	Exhibit A
D.C. Court of Appeals Order Amending the Rules Governing Interest on Lawyers Trust Accounts (IOLTA) (March 22, 2010)	Exhibit B
D.C. Bar Board of Governors Charge to Regulations/Rules/Board Procedures Committee, IOLTA Monitoring (October 6, 2009)	Exhibit C
Letter from Kim Michele Keenan, President, D. C. Bar to the Honorable Eric T. Washington, Chief Judge, D.C. Court of Appeals (Sept. 16, 2009)	Exhibit D
Comment from the Board on Professional Responsibility to Eric L. Hirschhorn, Chair, Rules of Professional Conduct Review Committee (April 6, 2009)	Exhibit E
Comment from the Office of Bar Counsel to Robert J. Spagnoletti, President, D.C. Bar (April 6, 2009)	Exhibit F
Memorandum from Bar Headquarters staff to the D.C. Bar Board of Governors (June 8, 2009)	Exhibit G
Minutes of Board of Governors meeting, (selection) (July 21, 2009)	Exhibit H
Comment from the Board on Professional Responsibility to Kim Michele Keenan, President, D.C. Bar (July 30, 2009)	Exhibit I
Comment and rule proposal from the Bar Foundation to the D.C. Bar Board of Governors (June 9, 2011)	Exhibit J
Joint comment from the Board on Professional Responsibility and the Office of Bar Counsel to Ronald S. Flagg, President, D.C. Bar (April 25, 2011)	Exhibit K

EXHIBIT A

Rule XI. Disciplinary Proceedings

Section 20. Approved Depositories for Lawyers' Trust Accounts and District of Columbia Interest on Lawyers' Trust Accounts Program

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR- approved depositories.

(b) Reports to Bar Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the over-draft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule

EXHIBIT A

means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non–IOLTA customers when the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA accounts and non–IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open–end money–market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:
(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's

standard accounting practice, at least quarterly, to the Foundation. The institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(i) All interest and dividends transmitted to the Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.
(j) Definitions. As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.
(2) "Foundation" means the District of Columbia Bar Foundation, Inc.
(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-¬market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.
(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.
(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.
(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.
(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

EXHIBIT B

District of Columbia
Court of Appeals

No. M-235-09

BEFORE: Washington, *Chief Judge*; Ruiz, Reid, Glickman, Kramer, Fisher, Blackburne-Rigsby, Thompson, and Oberly, *Associate Judges*.

ORDER
(FILED - March 22, 2010)

On consideration of the recommendations by the Board of Governors of the District of Columbia Bar to amend the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA), and of the comments received in response to the Court's Notice of proposed amendments published on November 19, 2009, it is hereby

ORDERED that the proposed amendments are hereby adopted, and it is

FURTHER ORDERED that to allow time to educate area banks and the members of the Bar about these changes, this order shall take effect on August 1, 2010. It is

FURTHER ORDERED that Rule 1.19 of the District of Columbia Rules of Professional Conduct ("Trust Account Overdraft Notification") and Appendix B of the Rules Governing the District of Columbia Bar ("Interest on Lawyers Trust Accounts Program") are hereby deleted. It is

FURTHER ORDERED that Rule 1.15 of the District of Columbia Rules of Professional Conduct ("Safekeeping Property") and the related commentary are hereby amended as indicated in the red-lined copy attached to this order as Appendix I. A "clean" copy of new Rule 1.15 is attached as Appendix II. It is

FURTHER ORDERED that a new Section 20 to Rule XI of the Rules Governing the District of Columbia Bar is hereby adopted as set forth in Appendix III to this order. It is

FURTHER ORDERED that the Clerk of the Court shall publish this order and its appendices on the website of the District of Columbia Court of Appeals, www.dcappeals.gov, and shall transmit this order and its appendices electronically and by written copy to the District of Columbia Bar, the Board on Professional Responsibility, and Bar Counsel on this date.

ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

EXHIBIT B

Appendix I

Redline Version of D.C. Rule of Professional Conduct 1.15 as Amended, Effective August 1, 2010.

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). ~~shall be kept in a separate account maintained in a financial institution which is authorized by federal, District of Columbia, or state law to do business in the jurisdiction where the account is maintained and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies.~~ Other property shall be identified as such and appropriately safeguarded.~~; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer under an escrow or similar agreement in connection with a commercial transaction.~~ Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) ~~(b)~~ Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) ~~(c)~~ When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) ~~(d)~~ Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

~~(e) Nothing in this rule shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Appendix – to Rule X of the Court's Rules Governing the Bar of the District of Columbia, and are hereby incorporated into these rules.~~

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. ~~paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.~~ This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the

applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

~~[3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program.~~

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly

and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

~~[4]~~ [6] Paragraphs (c) and (d) recognize that ~~L~~lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

~~[5]~~ [7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

~~[2]~~ [8] Paragraph (e) ~~(d) of Rule 1.15~~ permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

~~[6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.~~

~~[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.~~

~~[8]~~ [9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Appendix II

Clean Version - D.C. Rule of Professional Conduct 1.15 as Amended, Effective August 1, 2010

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute

shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a

lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[6] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds

should be promptly distributed.

[7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[8] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Appendix III

Amended D.C. Bar Rule XI, § 20 (New), Effective August 1, 2010

Section 20. Approved Depositories for Lawyers' Trust Accounts and District of Columbia Interest on Lawyers Trust Accounts Program.

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial

limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR- approved depositories.

(b) Reports to Bar Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees

shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:

(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(i) All interest and dividends transmitted to the Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

(j) Definitions. As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.

(2) "Foundation" means the District of Columbia Bar Foundation, Inc.

(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.

(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.

(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.

(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

EXHIBIT C

Charge to Regulations/Rules/Board Procedures Committee

IOLTA Monitoring

October 6, 2009

The Board of Governors directs the Regulations/Rules/Board Procedures Committee to undertake a review of specific proposed provisions to D.C. Rule of Professional Conduct 1.15 and Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar. The proposed provisions would provide notice to Bar members that the D.C. Bar Foundation (an unrelated 501(c)(3) organization) may monitor Bar members' participation in the Interest on Lawyers Trust Accounts (IOLTA) program. Specifically, the Committee will study and make recommendations about the wording and placement of the proposed provisions in the Rules Governing the Bar. The Committee will also study and make recommendations about the scope, parameters and mechanics of the administration of a mandatory IOLTA program as related to the recommendation on where notice on monitoring should be addressed in the Rules.

The Committee will consult with interested parties, including the D.C. Bar Foundation, the Board on Professional Responsibility, the Office of Bar Counsel, and any other parties it deems appropriate.

The Board requests that the Committee submit its report and any recommendations as soon as practicable.

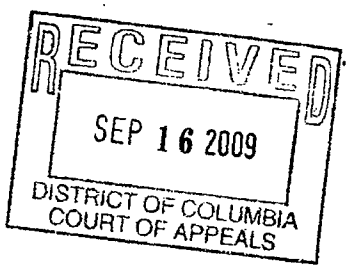
EXHIBIT C

EXHIBIT D

DC BAR

DISTRICT OF COLUMBIA BAR

September 16, 2009



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Chief Judge
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Re: Transmittal of Proposed Revisions to the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA)

Dear Chief Judge Washington:

On behalf of the District of Columbia Bar, I am pleased to transmit to you for the Court's consideration, proposed amendments to the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA).[1] The proposed amendments to Rule of Professional Conduct 1.15 and a new Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar seek to increase IOLTA interest revenue and provide greater clarity to the trust account ethics rules. In sum, the revisions would make participation in the IOLTA program mandatory for D.C. Bar members; require that banks that wish to qualify as "Approved Depositories" provide interest rate comparability on IOLTA accounts; and house the provisions on interest rate comparability and other provisions about approved depositories in a new section of Rule XI.

The proposed amendments result from a review by the District of Columbia Bar Rules of Professional Conduct Review Committee ("Rules Review Committee")[2] of proposed revisions to the IOLTA rules that were submitted to the Bar by the D.C. Bar Foundation ("Bar Foundation").[3] On September 8, 2009, the Board of Governors approved the proposed amendments discussed above.

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[1] In this letter, "IOLTA Rules" refers to three rules: Rules of Professional Conduct 1.15 and 1.19 and Appendix B of Rule X of the Court Rules Governing the Bar. Currently, a Bar member who receives client money or the money of a third person must consider all three of the rules to be fully compliant with the ethical mandates of this jurisdiction.

[2] The Rules Review Committee is the standing committee of the D.C. Bar charged with the ongoing review of the D.C. Rules of Professional Conduct.

[3] The Bar Foundation submitted its proposed revisions to the Bar on November 6, 2007, after its own 14-month study process.

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EXHIBIT D

On September 8, the Board also voted to reserve the transmittal of proposed amendments about an ancillary issue -- the monitoring of D.C. lawyers' participation in the DC IOLTA program -- pending the outcome of further study by the Bar's Regulations/Rules/Board Procedures Committee.[4]

After 18 months of study and analysis by the Rules Review Committee, a public comment period on the proposed IOLTA revisions by the Rules Review Committee, and numerous meetings with representatives of the Rules Review Committee and the Bar Foundation, the Rules Review Committee and the Bar Foundation came to a consensus on the majority of the proposed amendments. However, the Committee and the Foundation ultimately differed in their approach to one aspect of the proposed rules -- an exception to the IOLTA requirements for Bar members who are multi-state practitioners and may face conflicting or inconsistent trust account requirements in other jurisdictions.[5]

This letter summarizes the proposed amendments to the IOLTA rules and the work of the Rules Review Committee and the Bar Foundation. Details about the background and history of the existing trust account and IOLTA rules in the District of Columbia and the work of the Rules Review Committee and the Bar Foundation are provided in the Bar staff memorandum of July 9, 2009, attached as Appendix I.[6]

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[4] Discussion about the IOLTA monitoring proposal and the Bar Foundation's predecessor proposal of reporting and certification by D.C. lawyers begins on page 9.

[5] The Committee's proposed rule revisions would exempt a member from the D.C. IOLTA program if the member is otherwise compliant with the contrary mandates of a tribunal; or when the member is fully participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the member is licensed and principally practices -- the "licensed and principally practices" approach.

The Bar Foundation's proposed rule revisions would exempt a member from the D.C. IOLTA program only when a lawyer is otherwise compliant with the contrary mandates of a tribunal or the jurisdiction in which the lawyer is licensed and principally practices. If a member obtained the client funds as a result of the member's "out-of-state license," the member would not be subject to the D.C. IOLTA program for those particular funds -- the "on your D.C. Bar license/contrary mandates" approach. Additional details and analysis about the two approaches are provided in the Bar staff memorandum of July 9, 2009, attached as Appendix I.

[6] Additional background materials include the February 5, 2009, Report and Recommendations on the D.C. Rules Governing IOLTA by the Rules Review Committee, which includes the Bar Foundation's November 2007 proposal to the Bar; comments received during a public comment period in response to the February 5, 2009, proposed revisions; a June 4, 2009, memorandum from the Rules Review Committee to the Board of Governors that includes a summary of the comments received and certain changes made to the proposed amendments by the Committee in light of the comments; a June 8, 2009, Bar staff memorandum to the Board about the Bar Foundation's initial proposal of an IOLTA certification and reporting requirement by Bar members; and July 30, 2009,

The Proposed Revisions

In 1985, the D.C. Court of Appeals established rules to allow a lawyer or law firm to hold client funds that are nominal in amount, or are to be held for a short period of time, in a single pooled client trust account, commonly known as an IOLTA account. The interest produced by such an account, which would amount to a small sum for each individual client, is distributed to the Bar Foundation, which in turn distributes a predominant amount of the interest revenue collected to legal services providers to help address the unmet legal needs of residents and families in the District. Under the current rules, a lawyer may "opt out" of placing IOLTA eligible funds into a D.C. IOLTA account if the lawyer otherwise properly holds the funds separately from the lawyer's own property. To "opt out" of the D.C. IOLTA requirements, the lawyer must make a one-time filing with the Court. A detailed history of the development of the D.C. IOLTA rules is provided in Appendix I.

However, since 1985, many jurisdictions have adopted changes to rules governing lawyers and IOLTA accounts that have significantly increased the interest revenue available to legal services providers in those jurisdictions.[7] Accordingly, the purpose of the proposed revisions submitted by the Bar is to increase revenue from D.C. IOLTA accounts and to increase the interest paid by banks on funds held in D.C. IOLTA accounts (a practice known as rate comparability). The proposed revisions would effect these changes by:

• Changing the current D.C. IOLTA program from one in which D.C. Bar members may "opt out" of participating to one which is mandatory for all D.C. Bar members. An exception to the mandatory IOLTA proposal is provided when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices. These changes are effected by proposed revisions to Rule of Professional Conduct 1.15 and its comments.

(n. 6 cont.) written comments from the Board on Professional Responsibility about the Bar Foundation's proposal of monitoring DC IOLTA accounts. Although these background materials are not included in this submission to the Court, we are happy to provide these materials to the Court upon request.

[7] At least 40 jurisdictions now have a comprehensive/mandatory IOLTA program, and at least 23 states have adopted some form of interest rate comparability for IOLTA accounts.

• Requiring that banks that wish to qualify as "Approved Depositories" -- institutions where lawyers are allowed to open and maintain client trust accounts -- agree to provide certain interest rates on IOLTA accounts.[8] This change is effected by the creation of a new Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar. Other requirements for banking institutions with IOLTA accounts would also be moved to Section 20 of Rule XI.

Another proposed revision includes:

• The deletion in their entirety of existing Rule of Professional Conduct Rule 1.19 and Appendix B, with appropriate provisions from those rules relocated in Rule 1.15 and new Section 20 of Rule XI. Because these provisions address the jurisdictional authority of the Board of Professional Responsibility (BPR) and the Office of Bar Counsel (OBC) as to the financial institutions that elect to be approved depositories for the District of Columbia Bar, it is appropriate to house these provisions in Rule XI – the disciplinary rule.[9]

A redlined version of the proposed amendments is attached as Appendix II; a clean version is attached as Appendix III. New proposed Section 20 of Rule XI is attached as Appendix IV.

Multi-State Practitioner Exception and Other Concerns

From the outset, the Rules Review Committee supported amendments to the D.C. IOLTA rules that were consistent with the Bar Foundation's goals of increasing IOLTA interest revenue. However, the Committee was concerned that the Foundation's proposed rules could present serious conflict issues for multi-state practitioners because of conflicting or inconsistent trust account requirements in other jurisdictions. The Bar Foundation's proposed rules did not provide a safe harbor for a lawyer facing conflicting jurisdictional obligations.

The Committee was also concerned that the language and placement of the existing trust account rules, including the IOLTA Rules, were confusing. A final

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[8] The D.C. Board on Professional Responsibility approves banks as "Approved Depositories" for D.C. IOLTA accounts.

[9] Section 20 of Rule XI includes the authority of the BPR to approve depositories where D.C. lawyers deposit client funds, reporting obligations of the depositories to the BPR, the Office of Bar Counsel and the Bar Foundation, the proposed "interest rate comparability" rule and the role of the Bar Foundation in administering the IOLTA program. Depending on the outcome of further study by the Bar's Rules/Regulations/Board Procedures Committee, the Bar may subsequently propose that these provisions be housed in a newly created, separate court rule. See infra p. 11.

concern was that the Bar Foundation's proposed broad reach of a mandatory IOLTA rule, superimposed on existing Rule 1.19(b), was likely to increase both administrative burdens and the risk for trust account errors (a serious ethical violation). The Committee believed that the increased burden and risk were likely to fall disproportionately on solo and small firm lawyers who principally practice outside of the District, by requiring such lawyers who might only have a few District matters to open and maintain separate trust accounts in addition to existing operating and home state trust accounts.

The Committee noted the unique posture of the D.C. Bar as to multi-jurisdictional lawyers[10] and the substantial cross-border practice with our sister jurisdictions, Virginia and Maryland. The D.C. Bar has over 68,000 active members; nearly 49,000 of these members practice in the metropolitan Washington, D.C. area, which includes the District and parts of Virginia and Maryland. Of those members, a significant number may not maintain a District office, yet represent District clients. Likewise, there are District lawyers who maintain offices only in the District, but who are also licensed and practice in Virginia and/or Maryland.

Because the Committee did not want to subject District lawyers to mandatory rules that conflicted with mandatory rules of other jurisdictions, absent an appropriate guideline and safe harbor to reconcile conflicting obligations, the Committee proposed an IOLTA rule to which all D.C. Bar members would be subject but that also would provide a means for reconciling conflicting mandatory rules. The Rules Review Committee and the Bar Foundation worked together to develop a rule that would address the primary concerns of both groups. Ultimately, the Rules Review Committee produced a report and recommendations, including a multi-state practitioner exception, that were supported by the Bar Foundation. The proposed recommendations were published in the Rules Review Committee report of February 5, 2009.

Public Comments

The Bar sought comments on the proposed revisions from D.C. Bar members and community leaders during a public comment period from February 10 to April 6, 2009. Copies of the draft report were also made available to members and staff of the Board on Professional Responsibility and the Office of

[10] For example, a lawyer with licenses to practice in at least one other jurisdiction in addition to the District of Columbia. Many of the members of the District of Columbia Bar are admitted to practice in at least one other jurisdiction.

Bar Counsel. Twenty-two comments were received from individuals and organizations. The comments were made available to the Bar Foundation.

Maryland and Virginia

As described in more detail in Appendix I, the Bar received written comments from bar associations and other organizations from its sister jurisdictions of Maryland and Virginia.[11] Maryland expressed concern that the proposed "multi-jurisdictional exception" would have a negative impact on Maryland's IOLTA revenue. Virginia's concerns seemed to arise from confusion in interpreting the proposed language of the exception.

The Rules Review Committee took seriously the concerns expressed by Virginia and Maryland and revised its multi-jurisdictional practitioner exception. The revised exception would exempt a member from the D.C. IOLTA rules when the member is otherwise compliant with the contrary mandates of a tribunal; or when the member is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the member is licensed and principally practices – the "licensed and principally practices" approach. Although the Committee recognized that under its revised proposal, there likely will be some IOLTA revenue generated from District clients or District transactions that is deposited in another jurisdiction's IOLTA account, the amount of that revenue is unquantifiable, and the Committee believed that its approach was clearer and more straightforward than the approach initially recommended by the Bar Foundation (and rejected by the Rules Review Committee) in its November 2007 proposal.

The Bar Foundation did not concur with the Committee's revised exception. The Bar Foundation believed that the amended proposal created an overly broad exemption for Bar members who are licensed and principally practice in another jurisdiction. The Bar Foundation's proposed exception would exempt a member from the D.C. IOLTA rules only when a member is otherwise compliant with the contrary mandates of a tribunal or the jurisdiction in which the lawyer is licensed and principally practices. If a member obtained the client funds as a result of the member's "out-of-state license," the member would not be subject to the D.C. IOLTA program for those particular funds – the "on your D.C. Bar license/contrary mandates" approach.

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[11] The Maryland State Bar Association, the Bar Association of Montgomery County, and the Maryland Legal Services Corporation each submitted a comment. The Legal Services Corporation of Virginia and the Virginia State Bar submitted a joint comment.

Board Meetings of June 9, July 21, 2009, and September 8, 2009

On June 9, 2009, the Rules Review Committee's Chair and Vice-Chair, Eric Hirschhorn and Daniel Schumack, presented the Committee's final recommendations of June 4, 2009, to the Board of Governors. The final recommendations included the Committee's revised multi-jurisdictional practitioner exception that was drafted in response to the comments received from Maryland and Virginia. The Bar Foundation's then-President, Stephen Pollak, and Executive Director, Katherine Garrett, presented proposed revisions to the Rules Review Committee's final recommendation.

On July 21, 2009, the Board considered three IOLTA proposals. Each proposal recommended that participation in the D.C. IOLTA program become mandatory for all D.C. Bar members and interest rate comparability provisions be required for all D.C. approved financial depositories, but differed in its approach to creating an exception for members who are multi-state practitioners and who may face conflicting or inconsistent trust account requirements in other jurisdictions. The three approaches were:

1) No specific exception in the proposed revised rules or comments; [12]
2) A "licensed and principally practices" IOLTA exception for Bar members; and
3) An "on your license/contrary mandates" IOLTA exception for Bar members.

In addition to the Chair and Vice-Chair of the Rules Review Committee and the then-President and Executive Director of the Bar Foundation, the Bar Counsel and the Executive Attorney of the Board on Professional Responsibility were invited to attend and comment on the proposals before the Board. Briefings were also made by Bar staff, including the Assistant Executive Director, Programs; the Director, Regulation Counsel; the Assistant Director for Legal Ethics, Regulation Counsel; and the Manager, Practice Management Advisory Service (PMAS).[13] The Board of Governors found all of the comments helpful in

[12] Because the Bar Foundation had informally indicated that it would support its initial proposals in its November 2007 report, the Board included those proposals for consideration at the July 21, 2009, meeting.

[13] The PMAS manager advises Bar members on the business and management aspects of the practice of law, provides on-site office consultations for Bar members, and conducts intensive training sessions for Bar members about how to run a solo practice.

the Board's deliberations, in particular, those of the PMAS Manager who works with many solo and small firm lawyers. The PMAS Manager noted that many experienced lawyers have misconceptions about IOLTA in particular and trust accounts in general. His experience in working with solos, who often have no staff, and can sometimes make inadvertent mistakes by neglecting administrative and management matters that lead to disciplinary consequences, have led him to conclude that any IOLTA rules that are adopted should be clear and easy to follow.

The Board was mindful that a number of constituencies would be affected by the Board's decision on the proposed IOLTA revisions: members of the D.C. Bar who would be subject to the IOLTA rules; the clients of D.C. lawyers whose money and property the ethics rules protect; the legal services community of the District (who would be the beneficiaries of any increased revenue that results from changes in the IOLTA rules); and other jurisdictions, particularly Virginia and Maryland (and their respective legal communities.).

The Board considered the following questions to keep the various constituencies in mind when considering the proposals:

(1) Does the language of the proposed rule and its requirements provide sufficient clarity to Bar members to help them comply with the rule and to help them avoid an inadvertent violation of the rule (thus avoiding interaction with the disciplinary system)?

(2) Would the proposed rule subject client money to increased risk, which undermines the fundamental purpose of the safekeeping of property ethics rules?

(3) Would the language of the proposed rule potentially cause Maryland and Virginia to adopt new IOLTA rules to counter the District's IOLTA rules? The Bar recognizes that its decisions – particularly proposed changes to the ethics rules -- are in part subject to external reactions and the cooperation of other jurisdictions in the clear application of the rules in practice.

(4) Will the proposed rule benefit the Bar Foundation and the District's legal service providers by increasing IOLTA participation, interest revenue, and/or available interest rates?

After thorough discussion by the Board and the invited representatives at the July 21 Board meeting, the Board of Governors decisively approved the proposal that included the "licensed and principally practices" approach to an exception from the D.C. IOLTA program for members with multijurisdictional practices.

On September 8, 2009, the Board of Governors once again considered the IOLTA issues. Invited representatives from the Bar Foundation and the OBC and

the BPR also attended the September 8 meeting. At the meeting, the Board approved specific language in the proposed amendments. The specific language, in a new Comment [4] to Rule 1.15(b), is intended to provide guidance when a lawyer must make a good faith determination of the jurisdiction in which the lawyer principally practices in order to determine whether he or she falls within the exception of the D.C. IOLTA program.

The Bar Foundation's IOLTA Certification and Monitoring Proposals

On September 8, the Board also voted to reserve the transmittal of proposed amendments about an ancillary issue – the monitoring of D.C. lawyers' participation in the DC IOLTA program -- pending the outcome of further study by the Bar's Regulations/Rules/Board Procedures Committee. Although the Bar is not forwarding a monitoring proposal to the Court at this time, we are providing a brief background about the evolution of the IOLTA monitoring proposal and the IOLTA certification proposal that preceded it.

The Bar Foundation's IOLTA Certification Proposal

The Bar Foundation's 2007 proposal to the Bar included an amendment to the Rules in which lawyers would be required to advise the Bar Foundation of the opening and closing of D.C. IOLTA accounts, and report and periodically certify to the Bar Foundation compliance with, or exemption from, the IOLTA requirements.[14] Non-compliance with the certification requirement would have been treated as a disciplinary violation. The Rules Review Committee's February 5, 2009, proposed revisions left untouched this proposal of the Bar Foundation[15]

In their written comments the BPR and the OBC stated that non-compliance with a certification requirement should not subject a member to disciplinary suspension because a member's failure to do so does not directly implicate the public interest.[16] Additionally, they commented that enforcing a certification requirement would divert the resources of the Office of Bar Counsel from prosecuting serious and contested disciplinary cases. Instead, they

[14] The Bar Foundation believed that gathering and tracking information about Bar members' IOLTA accounts would help to increase its interest revenue.

[15] Because the Committee was not asked to consider the specific "form and manner" of this requirement, it did not analyze this part of the Foundation's proposal and did not take a position on it.

[16] The BPR and the OBC concurred with the Committee's other IOLTA recommendations.

recommended that enforcement of the IOLTA provisions be through administrative suspensions.

Considered analysis of certification was performed by Bar headquarters staff. Ultimately, it was concluded that certification would be unduly administratively burdensome and expensive, with no assurance that imposing such a requirement would produce more revenue for the Foundation or, if more revenue, enough additional revenue to offset the costs of administering a certification program. In addition, the Bar staff concurred with the views expressed by the BPR and the OBC in their written comments that non-compliance with a certification requirement should not be subject to disciplinary suspension. Contrary to the alternative suggested by the BPR and OBC, however, Bar headquarters staff also took the position that non-compliance with a certification requirement should not result in administrative suspension, i.e., the loss of one's license to practice law, under D.C. Bar Rule II or any other Bar rule. Because the certification proposal was withdrawn as described below, however, it appears that this issue is moot.[17]

Monitoring of Bar Members' IOLTA Accounts by the Bar Foundation

At the June 9, 2009, Board of Governors meeting, the Bar Foundation withdrew its proposal for disciplinary enforcement of a certification and reporting requirement. As a result, the Board did not consider this proposal. Instead, the Foundation proposed a provision in a comment to Rule 1.15 and Section 20(h) of Rule XI that would provide notice to Bar members that the Bar Foundation may monitor members' participation in the D.C. IOLTA program. On July 21, the Board approved in principle provisions that would provide notice to Bar members that the Bar Foundation may monitor Bar members' participation in the IOLTA program. At the meeting, Elizabeth Branda, Executive Attorney of the BPR, asked that the BPR have the opportunity to review and comment on any monitoring proposals, because of concerns about disciplinary implications.

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[17] Typically, the non-disciplinary parts of the Bar have had responsibility for handling matters where non-disciplinary enforcement is appropriate.

Although the BPR recommended administrative suspension for non-compliance with a certification requirement, the BPR did not consider the option of no suspension because that question was not before it when it reviewed the Rules Review Committee's report.

BPR Comments of July 30, 2009, on Proposed Provisions for Monitoring IOLTA Accounts by the Bar Foundation

On July 30, the BPR submitted written comments about the proposed monitoring provisions. In its comments, the BPR raised several questions and concerns: (1) Whether the monitoring provisions are necessary given that the Bar Foundation currently conducts monitoring activities; (2) If the proposed provisions are intended to increase the authority of the Bar Foundation, the additional activities that would be authorized need to be identified; and (3) Whether placement of the authority of the Bar Foundation to conduct monitoring activities in Rule XI would suggest that the Bar Foundation plays a role in the disciplinary process. The BPR recommended the creation of a separate new D.C. Bar Rule to address the role of the Bar Foundation in the IOLTA program.

At its September 8 meeting, the Board of Governors reconsidered the proposed monitoring provisions. After thorough discussion by the Board and invited representatives, the Board voted to reserve the proposed monitoring language for clarification. The Board will direct the Bar's Regulations/Rules/Board Procedures Committee to study the implications of the issues raised by BPR and, based on the results of that study, will forward recommendations on IOLTA monitoring to the Court at a later time.

To make a recommendation, the Board will be seeking clarity on what a monitoring plan would entail and what would be its implications for members in a mandatory IOLTA program as compared to the current voluntary program. Other relevant issues such as the applicability of the Bar's policies on membership records and IT policies and procedures will also need to be addressed.

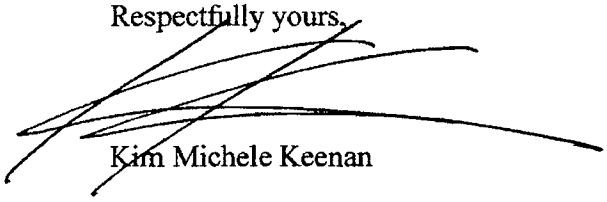
The Bar respectfully asks that the Court consider the attached proposed IOLTA rules. Because monitoring of IOLTA accounts by the Bar Foundation is not anticipated to begin until at least the third year after implementation of the revised IOLTA rules, and is ancillary to the proposed revisions on mandatory IOLTA and IOLTA interest rate comparability, the Bar believes that the Court should not delay adopting provisions that would authorize the implementation of mandatory IOLTA, which would greatly assist the important work of the Bar Foundation. Indeed, assuming that the Court changes the IOLTA rules, the immediate focus for implementation would be on education. The Bar plans to work with the Bar Foundation to conduct an intensive member education campaign to provide notice to Bar members about the new IOLTA rules and how to comply with them.

Timing of Implementation of IOLTA Rules

The Bar also respectfully asks that the Court delay the effective date of the changes to the IOLTA rules, if any, for at least four months after the date of the Court's adoption of the rules. The delay will allow the Bar to begin the process of notifying members about the rules changes; implement a member education program similar to the one conducted in 2006-07 in response to the substantial changes to the Rules of Professional Conduct; and work with the Bar Foundation in educating area banks about the rules changes. Because the Bar has found it helpful for the education of our members, the Bar also respectfully asks that the Court publish any rules changes in a red-lined version, in addition to a clean version.

Please let me know if you or other members of the Court have any questions or require anything further. I can be reached at (202) 380-6200 or by e-mail at keenankim80@gmail.com.

Respectfully yours,



Kim Michele Keenan

Enclosures

cc: Board of Governors
W. Mark Smith, Esq., President, D.C. Bar Foundation
Katherine L. Garrett, Esq., Executive Director, D.C. Bar Foundation
Members, Rules of Professional Conduct Review Committee
Charles J. Willoughby, Esq.
Katherine A. Mazzaferri, Esq.
Cynthia D. Hill, Esq.
Carla J. Freudenburg, Esq.
Hope C. Todd, Esq.

EXHIBIT E

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

Charles J. Willoughby
Chair

Ray S. Bolze
Vice Chair

Ernestine Coghill-Howard
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Russell F. Smith
Shirley M. Williams
Theodore D. Frank

Elizabeth J. Brando
Executive Attorney

Nancy C. Crisman
Assistant Executive Attorney

Erica S. Simpson
Assistant Executive Attorney

April 6, 2009

Eric L. Hirschhorn, Esquire
Chair
The Rules of Professional Conduct Review Committee
c/o Hope C. Todd, Esquire
The District of Columbia Bar
1250 H Street, N.W.
Sixth Floor
Washington, D.C. 20005-5937

Dear Mr. Hirschhorn:

On behalf of the Board on Professional Responsibility (the "Board"), I submit herewith the Board's comments on the proposed amendments to Rule 1.15 of the D.C. Rules of Professional Conduct and proposed D.C. Bar R. XI, § 20, which stem from the recommendations of the District of Columbia Bar Foundation and the D.C. Bar's Rules of Professional Conduct Review Committee ("Rules Review Committee"). The Board concurs with the recommendations of the Rules Review Committee with one exception, which is set forth in the attached comments.

The Board hopes that our comments are of assistance to the Rules Review Committee and the D.C. Bar Board of Governors. We would be pleased to respond to any questions concerning our comments.

With best regards,

Charles J. Willoughby
Chair

cc: Wallace E. Shipp, Jr., Esquire
Robert J. Spagnoletti, Esquire

EXHIBIT E

409 E Street, N.W., Building B, Room 208, Washington, DC 20001 ▪ 202-638-4290, FAX 202-638-4704

COMMENTS OF THE BOARD ON PROFESSIONAL RESPONSIBILITY ON PROPOSED CHANGES TO THE DISTRICT OF COLUMBIA RULES GOVERNING THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

INTRODUCTION

The D.C. Bar Foundation (the "Bar Foundation") has proposed to the D.C. Bar certain revisions to the District of Columbia's IOLTA rules. At the request of then-D.C. Bar President Melvin White, the D.C. Bar's Rules of Professional Conduct Review Committee (the "Rules Review Committee") considered those proposed amendments and on February 5, 2009, submitted its Report and Recommendations.

The Board on Professional Responsibility (the "Board") concurs with the recommendations of the Rules Review Committee with one exception. Specifically, we urge that the proposed reporting and periodic certification requirements should not be made part of the Rules of Professional Conduct nor should a violation subject the offending lawyer to discipline, but should instead be treated as administrative requirements of Bar membership under D.C. Bar Rule II.

A. The Proposals for Enforcement of New IOLTA Reporting Requirements

The Bar Foundation's proposal includes new requirements that attorneys report the establishment and closing of IOLTA accounts and periodically certify their compliance with or exemption from the IOLTA Rules.[1] Further, the proposal would make a failure to comply with these requirements a violation of the disciplinary rules. As the Bar Foundation noted:

[1] The Bar Foundation proposes to amend the Rules of Professional Conduct to include a new Rule 1.20. Proposed Rule 1.20(i) would require lawyers or law firms to advise the Foundation of the establishment and closing of IOLTA-eligible accounts. Proposed Rule 1.20(j) would require that every lawyer periodically certify that all IOLTA-eligible funds are being held in an IOLTA account.

> We do not envision that failure or refusal to comply with the rule requiring periodic certification would subject the Bar member to administrative suspension. Rather, as at present, noncompliance with any of the IOLTA rules would be addressed by the Office of Bar Counsel pursuant to the normal disciplinary process.

Bar Foundation's November 2, 2007 Report at 12.

The Rules Review Committee recommended that these and other provisions relating to IOLTA accounts be placed in a proposed Rule 1.15(b),[2] but it was not asked to, and did not, comment on how these requirements should be enforced. It did, however, agree that the Bar Foundation should be empowered to monitor compliance with the reporting and certification requirements.[3].

B. **The Board's Comments**

While the Board supports the reporting and certification requirements, it disagrees with the proposal to make failure to comply with those requirements a violation of the Rules of Professional Conduct. Rather, the Board recommends that the proposed reporting and certification requirements be treated as administrative requirements of Bar membership under D.C. Bar R. II, rather than in proposed Rule 1.15(b) as subjects of disciplinary enforcement. Doing so will enable a fast response to a lawyer's failure to comply and will also avoid diverting the resources of the disciplinary system from cases involving conduct that seriously affects the courts, the public, and the profession.

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[2] Proposed Rule 1.15 (b) states, in relevant part:

> A lawyer shall, in the form and manner prescribed by the District of Columbia Bar Foundation (Foundation), (1) advise the Foundation of the establishment and closing of a DC IOLTA Account; and (2) certify periodically to the Foundation compliance with the IOLTA requirements of this rule or exemption from those requirements.

[3] As endorsed by the Rules Review Committee, proposed D.C. Bar R. XI, § 20(h) would provide: "The Foundation may monitor . . . compliance by lawyers with the IOLTA reporting requirements of Rule 1.15(b) of the DC Rules of Professional Conduct."

Rule 1.15 sets forth a lawyer's ethical obligations regarding the proper handling of entrusted funds. Violations of its provisions are serious. Intentional or reckless misappropriation ordinarily results, almost automatically, in disbarment and even a negligent misappropriation results in a lengthy suspension, as may a commingling violation. By contrast, the reporting and certification requirements set forth in the proposed amendments to Rule 1.15(b) are prophylactic measures intended to remind attorneys of their IOLTA obligations. They do not prescribe the manner in which a lawyer must handle entrusted funds, but instead require a lawyer to state that he or she has fulfilled those substantive duties. The courts, the profession, and the public must be protected from lawyers who mishandle entrusted funds, but a lawyer who complies with these duties does not pose a risk to the public merely because he or she fails to report or certify that compliance. In short, the certification and reporting requirements do not directly implicate the public interest; they are a means to an end, not an end in themselves. With the exception of the requirement to report professional misconduct in Rule 8.3, which is critical to a self-regulating profession, the D.C. Rules of Professional Conduct contain no administrative reporting requirement that carries disciplinary sanctions for noncompliance.[4]

Rather, reporting and certification regarding the handling of IOLTA funds are more properly included among the administrative requirements of Bar membership set

[4] Imposing disciplinary sanctions based on noncompliance with rules that have not been adopted by the Court also raises serious questions. The proposed reporting and certification rules would delegate to the Bar Foundation the authority to develop the reporting and certification requirements that the disciplinary system would then be asked to enforce. We believe that discipline should be reserved for violation of ethical norms established by the Court.

forth in D.C. Bar Rule II. Other such requirements include: periodic registration;[5] maintaining on file a current address; paying Bar dues; and, for new lawyers, completion of a mandatory ethics course. These important requirements enable the Bar to operate smoothly, and noncompliance exposes a lawyer to an administrative suspension.

Administrative suspension is far more likely than disciplinary action to promote quick compliance with the reporting requirements at relatively little cost. As in the case of failure to register or to pay Bar dues, the Bar would be able to act promptly and on its own initiative, following notice that a lawyer has failed to make the required report and/or certification. No lengthy proceedings are necessary. The disciplinary system, by contrast, involves layers of procedural requirements, culminating, in most cases, in review before the D.C. Court of Appeals, before any sanction is imposed, and the process is often lengthy. Although this deliberate process is suitable for enforcing ethical norms, it is not well adapted to compelling the timely submission of reports and certifications. If the expectation is that an initial inquiry from Bar Counsel would stimulate compliance, surely the same can be said of a notice of administrative suspension by the Bar.

The recent amendments to Rule XI reflect a clear indication from the Court that only serious and contested cases should command the resources of the disciplinary system. We do not think that noncompliance with a reporting requirement, when the lawyer may be complying with substantive ethical obligations, meets this threshold. To divert the resources of Bar Counsel, the lawyers and public members who volunteer their time, and members of the Court to enforce reporting requirements seems contrary to the

[5] Perhaps lawyers could be required to file the necessary certification regarding compliance with or exemption from the IOLTA requirements with the annual registration statement.

Court's direction. It is, moreover, ill-advised, especially at a time when the number of complaints may increase due to the current economic environment.

CONCLUSION

The Board appreciates the opportunity to submit its comments on the proposed changes to the IOLTA rules. We hope they are of assistance to the Rules Review Committee and the D.C. Bar Board of Governors.

Respectfully submitted,

THE BOARD ON PROFESSIONAL RESPONSIBILITY

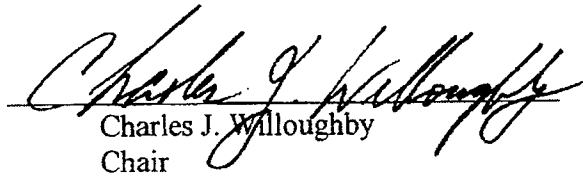
By: 
Charles J. Willoughby
Chair

EXHIBIT F

OFFICE OF BAR COUNSEL

April 6, 2009

Robert J. Spagnoletti
President, D.C. Bar Board of Governors
The District of Columbia Bar
1250 H Street, NW
Washington, DC 20005

Serving the District of Columbia Court of Appeals and its Board on Professional Responsibility

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Becky Neal
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H. Clay Smith, III
Traci M. Tait

Staff Attorney
Lawrence K. Bloom
Sara A. Walshe
Dolores Dorsainvil

Re: The District of Columbia Bar Foundation's Proposed Rule Amendments

Dear Mr. Spagnoletti:

We have had the opportunity to review the comments of the Board on Professional Responsibility ("Board") on the proposed amendments to Rule 1.15 of the D.C. Rules of Professional Conduct and proposed D.C. Bar R. XI, § 20, which stem from the recommendations of the District of Columbia Bar Foundation and the D.C. Bar's Rules of Professional conduct Review Committee.

The Office of Bar Counsels concurs in the comments of the Board.

Sincerely,

Wallace E. Shipp, Jr.
Bar Counsel

cc: Charles J. Willoughby, Chair

Elizabeth J. Branda, Executive Attorney
Board on Professional Responsibility

WES:LKB:gjh

515 5th Street NW, Building A, Room 117, Washington, DC 20001 ■ 202-638-1501, FAX 202-638-0862

EXHIBIT F

EXHIBIT G

MEMORANDUM

TO: **D.C. Bar Board of Governors**

FROM: **Katherine A. Mazzaferri, Cynthia D. Hill, Carla J. Freudenburg**

DATE: **June 8, 2009**

SUBJECT: **Staff Recommendations on Certain IOLTA Proposals**

Introduction

As an overarching principle, the Rules of Professional Conduct Review Committee ("Rules Review Committee"), the Bar staff and the Bar Foundation agree that a comprehensive IOLTA rule will further the important mission of the Bar Foundation -- to make funding available to legal service providers in the District of Columbia by increasing the revenue available to the Bar Foundation. The Bar Foundation and the Bar staff further agree that member education will be important to the success of implementing any revised IOLTA rules.

However, there are several aspects of the proposed revisions to Rule 1.15 to which the Rules Review Committee, the Bar Foundation, and Bar staff have each taken a different approach. These different approaches involve proposals for a limited exception to compliance with the IOLTA rules for lawyers who engage in multijurisdictional practice; a requirement that members certify their compliance with or exemption from the IOLTA rules; certain additional reporting requirements for members who are required to maintain IOLTA trust accounts; and enforcement mechanisms.

Multijurisdictional Practice Exemption

The Rules Review Committee and the Bar Foundation have taken different approaches to determining who is covered under the proposed multijurisdictional ("MJP") practice exemption in Rule of Professional Conduct 1.15(b).

The attached memoranda from the Rules Review Committee and the Bar Foundation provide details about the approach and rationale each has taken in drafting the exception to RPC 1.15.

Member IOLTA Rules Education Campaign

The Bar staff consensus is that the most productive, cost-effective way to notify members about the new IOLTA rules and to facilitate compliance is through a comprehensive, in-depth program education effort, to be conducted under the Bar's Rules Education Program. This emphasis on extensive member education is particularly important because the requirements of the different jurisdictions in which some D.C. Bar members are licensed to practice may initially complicate those members' understanding

EXHIBIT G

of how the revised rules would apply to them. The Bar Foundation supports the Bar's proposed member education campaign, and it is anticipated that the Bar Foundation would be involved in education and outreach to members.[1]

The Bar can draw on its successful experience in conducting the 2007 Rules Education Program on the substantial changes to the D.C. Rules of Professional Conduct. For example, all CLE courses devoted to the Rules changes received "good" to "excellent" ratings; most courses and faculty received "excellent" ratings; almost every course had feedback about the useful and practical nature of the courses; and many individual attendees commented that it was the best CLE they had attended. The 2007 Bar Conference was wholly devoted to the Rules changes, and the changes were highlighted in the *E-Brief* and the *Washington Lawyer*. The outreach has been ongoing: in FY 2007-08, 1,869 people attended 31 different courses that were in the Rules Education Program.

Additionally, the Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice, which is offered 12 times a year, receives consistently high ratings and reaches approximately 3,500 members annually. "Basic Training," a popular, intensive seminar for solo practitioners produced by the Practice Management Advisory Service, receives consistently outstanding feedback.

The Rules Education program on revised IOLTA rules would include:

1. *Washington Lawyer*: Bar president's page; "Speaking of Ethics" column; "Bar Counsel" column; and feature article(s). Articles and columns on the topic could appear in consecutive issues.

2. Continuing Legal Education: A new course about the new IOLTA rules could be developed, or the topic could be included as part of the existing CLE course on Ethics and Trust Accounts. The course could be offered free of charge to members; also available on a CD and online (if this latter method of delivery becomes available).

3. Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice: The topic would be included in the ethics, disciplinary system and regulation counsel segments of Course sessions.

4. Sections: Educational events sponsored by the solo and small firm committee of the Law Practice Management Section.

5. D.C. Bar Website: A lead story about changes to the IOLTA rules would be posted periodically on the Bar's website.

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[1] Although the Bar Foundation supports a member education campaign, it does not view the member education campaign as an alternative to an IOLTA certification and reporting plan.

6. Regulation Counsel Staff: Legal ethics counsels and the manager of the Practice Management Advisory Service (PMAS) would educate members one-on-one through phone and e-mail consultations about the new rules and compliance.

7. "Basic Training" seminar: Sponsored by the Practice Management Service Committee, this intensive seminar for new and current solo practitioners is held once or twice a month by the PMAS manager. During sessions of this seminar, the manager and Bar Foundation staff would be available to educate members about the new IOLTA rules.

8. Bar Foundation: Through its work of managing and distributing IOLTA funds, the Bar Foundation has established relationships with area banks and large District law firms. It is anticipated that the Bar Foundation would continue its outreach and education efforts about the new IOLTA rules to the banks and law firms.

9. Online surveys to selected groups of members (particularly to solo practitioners and to attorneys in small, medium and large firms) before and after implementation of the IOLTA rules to assess members' awareness of the IOLTA rules and the effectiveness of the Bar's notice to members, and to identify ways in which the Bar could facilitate members' compliance. This idea originated from a recent discussion with the Bar Foundation.

10. The Bar can provide to the Bar Foundation contact information on the firm administrators for the largest law firms located within the District of Columbia, which would enable the Bar Foundation to reach approximately 9,000 lawyers.

11. After two years, an evaluation and cost/benefit analysis should be considered to determine if a certification plan would be appropriate, and if so, how it might effectively be designed.

Certification Requirement

The Bar Foundation has proposed that D.C. Bar members be required to certify whether they are complying with the IOLTA rules or whether they are exempt from them. Under the Foundation's proposal, non-compliance with the certification requirement would be treated as a disciplinary violation.

Although the Rules Review Committee's Report includes an IOLTA certification requirement in RPC 1.15 (b),[2] originally proposed by the Bar Foundation, the Rules Review Committee has taken no position on the merits of the form and manner of this requirement.[3]

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[2] "A Bar member shall in a form and manner prescribed by the Foundation... (2) certify periodically to the Foundation compliance with the IOLTA requirements of this rule or exemption from those requirements."

[3] The Bar Foundation's proposal was in proposed RPC 1.20, and it specified that certifications would be submitted to the D.C. Bar.

In comments filed about the proposed IOLTA rule changes, the Board on Professional Responsibility (BPR) and the Office of Bar Counsel (OBC) stated their belief that non-compliance with a certification requirement should not subject a member to disciplinary suspension because a member's failure to do so does not directly implicate the public interest, which the Rules of Professional Conduct are intended to protect. Additionally, enforcing a certification requirement would divert the resources of the Office of Bar Counsel from prosecuting serious and contested disciplinary cases. Instead, they recommended that enforcement of the IOLTA provisions be through administrative suspensions.

The Bar staff believes, however, that certification would be unduly administratively burdensome and expensive, and there is no assurance that imposing such a requirement would produce the desired result -- more revenue for the Foundation – or, if more revenue, enough additional revenue to offset the costs of administering a certification program. In addition, the Bar staff concurs with the views expressed by the BPR and the OBC that non-compliance with a certification requirement should not be subject to disciplinary suspension. Contrary to the alternative suggested by the BPR and OBC, however, Bar headquarters staff also believes that non-compliance with a certification requirement should not result in administrative suspension, i.e., the loss of one's license to practice law, under D.C. Bar Rules II or any other Bar rule.[4]

Sanctions for Non-Compliance

Information from other jurisdictions demonstrates that there are a variety of approaches to the issues of whether to require certification of IOLTA compliance and, if so, how to enforce the requirement.[5] For example, although Maryland requires lawyers to report their compliance with, or exemption from the IOLTA rule or statute, its Rules do not specify any penalties for non-compliance. New York reports that lawyers are not required to certify. Pennsylvania lawyers are obligated to certify, and the attorney's annual registration form will not be processed if he or she does not certify IOLTA compliance or exemption. In addition, even where it appears that there are sanctions for non-compliance, imposition of the sanctions may be inconsistent. For example, although Texas lawyers are subject to suspension for failing to certify, sometimes this penalty is

[4] Typically, the non-disciplinary parts of the Bar have had responsibility for handling matters where non-disciplinary enforcement is appropriate.

Although the BPR recommended administrative suspension for non-compliance with a certification requirement, the BPR did not consider the option of no enforcement because that question was not before it when it reviewed the Rules Review Committee's report. As a preliminary view, the BPR leadership has a concern about the non-enforcement proposal of the Bar headquarters staff; however, the full BPR has not had the opportunity to consider the matter.

[5] Chart, IOLTA Compliance Reporting Information 2006, IOLTA Clearinghouse Database – Self Reporting by Programs.

not enforced. California also has a certification requirement, but it appears that it is not currently being enforced.[6]

Certification itself, as opposed to compliance with the underlying ethical requirement of properly maintaining an IOLTA account, is a technical process that does not – and, in this jurisdiction, should not -- rise to the level of becoming an ethical requirement.[7] None of the other ethical requirements of the D.C. Rules of Professional Conduct have certification requirements.

Disciplinary or administrative suspension for non-compliance with a certification requirement would likely fall disproportionately on solo and small firm practitioners. Unlike large-firm practitioners, who have support systems in place to monitor and respond to a certification requirement, it is typically more of a challenge for solo and small-firm practitioners to handle administrative and business tasks related to their practices. Moreover, in the current economic climate, more attorneys, including recent law school graduates, are opening solo practices, and current solo and small firm practitioners are struggling with diminished revenue and resources. We believe that Bar resources would be better spent on notice to our members about the new IOLTA rules through intensive education efforts instead of punishing lawyers for failing to certify compliance or exemption with the IOLTA rules.

Cost Effectiveness Analysis

A certification requirement is expensive, and not known to be cost effective. As of November 2008, it was estimated that it would cost approximately $208,000 during the first year to reach 88,000 members by postal mail[8] and nearly $160,000 annually in subsequent years. This estimate includes only the cost of postage, and the labor costs for database design and data collection; it does not include the costs of ongoing editing, maintenance or analysis of the data, creating reports, etc.[9] These costs would only rise as the Bar's membership increases and postage and labor costs increase.

The costs of certification would have to be absorbed by the Bar Foundation. The 1980 member referendum prohibits the use of Bar dues for administering this program.

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[6] Maryland, New York and Pennsylvania are voluntary bar jurisdictions; California, Florida and Texas are unified bars.

[7] Without a track record of applying other methods, such as massive education, to secure compliance, certification and sanctions would be a particularly harsh response to a member who properly maintains all accounts but fails to submit a certification that he or she is complying with the IOLTA rules, or the member who clearly is exempt from the IOLTA requirements but fails to submit a certification to that effect.

[8] Given the unreliability of e-mail (e.g., incorrect and outdated addresses, member restrictions on usage, spam filters, employer rules about receipt of non-employment e-communications, etc.), e-mail would not be a viable alternative for effective notice to members who would be subject to the new requirements.

[9] The Bar staff also has not attempted to design or to estimate the costs of administering a process for administrative suspension of members who do not comply with a certification requirement, as proposed by the Bar Foundation.

If asked by the Court of Appeals for its opinion on using dues funds for certification, the BOG would have to determine, as a policy matter, if it thought that this use of dues was an appropriate, and a good use of dues, given the other Bar programs that the Bar is not permitted to fund with dues[10], as well as the limitations on available resources for those activities that are currently dues-funded.

Certification is unlikely to be cost effective for the Bar Foundation. The Bar Foundation has told us that $208,000 is the equivalent of nearly two months of revenue for it. However, given the current economic climate, the Foundation is now facing a $1,000,000 shortfall in interest revenue this year, and if a certification requirement were in effect, the costs of certification would absorb a higher percentage of its income – almost 20%.[11]

We are unaware of any way to quantify the amount of extra interest revenue that the Bar Foundation might gain through a certification requirement that would enable it to cross-check banking data and track down revenue that it otherwise may be "missing." There is no way of knowing whether a certification requirement would net the Foundation a "profit" in excess of the funds it would expend on certification.

Because there is not a uniform method for administering a certification requirement that can be duplicated reliably to produce enough revenue to justify the significant costs to administer it, we believe that it would be prudent initially to take a careful approach before implementing a certification program in this jurisdiction.

IOLTA Account Reporting Requirements

The Rules of Professional Conduct Review Committee's Report also includes an IOLTA reporting requirement in RPC 1.15(b)(1): "A Bar member shall in a form and manner prescribed by the Foundation (1) advise the Foundation of the establishment and closing of a DC IOLTA account . . ."

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[10] Including the CLE Program, which assists members in complying with their ethical obligations under RPC 1.1 to maintain the requisite knowledge and skills to represent clients competently.

[11] The variety of approaches among other jurisdictions may reflect how much IOLTA revenue is reliably anticipated as compared to with how much it costs to administer a certification requirement. For example, in 2007-08, Florida received $44 million in IOLTA revenue; California received $22 million in 2008; Texas, $20 million in 2007; Pennsylvania, $12.1 million in 2008; and Maryland, $6.7 million in 2008.

Although we do not know the break-out of the costs of administering California's IOLTA certification, California administers IOLTA accounts, the California Equal Access Fund, the Justice Gap Fund and the administration of grants to legal services providers with a $1.5 million operating budget. Three full-time staff work on IOLTA administration. Texas administers IOLTA compliance with two full-time staff who spend 50 to 60% of their time on compliance work during an approximately six-month period, and one assistant who provides full-time support during the same six months. Members comply through their law firms, online, or by mail. Last year, the Texas certification process moved more fully online; members were mailed only one paper reminder.

As with the proposed certification requirement, included in the Bar Foundation's report, the Rules Review Committee has taken no position on the form and manner of its implementation. [12]

The Bar Foundation has proposed that non-compliance with the reporting requirement should be treated as a disciplinary violation. While disagreeing with this approach, the BPR and the OBC have suggested that failure to report the opening and closing of IOLTA accounts should be subject to administrative suspension.[13]

Based on the research about some other jurisdictions, there is lack of uniformity and indeed, considerable ambiguity about whether there are penalties for bar members who fail to report the opening and closing of IOLTA accounts. For some jurisdictions, it is difficult to determine whether reporting is even required. For example, in Maryland and Pennsylvania, it is unclear whether attorneys are required to report the opening and closing of IOLTA accounts. According to IOLTA instructions given to California and Texas attorneys, it appears that they are required to report, but it is not clear that this is a rule-based requirement. Florida's ethical rules do require a member to report the opening of an IOLTA account (but are silent about whether the attorney must report the closing of such accounts), and failure to do so presumably subjects a member to disciplinary sanctions.

For the reasons expressed about certification, we do not think that there should be any consequences for the failure of a D.C. Bar member to notify the Bar Foundation of the opening and closing of an IOLTA account. In addition, Bar staff also believes that non-compliance should not result in administrative suspension under D.C. Bar Rule II or any other Bar rule.

However, we recognize that there are public policy reasons why the Bar Foundation would want members to notify it when they establish and close IOLTA accounts. For example, under current Appendix B(c)(1) and (2) to Rule X of the D.C. Bar Rules and the form used to establish an IOLTA account, the depository is directed by the lawyer or law firm to remit the interest, other financial information and the name of the lawyer or law firm associated with the IOLTA account to the D.C. Bar Foundation. The form also directs the lawyer to send a copy to the Bar Foundation (DC IOLTA Account Election Form attached). However, the Bar Foundation reports that banks and Bar members are inconsistent in providing this information. Thus, the Bar Foundation's proposed notice requirement would enable Foundation staff to cross check for accuracy the IOLTA account information and interest that the banks are providing to the Bar Foundation.

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[12] The Bar Foundation's proposal was in proposed RPC 1.20, and specified that notice would be made to the Bar Foundation in a form and manner prescribed by the Bar Foundation.

[13] As was the case with its consideration of the certification requirement, the BPR did not consider the alternative of no enforcement of an account reporting requirement because that question was not before it. While the BPR leadership preliminarily has a concern about the non-enforcement proposal, the full BPR has not had the opportunity to consider the matter.

The Rules Review Committee's proposed Section 20(g)(1) through (3) to Rule XI of the Rules Governing the Bar mirrors the purpose and function of current Appendix B(c)(1) and (2). The Bar Foundation agreed with the Rules Review Committee's placement of this language in Rule XI instead of an RPC.[14] The current language of Appendix B(c) states that lawyers or law firms depositing client funds . . . shall direct the depository institution to remit the interest to the Bar Foundation, etc. In comparison, the proposed language of Rule XI Section 20(g) does not include the language "lawyers or law firms shall direct the depository institution." Instead, Section (g) states that "On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall . . ." However, the obligations of the banks to the Bar Foundation are the same under the current and proposed rules.

Although we do not believe that there should be disciplinary or administrative consequences for the failure of a Bar member to report the opening and closing of an IOLTA account to the Bar Foundation, we support the idea that there should be a strong statement by the Court of Appeals as to the importance of lawyers reporting this information to the Bar Foundation. Additionally, there needs to be clarity on this point for our members and for our staff experts in the Legal Ethics and Practice Management programs who typically field these kinds of inquiries. In a manner analogous to RPC Rule 6.1, where members are encouraged to either provide pro bono representation or contribute to legal services providers, we suggest that members should be encouraged – although not required -- to notify the Bar Foundation of the establishment and closing of IOLTA accounts.

Conclusion

We strongly believe that an intensive education effort by the Bar and the Bar Foundation will accomplish the goal of educating Bar members about their new obligations under the revised IOLTA rules and will increase interest revenue to the Bar Foundation without the significant drain on revenue and staff resources that reporting and certification requirements would entail. The Bar already has a successful member education program to draw on in designing this effort. Several years after implementation of the IOLTA rules, an assessment can be considered to determine if certification and/or account reporting requirements are necessary to enhance the Bar Foundation's revenue and work significantly.

We also support surveys of our members to measure compliance with the IOLTA rules and to help us improve our efforts to facilitate member compliance.

Because we recognize that there are public policy reasons why the Bar Foundation would want members to notify it when they establish and close IOLTA accounts, we support a voluntary program accompanied by a strong statement from the

[14] The Rules Review Committee believed that the obligations of the approved depositories were more appropriately housed in Rule XI instead of a Rule of Professional Conduct, which governs obligations of lawyers.

Court within the Rules of Professional Conduct to encourage Bar members to notify the Bar Foundation when they open and close IOLTA accounts.

EXHIBIT H

District of Columbia Bar
Board of Governors Meeting[1]
July 21, 2009

Call to Order
(Agenda Item 1)

President Kim M. Keenan called the Board of Governors to order at 1:15 p.m.

The members of the Board of Governors present at the meeting were: Johnine P. Barnes, Paulette E. Chapman, Judith M. Conti, Sabine S. Curto, Judy Deason, Ronald S. Flagg, Meredith Fuchs, Nathalie F.P. Gilfoyle, Ankur J. Goel, Ellen M. Jakovic, Kim M. Keenan, Barry C. Mills, Laura A. Possessky, James W. Rubin, and R. Justin Smith. Amy L. Bess, Charles R. Lowery, Jr., Christina G. Sarchio, and Robert J. Spagnoletti participated by telephone.

The Honorable Eric T. Washington, Chief Judge, D.C. Court of Appeals, and the Honorable Lee Satterfield, Chief Judge, D.C. Superior Court, joined the meeting. Bar headquarters staff members who attended were Katherine A. Mazzaferri, Cynthia D. Hill, Joseph P. Stangl, Maureen Thornton Syracuse, Carla J. Freudenburg, Mark Herzog, Cynthia G. Kuhn, Daniel Mills, Karen Savransky, and Hope C. Todd. Others in attendance were Elizabeth Branda, Board on Professional Responsibility; Katherine Garrett, D.C. Bar Foundation; Eric L. Hirschhorn, Rules of Professional Conduct Review Committee; Virginia A. McArthur, Continuing Legal Education Committee; Stephen J. Pollak, D.C. Bar Foundation; Daniel Schumack, Rules of Professional Conduct Review Committee; and Gene Shipp, Office of Bar Counsel.

Proposal on Amendments to IOLTA Rules
(Agenda Item 14)

Ms. Hope Todd summarized the three proposals for revisions to the IOLTA Rules to make IOLTA mandatory for D.C. Bar members and to require interest rate comparability for all

[1] IOLTA discussion only; all other portions of the minutes are redacted.

EXHIBIT H

approved depositories. These included a November 2007 proposal of the D.C. Bar Foundation, a June 4, 2009 proposal of the Rules of Professional Conduct Review Committee ("Rules Review Committee"), and a June 9, 2009, proposal of the D.C. Bar Foundation. The critical distinction among the three proposals is how each rule addresses exemptions for members with multi-jurisdictional practices.

Mr. Daniel Schumack, Vice-Chair of the Rules Review Committee, presented the Rules Review Committee's recommendation, which would allow an exemption if the lawyer is otherwise compliant with contrary mandates of a tribunal or is participating in, and compliant with the trust accounting rules and IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices. He highlighted the committee's concerns about a transaction-based rule, e.g., the risks that attorneys would have to maintain multiple trust accounts, incur additional expense to manage and maintain them, and potentially commit disciplinary violations if funds were placed in the wrong accounts. He expressed the committee's desire to simplify and to clarify the IOLTA and trust accounting rules.

Mr. Eric L. Hirschhorn, Chair of the Rules Review Committee, also described the differences among the proposals.

Mr. Stephen J. Pollak, immediate past President of the D.C. Bar Foundation, and Ms. Katherine L. Garrett, Executive Director of the Bar Foundation, described the Foundation's November 2007 proposal, which would take a transactional approach and would require that all IOLTA funds arising out of transactions with a nexus to the District of Columbia be placed in D.C. IOLTA accounts. In response to the Rules Review Committee proposal, the Bar Foundation also put forward its June 9, 2009 proposal, which considers the practitioner's principal place of practice and would permit an exception to the D.C. IOLTA rule only when there is a conflict between the D.C. rule and the contrary mandates of a tribunal or another jurisdiction's rules.

Mr. Shipp described the Bar Counsel's analysis of disbursement irregularities and overdraft notices related to IOLTA accounts. He concluded that the number of matters involving trust accounts docketed by Bar Counsel is very small in relation to the total number of complaints received about other matters.

Mr. Mills discussed the impact on solo and small firm practitioners of maintaining multiple IOLTA accounts. He noted that in his Basic Training seminar, he receives many basic questions about trust accounts. He commented that any IOLTA rule adopted should be clear and easy for practitioners to follow.

The discussion moved to the merits of a transaction based or principal place of practice approach to addressing multi-jurisdictional practice considerations, the ease of practice for attorneys, and the increase in the amount of money potentially available for IOLTA.

> **ACTION ITEM:** Ms Keenan requested the sense of the Board as to Option 1, the Bar Foundation's proposal of November 2007 of a transaction-based approach. The sense of the Board of Governors was to reject option 1.
>
> **ACTION ITEM**: A motion was made and seconded to vote between options 2, the Rules Review Committee proposal of June 4, 2009 (rate comparability required for approved depositories and IOLTA participation mandatory for attorneys with exemption based on "licensed and principally practices") and 3, the Bar Foundation proposal of June 9, 2009 (rate comparability required for approved depositories and IOLTA participation mandatory for attorneys with exemption based on "contrary mandates"). Through a ballot vote by the voting members of the Board of Governors, the Board decisively approved recommending option 2 to the Court of Appeals.

Ms. Garrett then discussed the Bar Foundation's proposal on IOLTA monitoring by the Bar Foundation. Citing potential disciplinary consequences, Ms. Elizabeth Branda requested an opportunity to review and comment on any proposal on IOLTA monitoring. Ms. Mazzaferri discussed concerns related to sharing member records with the Bar Foundation for its monitoring efforts. She noted that those concerns could be addressed in a transmittal letter to the Court of Appeals. The Board then considered two separate proposals for draft language, one submitted by the Bar Foundation and the other by the D.C. Bar staff.

ACTION ITEM: A motion was made and seconded to approve in principle an IOLTA monitoring concept, with the specific language to be developed by the Bar Foundation and the Rules Review Committee, for final approval by the Executive Committee. The motion was accepted without objection.

EXHIBIT I

BOARD ON PROFESSIONAL RESPONSIBILITY

July 30, 2009

Kim Michele Keenan, Esquire
President, District of Columbia Bar
c/o Carla J. Freudenberg, Esquire
Regulation Counsel, District of Columbia Bar
1101 K Street, N.W.
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Washington, D.C. 20005

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Deborah J. Jeffrey
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Theodore D. Frank

Elizabeth J. Branda
Executive Attorney

Nancy C. Crisman
Assistant Executive Attorney

Erica S. Simpson
Assistant Executive Attorney

Re: Proposed Changes to the District of Columbia Rules Governing IOLTA

Dear Ms. Keenan:

On behalf of the Board on Professional Responsibility, I submit herewith comments on the most recent proposed changes to the District of Columbia rules governing the Interest on Lawyers' Trust Accounts (IOLTA).

The Board hopes that our comments are of assistance to the Board of Governors in making its recommendations to the D.C. Court of Appeals.

We would be pleased to respond to any questions concerning the Board's comments.

With best regards,

Charles J. Willoughby
Chair

cc: Wallace E. Shipp, Jr., Esquire
Bar Counsel

Ronald S. Flagg, Esquire
President-Elect
District of Columbia Bar

Katherine L. Garrett, Esquire
Executive Director
District of Columbia Bar Foundation

EXHIBIT I

430 E Street, N.W., Suite 138, Washington, DC 20001 ▪ 202-638-4290, FAX 202-638-4704

SUPPLEMENTAL COMMENTS OF THE BOARD ON PROFESSIONAL RESPONSIBILITY ON PROPOSED CHANGES TO THE DISTRICT OF COLUMBIA RULES GOVERNING THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

INTRODUCTION

The Board has been asked to comment on proposed language authorizing the Bar Foundation to monitor compliance with IOLTA requirements. The new language provides, in relevant part: "The Foundation may monitor lawyers' participation in the DC IOLTA program." Proposed Comment 4 to Rule 1.15. Two classes of entities are subject to monitoring: (1) financial institutions that hold IOLTA accounts; and (2) lawyers, with respect to their participation in the IOLTA program.[1] The proposal will require changes to the Comments to Rule 1.15 (safekeeping of property) and a new section of D.C. Bar Rule XI ("Rule XI") to address trust accounts. The monitoring provision would appear as Rule XI, § 20(h).

The Board has been advised that, for many years, the Foundation has monitored the opening of IOLTA accounts at financial institutions. The institution notifies the Foundation, which can then reconcile the interest payments to ensure that the Foundation is receiving funds from that IOLTA account. We understand that the Foundation intends to continue this practice, in the expectation that new IOLTA accounts will be opened if participation in IOLTA becomes mandatory, as the Board of Governors will propose. We are told that this monitoring has been occurring for more than 20 years, and the Foundation has not previously considered express authorization necessary. Further, we are told that the Foundation from time to time makes inquiries to individual lawyers.

---

[1] Proposed Rule XI, § 20(h) provides that "[t]he Foundation may monitor 1) fulfillment of the requirements of paragraphs (f) and (g) of this Rule [setting forth dividend and interest rates and the remittance and reporting obligations of participating financial institutions] by institutions that elect to offer and maintain DC IOLTA accounts; and 2) lawyers' participation in the DC IOLTA program.

In the Board's view, these proposed amendments raise three issues:

1. Is additional authority necessary?

The rule seems superfluous in light of the fact that the Foundation currently monitors the opening of new accounts and may under its existing authority make inquiries of lawyers. If the rule is instead intended to increase the authority of the Foundation, it is important to identify the additional activities that the Foundation would be authorized to take.

2. Placing the IOLTA rules in Rule XI will make them less prominent.

Rule XI addresses the jurisdiction and operation of the disciplinary system. The IOLTA rules now appear as an appendix to the D.C. Rules of Professional Conduct. A violation of these provisions subjects a lawyer to discipline. As we understand, the Board of Governors approved the recommendation of the Rules of Professional Conduct Review Committee to move the IOLTA provisions from the appendix to a new section of Rule XI, which would separate them from the ethics rules governing lawyer conduct. Our understanding is that one objective of this change is to make the IOLTA rules more prominent.

We believe that the change will have the opposite effect. In the Board's experience, the vast majority of lawyers are not familiar with Rule XI and learn of it only when they become the subject of disciplinary charges. Further, it is not at all apparent that financial institutions will think to turn to the rule that governs lawyer discipline to determine their IOLTA responsibilities. Consequently, attaching the IOLTA rules at the end of the disciplinary procedures set forth in Rule XI will likely make the IOLTA rules harder for lawyers to find and no more accessible to financial institutions than they are in the appendix to the disciplinary rules.

3. **Describing the Foundation's authority in a Court rule devoted to the disciplinary system is confusing and potentially mischievous.**

In addition, placing in Rule XI a description of the Foundation's authority to monitor lawyers' participation in IOLTA implies that the Foundation is part of the disciplinary system and that a failure to provide information in response to its inquiry may be grounds for discipline. The proposed language of Rule XI, § 20(h) authorizes the Foundation to monitor "lawyers' participation in the DC IOLTA program." This suggests that the Foundation is to play an active role in the disciplinary system by investigating possible non-compliance. The problem is compounded because the provision would delegate to the Foundation broad discretion over the form and substance of its monitoring. Though the proponents of this provision have assured us that they contemplate only voluntary participation and non-intrusive inquiries, nothing in proposed § 20(h) so limits the Foundation's authority, leaving open the possibility that a future Foundation might take a contrary position. Engrafting a voluntary procedure into the mandatory rules of the disciplinary system invites confusion.

The Board appreciates the assurance of Bar Counsel that he would not prosecute an attorney for failing to cooperate with voluntary monitoring and that refusal to cooperate would not constitute misconduct under Rule XI, § 2(b) (defining misconduct). We do not find the issue as clear as Bar Counsel suggests, and there is no guarantee that a future Bar Counsel will not take a different view. The Board has held that provisions of Rule XI governing recordkeeping are enforceable by Bar Counsel, and they have been charged as violations.

4. **Where should the Bar Foundation's authority appear?**

The Board submits that the Bar, the Court and the Foundation would be best served by creating a new District of Columbia Bar Rule, Rule XVI, to address the Bar Foundation and its

role in IOLTA.[2] The Board on Professional Responsibility, the Clients' Security Fund, and the Attorney/Client Arbitration Board each has its own separate rule, making it easy for a lawyer to find the relevant provisions. Making participation in IOLTA mandatory will elevate the role of the Bar Foundation, and it is fitting that the Court's rules recognize its importance. A separate rule dedicated to the Bar Foundation will make it more prominent to both lawyers and financial institutions than appending the provisions to Rule XI.

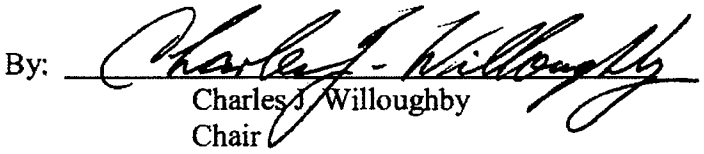
Our proposed Rule XVI should explain the role of the Foundation and its authority to monitor lawyers' participation in IOLTA. The Board believes that the Rule should describe with some specificity what actions the Foundation is authorized to take and make clear that a lawyer "should" (i.e., is strongly urged to) comply with those reasonable requests.

CONCLUSION

The Board appreciates the opportunity to submit its comments to the most recent proposed changes to the IOLTA rules. We hope they are of assistance to the Board of Governors.

Respectfully submitted,

THE BOARD ON PROFESSIONAL RESPONSIBILITY

By: 
Charles J. Willoughby
Chair

Dated: July 30, 2009

[2] Alternatively, the proposed rule could be numbered as Rule XIV, thus grouping the rule dedicated to the Bar Foundation with the rules governing the Board, the Clients' Security Fund and the Attorney/Client Arbitration Board, and the successive rules renumbered accordingly.

EXHIBIT J

THE DISTRICT OF COLUMBIA BAR FOUNDATION

FUNDING LEGAL SERVICES FOR THOSE IN NEED

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STAFF

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Amanda M. Gay
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Imoni Washington

June 9, 2011

D.C. Bar Board of Governors
District Of Columbia Bar
1101 K St NW
Washington, DC 20005

Re: March 25, 2011 Draft Report of the Rules, Regulations and Board Procedures Committee in Respect of the D.C. IOLTA Program

Dear Members of the D.C. Bar Board of Governors:

Thank you for the opportunity to comment on the above-referenced draft report ("Report") of the D.C. Bar's Rules, Regulations and Board Procedures Committee ("Committee").

We have fundamental difficulties with each of the two principal recommendations of the report: 1) that there should be no IOLTA certification program (the "Certification" issue); and 2) that the Foundation's administration of Bar members' reporting or certifying compliance with IOLTA requirements should be subject to oversight by and approval of the Bar's Board of Governors (the "Governance" issue).

A. Certification

The Report concludes that D.C. Bar members should not be required to certify their compliance with the D.C. IOLTA rules, or to regularly provide their IOLTA account information. Report at 26. Given that 42 states have some form of certification requirement under their IOLTA program, we had serious questions about that recommendation. However, based on discussions subsequent to the issuance of the Report, we have reached agreement in principle with Bar leadership and staff on a certification process that appears to be workable and that does not involve the Bar's dues statement. Consequently, at this juncture, we are operating on the assumption that that issue is resolved.

B. Governance

1. The Bar Foundation

The D.C. Bar Foundation ("the Foundation") was created in 1977 as a 501(c)(3) organization separate from and independent of the Bar. Its principal function is to provide funding and other support to the network of non-profit

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EXHIBIT J

organizations in the District that deliver legal services to our poor and underserved residents. Sources of funds include i) private donations from lawyers and firms in the District, as well as from foundations and other businesses; ii) public funds granted to the Foundation by the D.C. City Council; and iii) interest on D.C. IOLTA accounts. The funds are used to provide support to the District's legal services network in the form of grants to providers of legal services, loan repayment assistance awards for public interest lawyers, and for other programs. Over the last decade, the Foundation has become *the* major private funder of civil legal services in the District of Columbia. Administration of the IOLTA program remains a core element of the Foundation's responsibilities.

2. The Foundation's Governance Structure

Under the Foundation's Charter, its Directors are approved by the D.C. Bar Board of Governors; and, historically, most of them have been former Presidents of the D.C. Bar. The Foundation is a natural ally of the Bar, and has always worked in close cooperation with it. Other than through its Director-approval role, however, the Bar has no involvement in the conduct of the Foundation's affairs — it has neither control nor any oversight function over the Foundation's operations.

As a matter of corporate governance, the Foundation has a *relationship* with the Bar: the Bar plays a role in appointing its Board. But the Board members, once appointed, have a fiduciary duty to the Foundation, and are responsible to the Foundation and not the Bar. Because of the importance of the Foundation's work, and because of its independent status, the Foundation has been able to attract leading members of the Bar to serve on its Board. Thus, the current nine members include four former presidents of the D.C. Bar, one current candidate for president-elect of the D.C. Bar, two former managing partners of large District of Columbia law firms and two other leaders in the D.C. legal community.

The independence of the Foundation is important in other ways. In the Foundation's fund-raising function, the Bar is a potential competitor for sometimes scarce dollars: the Foundation and the Bar solicit donations from some of the same lawyers and law firms. The Bar solicits contributions for its Pro Bono Program, and the Foundation solicits them for the District's entire legal services network (a process that has worked harmoniously, we note). Similarly, in the Foundation's grant-making and support function, the legal services providers, who are badly in need of funding, are potentially in competition with the Bar's Pro Bono Program. It is appropriate and fitting then that the Foundation be entirely independent of the Bar in the discharge of its duties.

The rule proposed by the Committee would encroach on the independence of the Foundation. It would require that the Foundation submit "a formal [IOLTA compliance] monitoring plan *for review and approval* by the Bar's Board of Governors"; and it would require that whenever the Foundation has "new information, new data, new best practices, or just experience in monitoring" suggesting "that *changes* in the monitoring are appropriate or needed, the Foundation would ... submit such changes to the Board of Governors for *approval*," and

"report at least annually" on monitoring activities to the Board of Governors. *See*, Committee Report at 24, 25.

It is particularly inappropriate for the Bar to be placed in an oversight and approval role of the Foundation's administration of the IOLTA program. The Foundation's role as administrator of the IOLTA program was given to it by the D.C. Court of Appeals; the Foundation has developed significant expertise in the administration of the IOLTA program, over the last twenty-five years — expertise which the Bar's Board of Governors does not have; and the Foundation has done a very high quality job administering the IOLTA program.

3. The Foundation's IOLTA Experience and Expertise

The IOLTA program itself was created by Court of Appeals rule in 1985. The Foundation has administered the IOLTA program since its inception, pursuant to authority delegated by the Court of Appeals. The program *required* lawyers covered by the IOLTA rule — unless they formally opted out — to maintain qualifying IOLTA accounts that paid interest to the Foundation. Because the Foundation administered the IOLTA program on behalf of the Court of Appeals, the Foundation has reported at least annually on its administration of the program to the Court's Chief Judge or, on occasion at the Chief Judge's request, to its Board of Judges.

The Foundation by all accounts has discharged its duties well. In 2000, the D.C. Bar's Study Committee on the Foundation issued a report stating that "the D.C. Bar Foundation should continue its excellent job of managing the District's Interest on Lawyers Trust Accounts ("IOLTA") program." *Final Report of the D.C. Bar's District of Columbia Bar Foundation Study Committee* (May 1, 2000), p. 31. Since 2000, the Foundation's administration of the IOLTA program has only strengthened. The Foundation also plays a constructive and growing role in the national IOLTA community. The Foundation's Executive Director serves on the Board of the National Association of IOLTA Programs, and was appointed in 2010 to the Joint ABA Commission on IOLTA/NAIP Technical Assistance Committee. And the Foundation's Executive Director is sought out to serve on substantive panels at the twice-yearly workshops on IOLTA programs.

In its role as administrator of the program, the Foundation has, for many years, collected information, fielded questions from members of the Bar and from banks concerning technical requirements of the IOLTA rules, developed programs to reward banks that paid good interest rates on IOLTA accounts, worked with banks, D.C. lawyers and others to troubleshoot issues arising in the IOLTA program, and reconciled information received separately from banks and from lawyers concerning the lawyers' IOLTA accounts. This work is often revenue neutral, but is critically important to helping lawyers remain in compliance with the rules. In short, since 1985, the Foundation has monitored compliance with and administered the IOLTA program.

The Foundation has done its work in close *collaboration* with the Bar. In performance of its functions under the IOLTA program, the Foundation set up an IOLTA committee whose

members include representatives of the Bar's Board of Professional Responsibility, the Bar's Office of Bar Counsel, and Bar staff whose duties intersect with the IOLTA program. The D.C. IOLTA program has been very well run, and there has never been, and there is not now, any reason to place the Foundation's administration of that program under the control of the Bar.

C. Oversight by the D.C. Bar of the Foundation's Administration of a Certification Process is Unnecessary and Ill-Advised

The rule proposed by the Committee seems to rest on the premise that, in administering a certification process as part of an IOLTA program, the Foundation would be engaged in "regulation" — a function within the province of the Bar. In fact, however, the Foundation would not be engaged in regulation at all. It would be engaged in gathering information, and counseling compliance. These are the same functions the Foundation has performed for the Court of Appeals since 1985 when the IOLTA program was created. The information gathered might lead some entity of *the Bar* to engage in regulatory or disciplinary actions. But regulation and discipline are not responsibilities of the Foundation.

1. The Foundation's Functions Under a Certification Process

Under the certification process just agreed to in principle between the Foundation and the Bar, the Foundation will be performing functions similar to those it has performed in the past. The Bar will send e-mails to those Bar members and firms most likely to have D.C. IOLTA obligations, requesting that they certify compliance — and provide bank and account number — with the D.C. IOLTA rules. The members' responses will be sent to the Foundation. Follow-up e-mails will be sent by the Bar to those members who do not respond at all. If there is widespread non-compliance with the certification requirement, Bar counsel or *the Bar* will have to decide whether regulatory or disciplinary action should be taken. The Foundation has no responsibilities for performing either a regulatory or a disciplinary function.

2. The Foundation's Position on the Governance Issue

We submit that, before this Board of Governors proposes that the Court of Appeals adopt a new rule altering the Foundation's pre-existing governance structure and compromising the independence of the Foundation, there should have to be a problem that needs fixing. There is none, here. The proposed radical change in the Foundation's governance structure is unnecessary.

Cooperation, consultation and communication between the Foundation and the Bar concerning any certification process are important. Such cooperation will continue, as it has in the past. However, oversight and approval of the Foundation's implementation of a certification process would be ill-advised. The Foundation's small staff is fully occupied as it is. The Bar's process for Board of Governors' approval will consume both time and resources of the Bar Foundation. The process of resolving the question of what "changes" in the certification process *require* Board approval will itself be time consuming. All of these issues are far better left to a

much more efficient and informal process of collaboration and consultation such as that put in place in the Bar Foundation's IOLTA Committee.

The Foundation should continue in its role as administrator (not regulator) of the IOLTA program — a program concerning which it has developed significantly greater expertise than any other body in the District. Its administration of that program — including any certification process — should not be subject to a cumbersome process of approval by a Bar Board of Governors with little knowledge of the details of IOLTA program administration whenever "new experience" or "new data" suggest changes in the process. And the Foundation should continue to report to the Court of Appeals concerning its administration of IOLTA, just as it has in the past.

We submit on the following page proposed rule language that would codify existing administrative and reporting responsibility, and that will provide for a certification process.[1]

Respectfully submitted on behalf of
the D.C. Bar Foundation's
Board of Directors,

W. Mark Smith
President

[1] In the interest of completeness, we should say that we believe there are errors and omissions in the Report, which are better left for another day if necessary.

Proposed Rule Language

New DC Court of Appeals Rule:

The DC Bar Foundation (Bar Foundation) administers the District of Columbia Court of Appeals' IOLTA program (DC IOLTA program) The Bar Foundation shall report annually to the District of Columbia Court of Appeals on its administration of the DC IOLTA program.

Add to Comments to RPC 1.15:

Lawyers may be requested to periodically certify or report on their compliance with the DC IOLTA program.

EXHIBIT K

BOARD ON PROFESSIONAL RESPONSIBILITY

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Executive Attorney

Nancy C. Crisman
Assistant Executive Attorney

Benjamin M. Lee
Assistant Executive Attorney

April 25, 2011

Ronald S. Flagg, Esquire
President, District of Columbia Bar
1101 K Street, N.W.
Suite 200
Washington, D.C. 20005

Re: Report of the Regulations/Rules/Board Procedures Committee on the Promulgation of a New D.C. Bar R. XIV to Address IOLTA Monitoring

Dear Mr. Flagg:

In response to the report of the D.C. Bar's Regulations/Rules/Board Procedures Committee (the "Committee") proposing a new D.C. Bar Rule XIV to address the monitoring of compliance with IOLTA requirements, the Board on Professional Responsibility and the Office of Bar Counsel submit herewith the following comments.

The Committee has proposed that any monitoring plan developed by the D.C. Bar Foundation "shall be subject to review and approval by the District of Columbia Bar's Board of Governors." Report at 30. We take no position on whether the D.C. Bar has the authority to oversee the Bar Foundation's monitoring or compliance program. We do, however, disagree with the underlying premise offered to support the Bar's proposed oversight function. It is described as follows in the Committee report:

> [T]he Bar has multiple responsibilities to its members. Among these responsibilities, *two core functions that the D.C. Court of Appeals has assigned the Bar are educating members of the D.C. Bar about the requirements of the rules of the D.C. Court of Appeals and regulating the conduct of those members on the rules.*

Id. at 24. (emphasis supplied).

EXHIBIT K

430 E Street, N.W., Suite 138, Washington, DC 20001 ▪ 202-638-4290, FAX 202-638-4704

Under the Rules of the Court of Appeals Governing the Bar, the D.C. Bar's regulatory authority over attorney conduct is limited to the enforcement of compliance with the administrative requirements of Bar membership, through administrative suspension. *See* D.C. Bar R. II, § 2(3). The statement in the Committee report, however, is susceptible to a broader interpretation. It suggests that the D.C. Bar's core functions include "regulating the conduct of [] members on the rules." Report at 24. As such, the statement is inconsistent with D.C. Bar R. XI, which delegates the core function of attorney regulation to the Board on Professional Responsibility, which was established as an independent arm of the Court.

Second, the Committee's report misinterprets the Board's position on IOLTA monitoring, as set forth in the Board's July 30, 2009 comments submitted to the Board of Governors. The report describes the Board as raising a concern "[w]hether the authority of the Bar Foundation to conduct monitoring activities under a *mandatory* program would be different from its authority to monitor a *voluntary* program, and if so, how it should be defined." Report at 6. (emphasis in original). To the contrary, the Board took no position on the Bar Foundation's monitoring authority under either a voluntary or a mandatory program.

In its comments, the Board instead was concerned with the then pending proposal to place language authorizing the Bar Foundation to monitor IOLTA participation in Rule XI. The Board believed that including the provision in Rule XI would create the misperception that the Foundation plays an active role in the disciplinary system. To avoid that result, and in recognition that mandatory IOLTA participation would make the Bar Foundation more prominent, the Board proposed a separate rule to recognize its importance. The Board described the purpose of the proposed rule as follows:

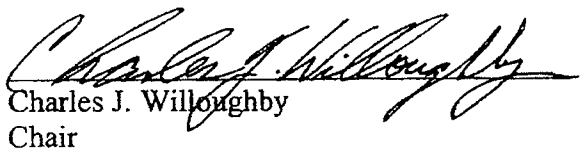
> Our proposed Rule XVI should explain the role of the Foundation and its authority to monitor lawyers' participation in IOLTA. The Board believes that the Rule should describe with some specificity what actions the Foundation is authorized to take and make clear that a lawyer "should" (i.e., is strongly urged to) comply with those reasonable requests.

Board Comments, July 30, 2009 at 4.

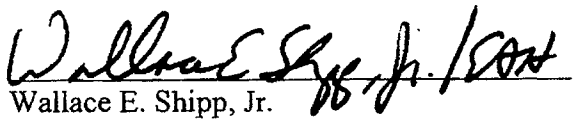
Our understanding is that the Bar Foundation's monitoring of IOLTA compliance has been beneficial to lawyers, and in turn the public, by identifying

potential misconduct and giving lawyers an opportunity to correct it. We thus recommend that in considering the Committee's proposal, the Board of Governors make every effort to avoid any undue impediment to continued monitoring by the Bar Foundation.

Respectfully submitted,



Charles J. Willoughby
Chair
Board on Professional Responsibility



Wallace E. Shipp, Jr.
Bar Counsel

cc: Darrell G. Mottley, Esquire
Katherine A. Mazzaferri, Esquire ✓
Katherine L. Garrett, Esquire

District of Columbia Bar

REGULATIONS/RULES/BOARD PROCEDURES COMMITTEE

REPORT ON IOLTA

FINAL REPORT

June 28, 2011

District of Columbia Bar

Regulations/Rules/Board Procedures Committee

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- Francis D. Carter
- Kathryn A. Ellis
- Ronald C. Jessamy
- Pamela S. Satterfield

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I. INTRODUCTION

At its September 8, 2009, meeting, the District of Columbia Bar Board of Governors ("Board of Governors" or "Board") approved a charge to the Regulations/Rules/Board Procedures Committee [1] ("Regulations/Rules/Board Procedures Committee" or "Committee") to study and make recommendations as to whether and how the D.C. Bar Foundation ("Bar Foundation"), pursuant to the revised D.C. IOLTA[2] rules issued by the D.C. Court of Appeals, would have the authority to monitor participation of D.C. Bar members in the D.C. IOLTA program. The charge to the Committee stated:

District of Columbia Bar Board of Governors
Charge to Regulations/Rules/Board Procedures Committee
IOLTA Monitoring
October 6, 2009

> The Board of Governors directs the Regulations/Rules/Board Procedures Committee to undertake a review of specific proposed provisions to D.C. Rule of Professional Conduct 1.15 and Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar. The proposed provisions would provide notice to Bar members that the D.C. Bar Foundation (an unrelated 501(c) (3) organization) may monitor Bar members' participation in the Interest on Lawyers Trust Accounts (IOLTA) program. Specifically, the Committee will study and make recommendations about the wording and placement of the proposed provisions in the Rules Governing the Bar. The Committee will also study and make recommendations about the scope, parameters and mechanics of the administration of a mandatory IOLTA program as related to the recommendation on where notice on monitoring should be addressed in the Rules.

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[1] This is a standing Committee established by the Board of Governors in July 1999 to review the Bar's Rules, By-laws and procedures, and to propose changes as needed. *See* By-laws at Appendix 1.

[2] "IOLTA" stands for "Interest on Lawyers Trust Accounts." An IOLTA account is a specific kind of client trust account. Under the new D.C. IOLTA rules, a D.C. Bar member lawyer or a law firm possessing client funds that are nominal in amount or are to be held for a short period of time, and that would not likely earn net interest in a separate account (with certain limited exceptions) must deposit these funds in a D.C. IOLTA account, which is a pooled client trust account. Bar members may only deposit IOLTA funds in approved depositories that offer certain interest rates on IOLTA accounts ("rate comparability"). *See* Rules of Professional Conduct 1.15 and Section 20, Rule XI of the Rules Governing the Bar, at Appendix 2.

Given the nature of their practice areas and settings, members who would be unlikely to need to establish an IOLTA account include government lawyers, academics, and in-house counsel.

The interest generated by IOLTA accounts is forwarded by financial institutions to the D.C. Bar Foundation, which uses the funds to support civil legal services providers in the District.

The Committee will consult with interested parties, including the D.C. Bar Foundation, the Board on Professional Responsibility, the Office of Bar Counsel, and any other parties it deems appropriate.

The Board requests that the Committee submit its report and any recommendations as soon as practicable.[3]

II. BACKGROUND AND HISTORY

A. Amendments to the Rules Governing IOLTA

On March 22, 2010, the D.C. Court of Appeals issued amendments to the Rules Governing Interest on Lawyers Trust Accounts (IOLTA).[4] The amendments took effect on August 1, 2010.[5] The essence of the revisions to the IOLTA rules was to change the then-existing mandatory, opt-out IOLTA program to a mandatory program with exceptions related to multijurisdictional practice or the contrary mandates of a tribunal. These amendments grew out of a process that began in November 2007.

At that time, after its own 14-month study process, the D.C. Bar Foundation proposed to the Bar that the IOLTA rules be revised with the primary purpose of increasing interest revenue derived from D.C. IOLTA accounts. The Bar Foundation's proposed revisions included: (1) making participation in the D.C. IOLTA program mandatory, rather than a mandatory, opt-out program, and (2) requiring that a banking institution seeking to qualify as an "Approved Depository"—an institution where lawyers

[3] Relevant portions of minutes of the Board's September 8, 2009, meeting are attached as Appendix 3.

[4] Order No. M-235-09 (D.C. Ct.App.Mar.22, 2010), D.C. Bar, Bar News, *D.C. Court of Appeals Adopts Amendments to IOLTA Rules*, July 6, 2010. S*ee* Appendix 5.

http://www.dcbar.org/inside_the_bar/bar_news/shell.cfm?filename=iolta_amended**.**

[5] Beginning in March 2010, the Bar has conducted an extensive ongoing IOLTA rules education campaign for Bar members. Activities have included the publication to Bar members of a letter about the new IOLTA rules from Chief Judge Eric T. Washington of the D.C. Court of Appeals; the publication of articles about the new IOLTA rules and the new rules on the Bar's website and in several editions of *E-Brief* and *Washington Lawyer*; CLE course offerings; education through *Basic Training* sessions and the Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice; and education through one-on-one consultations with Bar members by Bar staff.

are allowed to open and maintain client trust accounts—must provide certain interest rates on IOLTA accounts ("rate comparability").

At the request of the D.C. Bar Board of Governors, the Bar's Rules of Professional Conduct Review Committee ("Rules Review Committee") then conducted an 18-month study and analysis of the Bar Foundation's proposal.

On September 8, 2009, after consideration of recommendations for amendments from the Rules Review Committee and the Bar Foundation, the Board of Governors approved a proposal to be submitted to the Court of Appeals. On September 16, 2009, the Board of Governors submitted the proposal to the Court of Appeals.[6]

The Court's action of March 22, 2010 adopted the Board's recommendations.[7]

B. D.C. Bar Foundation's IOLTA Monitoring and Certification Proposals

On September 8, 2009, the Board also voted to reserve the transmittal to the Court of Appeals of any proposed amendments about an ancillary issue -- the monitoring of D.C. lawyers' participation in the D.C. IOLTA program -- pending the outcome of further study by the Bar's Regulations/Rules/Board Procedures Committee.

The Bar Foundation's 2007 proposal to the Bar had recommended an additional amendment to the D.C. Rules of Professional Conduct pursuant to which lawyers would be required to advise the D.C. Bar Foundation of the opening and closing of D.C. IOLTA accounts and also to report, and periodically certify, to the Bar their compliance with, or exemption from, the IOLTA requirements. This recommendation was based on the Bar Foundation's belief that gathering and tracking information about Bar members' IOLTA

[6] *See* Appendix 4.

[7] *See* Appendix 5.

accounts would help to increase the Bar Foundation's income from such accounts. Noncompliance with the reporting and certification requirements would be treated as a disciplinary violation.

The Rules Review Committee was not asked by the Bar to consider the specific "form and manner" of a certification requirement, so it did not analyze that part of the Bar Foundation's proposal and did not take a position on, nor make a recommendation about, any part of the Bar Foundation's proposal or its recommendation that noncompliance with a certification requirement would be a disciplinary violation.

Because the Rules Review Committee did not offer an opinion or recommendation about the validity of the Bar Foundation's certification proposal, the Rules Review Committee's report simply included the Bar Foundation's proposal that lawyers certify and report IOLTA account information to the Bar Foundation, with non-compliance being treated as a disciplinary violation. The proposal was to include these requirements as an amendment to Rule 1.15.

The Rules Review Committee's proposed recommendations were published on February 5, 2009.[8] The Bar conducted a public comment period from February 10 to March 27, which was extended to April 6, 2009.

In their written comments of April 6, 2009,[9] the Board on Professional Responsibility (BPR) and the Office of Bar Counsel (OBC) stated that noncompliance with a certification requirement should not subject a member to disciplinary suspension because a member's failure to comply does not directly implicate the public interest, and

[8] *See* Appendix 6: *The Rules of Professional Conduct Review Committee Report and Recommendations on the D.C. Rules Governing IOLTA, Draft for Public Comment*, February 5, 2009.

[9] *See* Appendix 7, BPR comments on IOLTA, dated April 6, 2009.

enforcing such a requirement would divert resources from prosecuting serious disciplinary cases. Instead, they recommended that enforcement of the IOLTA provisions be through administrative suspension. The BPR and the OBC concurred with the Rules Review Committee's other IOLTA recommendations.

Bar headquarters staff performed considered analysis of certification and provided it to the Board of Governors in a June 8, 2009, memorandum.[10] The memorandum concluded that certification would be administratively burdensome and costly with no assurances that it would produce enough additional revenue for the Bar Foundation to offset the costs of administering such a program. Also, Bar headquarters staff took the position that noncompliance should not result in either disciplinary, or administrative, suspension for Bar members.

At the June 9, 2009, Board meeting, the Bar Foundation withdrew its proposal for disciplinary enforcement of a certification and reporting requirement.[11] As a result, the Board did not consider the proposal. Instead, the Bar Foundation proposed a provision in a comment to Rule 1.15 and proposed Section 20(h) of Rule XI of the D.C. Court of Appeals Rules Governing the Bar that would provide notice to Bar members that the Bar Foundation may monitor members' participation in the D.C. IOLTA program.[12]

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[10] *See* Appendix 8, staff memorandum to BOG, dated June 8, 2009.

[11] *See* Appendix 9.

[12] In the interim between the June and July 2009 Board meetings, Bar headquarters staff developed a proposed monitoring concept, detailed in the attached "IOLTA Random Monitoring Concept" memorandum of July 2009, which included potential methods by which the Bar Foundation might conduct monitoring. However, the Bar Foundation did not provide feedback about the proposed concept and it was not submitted to the Board for its consideration. The document is found at Appendix 22.

At its July 21, 2009, meeting,[13] the Board approved, in principle, provisions that would provide notice to Bar members that the Bar Foundation may monitor Bar members' participation in the IOLTA program. At the meeting, because of concerns about disciplinary implications, the BPR asked for the opportunity to review and comment on any monitoring proposals. Together, representatives of the Bar and the Bar Foundation drafted proposed language on monitoring to reside in Rule 1.15 as Comment [4] and Rule XI Section 20(h).[14]

On July 30, 2009, the BPR provided comments to the Bar that raised several issues:[15]

1. Whether the monitoring provisions are necessary given that the Bar Foundation currently conducts monitoring activities;[16]

2. Whether placement of the authority of the Bar Foundation to conduct monitoring activities in Rule XI would suggest that the Bar Foundation plays a role in the disciplinary process; and

[13] *See* relevant portions of the minutes of the July 21, 2009, meeting of the Board of Governors at Appendix 10.

[14] *See* proposed "IOLTA Monitoring Provisions" at Appendix 13.

[15] *See* BPR Comments, July 30, 2009, at Appendix 12.

[16] Under the previous, mandatory, opt-out D.C. IOLTA program, the Bar Foundation would informally contact a lawyer or law firm, as needed, about the lawyer's or law firm's IOLTA participation for the purpose of reconciling the records of IOLTA remittance and statements received by the Bar Foundation from financial institutions. These activities and the authority to conduct them by the Bar Foundation were not set out in the former D.C. IOLTA rules. However, this Committee concluded that the authority of the Bar Foundation to conduct such quasi-monitoring activities under the mandatory, opt-out IOLTA program was implied based on the description of the functions of the Bar Foundation in administering the IOLTA program that were included in former Appendix B – "Interest on Lawyers Trust Accounts Program"—of the D.C. Court of Appeals Rules Governing the Bar. Under the new IOLTA rules, Appendix B has been deleted in its entirety. Relevant portions of Appendix B have been moved to Rule of Professional Conduct 1.15 and new Section 20 of Rule XI of the Rules Governing the D.C. Bar. *See also* section III B of this report, *infra*.

3. Whether the authority of the Bar Foundation to conduct monitoring activities under a *mandatory* program would be different from its authority to monitor a mandatory, *opt-out* program, and if so, how it should be defined.

The BPR recommended the creation of a new and separate D.C. Bar Rule to address the role of the Bar Foundation in the IOLTA program.

At its September 8, 2009, meeting, the Board of Governors reconsidered the proposed monitoring provisions.[17] Because of the issues raised in the BPR comments, and further questions by the Board, the Board voted to reserve the proposed monitoring language for further study. In its transmittal of materials to the D.C. Court of Appeals, the Board notified the Court that it would direct the Bar's Regulations/Rules/Board Procedures Committee to study the implications of the issues raised by the BPR and, based on the results of that study, would forward recommendations on IOLTA monitoring to the Court at a later time.[18] As described above, the Board voted to approve recommending the rest of the proposed IOLTA revisions, which were forwarded to the Court on September 16, 2009.[19]

The D.C. Court of Appeals conducted a public comment period from November 19, 2009, until January 4, 2010, which was extended to January 19, 2010, on the Bar's proposed amendments to the IOLTA rules. As noted above, on March 22, 2010, the Court adopted amendments to the IOLTA rules and these became effective August 1, 2010.

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[17] *See* memo to the Board of Governors at Appendix 11.

[18] *See* Appendix 4.

[19] *See* Appendix 4.

In October 2009, the Regulations/Rules/Board Procedures Committee began meeting to review and discuss the issues related to the amendments and the concept of the Bar Foundation monitoring attorney compliance with the IOLTA rules.

III. SUMMARY OF INFORMATION GATHERED BY THE COMMITTEE

A. D.C. Bar Foundation

In the course of its inquiry, the Committee received briefings from D.C. Bar Foundation Executive Director Katherine L. Garrett, and President W. Mark Smith. The Bar Foundation reported that the interest rate comparability provisions in the amendments are designed to enhance revenues from IOLTA accounts. Ms. Garrett stated that it would take at least one year after a mandatory rule took effect to be able to measure the results in the District of Columbia.

Ms. Garrett characterized the Bar Foundation's current procedures to monitor the mandatory, opt-out IOLTA program as largely a reconciliation effort. For example, the Bar Foundation currently receives information from a lawyer, a law firm or a financial institution when a Bar member establishes, or changes, an IOLTA account. This includes the financial institution at which the account(s) is maintained, and in the case of a law firm, which lawyers are covered by that account.

In its efforts to reconcile IOLTA revenue reports received from financial institutions, and to identify and rectify errors by financial institutions, the Bar Foundation may then contact a lawyer, a law firm or the financial institution. Ms. Garrett described, for example, that the Bar Foundation might receive a report from a financial institution that it had no IOLTA funds to provide to the Bar Foundation. However, if the Bar Foundation knew that in a prior year, a particular attorney or law firm had an IOLTA

account at that institution, the Bar Foundation would call the attorney or law firm to see whether the account had been closed; if not, the Bar Foundation could contact the financial institution to point out the inaccuracy of the information previously provided and to ask for further investigation and correction of the information, as well as the forwarding of the IOLTA funds as required.

However, as Ms. Garrett pointed out, the Bar Foundation does not know whether it has accurate information on all established IOLTA accounts. It also does not know how many lawyers should open and maintain IOLTA accounts, but, in fact, do not. The Bar Foundation's position was that its revenues could also be increased by making sure the Bar Foundation had accurate information on every IOLTA account, by obtaining the balance of each account and the rate of return in order to determine the revenue which should be provided, and by ensuring that every attorney required to have an IOLTA account did, in fact, have one. Ms. Garrett stated her belief that certification (as described in greater detail below) was the appropriate way for the Bar Foundation to obtain such information.

Mr. Smith stated his belief that compliance would be improved by some sort of compliance reporting and/or certification requirement. He also stated that currently, some jurisdictions have administrative or disciplinary sanctions for the failure to certify IOLTA compliance.[20] During the discussion, it was noted that because of the recent economic downturn, many more lawyers appear to be establishing solo practices and, as a result, one would expect that many more individual IOLTA accounts are being opened. However, it

[20] Research conducted by Bar staff indicated that sanctions in other jurisdictions appear to be applied inconsistently, rarely, or not at all.

was unclear whether this was, in fact, the case and/or whether the Bar Foundation's current database would track this occurrence.

At this meeting, the Bar Foundation representatives described certification as an annual process whereby all bar members would state whether they hold IOLTA-eligible funds and, if so, whether they are in compliance with the rules governing IOLTA. Certification was characterized as the industry "best practice" and the Bar Foundation representatives said that requiring certification would bring the administration of the District's IOLTA program closer to what other jurisdictions do. The Bar Foundation did not propose that disciplinary sanctions be imposed for a failure to comply with a certification process.

Mr. Smith also stated concerns about the concept of monitoring as opposed to certification. His view was that, to say that the Bar Foundation would "monitor" compliance implies that the Bar Foundation would "police" compliance and the Bar Foundation does not want to be in that position.

Ms. Garrett did not believe that the Bar Foundation should bear any part of the expense of collecting data in the certification process. Rather, she stated that the Bar, at its expense, should collect IOLTA account information on or with the Bar's dues statements and provide that information to the Bar Foundation. The Bar Foundation would then input the information into its database at its own expense, which she did not think would be significant. Ms. Garrett also stated that she did not think that there could or should be rules to govern the Bar Foundation in this process because it is not part of the Bar. She asserted that neither the Board of Governors nor the Regulations/Rules/Board

Procedures Committee can regulate the Bar Foundation or oversee its functions because it is an independent 501(c) (3).

The Bar Foundation representatives agreed that it is very important to educate lawyers about the IOLTA rules and about the consequences of the change from a mandatory, opt-out IOLTA program to a mandatory IOLTA program

B. Office of Bar Counsel and Board on Professional Responsibility

The Committee met with Bar Counsel Gene Shipp (OBC) and Board on Professional Responsibility (BPR) Executive Attorney Elizabeth J. Branda. Both Mr. Shipp and Ms. Branda indicated that they wanted any provisions on certification or monitoring to be outside the scope of Rule XI, which is a disciplinary rule.

They agreed that failure to certify should not result in disciplinary investigation or action by the OBC. They said that the OBC would investigate a member only if there were evidence of financial wrongdoing, and they took the position that failure to certify compliance with IOLTA rules should not, in and of itself, be sufficient to warrant an investigation.

Mr. Shipp and Ms. Branda agreed that education of Bar members subject to the new, mandatory IOLTA rules would be the best way to increase participation in the program. They did not know of any members being disciplined in the District of Columbia solely for failure to have a trust account, even though they could be, under the current rules. They acknowledged that determination of administrative consequences for members is not within the OBC's or the BPR's purview.[21] They also stated that they were

[21] If there are problems with a financial institution that has received approved depository status from the BPR, the BPR can withdraw that designation.

not aware of any jurisdiction that disciplines for failure to certify compliance with IOLTA mandates.

C. Bar Foundations: Florida, Texas, and District of Columbia

The Committee expressed an interest in gathering information on "best practices" in states with large mandatory bars, and to find out how bar foundations in those states administer mandatory IOLTA programs. To that end, the Committee invited Florida Bar Foundation Executive Director Jane E. Curran, and Texas Access to Justice Foundation ("ATJ Foundation)[22] Executive Director Betty Balli Torres, to meet with the Committee by telephone conference, with written questions sent to them in advance.[23] At the Committee's invitation, Ms. Garrett also joined this discussion by phone.

1. Florida Interest on Trust Accounts (IOTA) Program[24]

Ms. Curran informed the Committee that the Florida Bar Foundation is a 501(c)(3) public charity governed by the Florida Supreme Court through articles of incorporation of the bar foundation. Mandatory IOTA was implemented in Florida in 1989. In 1990-91, the first full year after implementation of mandatory IOTA, revenues (then including revenues derived from accounts holding real estate funds) increased by 550 percent from $2 million to $19.5 million. From the inception of mandatory IOTA in Florida, certification was required. Ms. Curran stated, however, that certification was and is viewed as an educational tool. The Florida Bar Foundation offers ongoing education, information and assistance to lawyers to ensure their

[22] The ATJ Foundation administers the Texas IOLTA program.

[23] *See* Appendix 14.

[24] "IOTA" stands for the Florida Supreme Court's Interest on Trust Accounts Program.

compliance. Ms. Curran stated that there has never been a disciplinary issue related to IOTA compliance in Florida.

When Florida's IOTA program became mandatory in 1989, each member of the Florida Bar was sent an "IOTA Handbook" -- developed, printed and distributed at the Florida Bar Foundation's expense -- detailing the IOTA program and requirements. IOTA handbooks are still sent upon request along with the two forms that attorneys are required to complete when establishing IOTA accounts: (1) the Notice to Eligible [financial] Institution, signed by the trust account signatories, directing the bank to establish the IOTA account and including information for the eligible institution about remitting and reporting on IOTA accounts and what service charges may be deducted from IOTA account interest; and (2) the Notice to Bar Foundation form signed by the attorney advising the Foundation that an IOTA account has been established and including the name of the holding institution and the attorneys at the law firm using the IOTA account. The Florida Supreme Court's IOTA rule prohibits the Bar Foundation from disclosing information about an IOTA account that it receives as the administrator of IOTA except upon official request of the Florida Bar. The Foundation uses database software to track IOTA accounts and remittance information. For established accounts, and until 1992, a question on the dues statement of the Florida Bar specifically required that the member state whether he or she was in compliance or if he or she was exempt from IOTA. Since that time, the IOTA language has been more general -- asking whether members were in compliance with the trust accounting rules generally. Ms. Curran stated that the Florida Bar Foundation is considering asking the Florida Bar to reinstate specific IOTA certification language on the dues statement. Alternatively, the Florida Bar

Foundation will consider whether or not to send out its own annual statement asking members of the Florida Bar to verify the accuracy of their IOTA account information on file with the Bar Foundation and offering assistance if needed.

2. Texas Interest on Lawyer Trust Accounts (IOLTA) Program

Ms. Torres provided background about the Texas Access to Justice Foundation ("ATJ Foundation"), stating that it was created by the Texas Supreme Court and is a separate, 501(c)(3) public charity. Created in 1984, IOLTA started as a voluntary program and changed to mandatory in 1989. When the program became mandatory, the ATJ Foundation immediately saw a dramatic increase in revenue from $534,000 to $9.3 million, with the bulk of the revenue (not including accounts holding real estate funds) attributed to the Texas plaintiffs' bar. Ms. Torres stated that there can be $1 billion to $1.2 billion in Texas bar members' IOLTA accounts at any given time.

At the beginning of the IOLTA program, Texas bar members were educated about the process through CLE programs, bar journal articles and meetings at large firms. When a member opens or closes an IOLTA account, he or she is required to send in a form to the ATJ Foundation providing the account information. That information stays with the ATJ Foundation.

For more than 20 years, until the 2009-10 bar year, Texas bar members received both a dues statement and a *separate* IOLTA form (a compliance statement). In some years, the separate IOLTA compliance form was sent with the bar dues. In other years, it was sent as a separate mailing. Always, it was sent at the expense of the ATJ Foundation. Always, the members' dues were remitted to the Bar and the separate IOLTA compliance statement, with account information, was returned to the ATJ Foundation.

Beginning in the 2009-10 bar year, due to low interest rates, the cost of the mailings and the intensive staff time and paperwork which had been involved, the separate form was eliminated and compliance language was added to the dues statement itself.[25] A signature is not required either on paper or online.

The savings resulting from this change have meant that more revenues are available for access to justice purposes. IOLTA certification continues to be handled in a similar fashion during the 2010-11 bar year. The ATJ Foundation will evaluate whether to continue this practice once the economy improves, but currently believes this is the most cost efficient way to handle compliance.

3. District of Columbia IOLTA Program

Ms. Garrett clarified that the balances in IOLTA accounts in the District of Columbia are not close to comparable to the larger balances in Texas and Florida IOLTA accounts. She stated that the Bar Foundation has retained a consultant used by other states to assist with the District's transition to mandatory IOLTA. She said that the consultant could assist with evaluating available technology and options for databases; conducting outreach and education to financial institutions including making recommendations on administration of the banking and compliance processes under the Bar Foundation's

[25] Language on the 2009-10 Texas State Bar dues statement states in part:

> This year the dues statement is being used to confirm your compliance with IOLTA….*An IOLTA compliance statement will NOT be mailed to you.* By paying your Bar dues, you certify that you are in compliance with IOLTA and no further action is required. If you are not currently in compliance (or have changes to your IOLTA status), check the box on the remittance coupon below certifying that you will update your IOLTA compliance information at **www.teajjf.org**. Please read the enclosed IOLTA flyer for more information.

(*See* Appendix 16)

According to an official of the State Bar of Texas, the inclusion of IOLTA compliance provisions on the dues statement does not generate additional work for the bar because there is no follow-up (such as monitoring or collecting information on compliance) required by the bar. Attorneys make changes throughout the year to an online system hosted entirely by the ATJ Foundation.

purview; and supporting joint educational efforts to lawyers by the D.C. Bar and the Bar Foundation.

Although members can provide IOLTA information to the Bar Foundation online, the Bar Foundation needs extra staff to administer these processes. Currently, one staff member spends 20-30 percent of his or her time on IOLTA including data entry; another spends 10-15 percent of his or her time on IOLTA issues; and Ms. Garrett spends 25 percent of her time on IOLTA.

D. State Bar Executive Directors: Texas and Florida

After the Committee gathered information from the bar foundations, it obtained information from the bar executives of both the Texas and Florida state bars. Florida Bar Executive Director Jack Harkness and State Bar of Texas Executive Director Michelle Hunter provided information to the Committee. Mr. Harkness joined a meeting by phone and Ms. Hunter submitted written responses to questions which had been provided to both executives in advance.[26]

1. Texas

Ms. Hunter provided background information similar to that which was provided by Ms. Torres. She clarified that, in Texas, the ATJ Foundation and the bar are separate entities with no overlap in functions, resources or board membership. Only the ATJ Foundation receives IOLTA funds and maintains the bank account information on members' IOLTA accounts. The ATJ Foundation is not subsidized by mandatory bar dues.

[26] *See* Appendix 15.

In 2003, however, the Texas legislature added to the State Bar Act a provision requiring the Texas Supreme Court to set a $65 mandatory legal services fee to be paid annually by each non-exempt active member of the state bar. One half of this fee is allocated to civil legal services to the poor and is administered entirely by the ATJ Foundation.

The dues statement also provides the opportunity for lawyers *voluntarily* to contribute to access to justice initiatives in addition to paying the mandatory $65 legal services fee.[27] These funds are distinct from IOLTA funds and historically have been allocated in part to the ATJ Foundation.[28] In 2009, about $620,000 was collected through these voluntary contributions. The State Bar of Texas does not provide direct pro bono assistance. But members who do pro bono work or who are legal aid attorneys may be eligible for legal malpractice insurance, free access to Lexis, scholarships and/or free CLE courses.

2. Florida

Mr. Harkness confirmed that the 30-year old Florida IOTA program previously asked members if they were in compliance on the dues statement.[29] The requirement changed with the 2009-10 statement, where the member was asked if he or she was in compliance with the Florida Bar trust account rules. The 2010-11 statement requires the

[27] *See* Texas dues statement for 2009-10 at Appendix 16. In 2009-10, a suggested $150 contribution was printed on the dues statement as an "opt-out" provision (i.e., a bar member who does not want to make a contribution or wishes to do so in a different amount must delete the printed $150 amount and replace it with a different amount or delete it altogether).

[28] Another entity, the Texas Bar Foundation, also historically receives a portion of these funds. According to information from its website, this charitable organization "solicits charitable contributions and provides funding to enhance the rule of law and the system of justice in Texas, especially for programs that relate to the administration of justice; ethics in the legal profession; legal assistance for the needy; the encouragement of legal research, publications and forums; and the education of the public."

[29] *See* Florida dues statements for 2008-09, 2009-10 and 2010-11 at Appendix 17.

member to certify that he or she has read the trust account rules and is in compliance with these rules. Therefore, and as a practical matter, the process of filling out the form and providing a copy of it to the Bar Foundation only takes place when the account is opened at the bank.

The Florida Bar does not subsidize the bar foundation's work. The bar foundation handles the entire IOTA process and certification. The bar does not maintain any bank information.

The Florida Bar is required to provide lawyer addresses when requested by anyone -- whether the public, the Bar Foundation, or other individuals or groups -- under the state's public records law. This information is provided electronically. Currently, lists are provided. In the near future, however, it will be possible to download members' names and contact information from the website. This would eliminate any request having to be made and free the bar from the task of providing the lists.

Mr. Harkness noted that requiring lawyers to certify their compliance with the rules on the dues statement serves mainly as an educational tool, including education about the IOTA rules. There is no place to sign or certify compliance, either in hard copy or electronically. The wording on the dues statement provides that the member certifies compliance by the act of paying his or her dues.

He also reported that, before the market changed, there was approximately $80 million in IOTA funding. Now there is just about $20 million. Most of the funds held in IOTA accounts are from real estate transactions, with the funds deposited with lawyers before closings.

The banks and the attorneys are very familiar with IOTA because the state has had an IOTA requirement for so long. Florida also has a strong educational program for newly admitted and current members.

E. D.C. Bar Pro Bono Program

The D.C. Bar's Pro Bono Program ("D.C. Bar Pro Bono Program" or "Pro Bono Program") is unique among such programs in bar associations in that, as a result of a member referendum in 1980, no dues money may be used to support it. Therefore, one of the Regulations/Rules/Board Procedures Committee's concerns was the consequences of any changes that might impact the funding of that program and, in particular, the potential effect on the Pro Bono Program of any new information required by or with the dues statement.[30] To explore this issue, the Committee invited D.C. Bar Pro Bono Program Executive Director Maureen T. Syracuse, and the Program's Fundraising Consultant Betsy Crone, to a meeting. Ms. Crone and Ms. Syracuse discussed the anticipated impact on fundraising for the Pro Bono Program if the dues statements sent to Bar members contained an additional requirement that the member certify compliance with IOLTA.

Ms. Syracuse gave background information to the Committee, highlighting that the Pro Bono Program is funded entirely by voluntary contributions, while other state bars' programs are subsidized by bar dues. In the 2009-10 fiscal year ended June 30, 2010, the D.C. Bar Pro Bono Program had a $2 million budget, with one third of that amount coming from contributions made by lawyers when they respond to the check off section of the dues statement.

[30] Indeed, the Bar's sections (whose dues are collected through the Bar's dues statement) are in a similar position. Special care needs to be given to any inadvertent financial impact on their funding.

Ms. Crone explained that anything added to the dues statement that is confusing, or which increases the difficulty in filling out the form, will result in unintended consequences. For example, if the members must hold onto the form in order to verify information about their IOLTA accounts or to investigate whether they have and/or are required to have an IOLTA account, there will be later payment of bar dues and, correspondingly, later or perhaps lower associated Pro Bono Program contributions. An IOLTA insert could further affect the revenues that the Pro Bono Program derives from the dues statement such as by suggesting to members that their responsibilities to support access to justice in the District are met simply by complying with IOLTA requirements or by distracting members from the Pro Bono Program check-off. The Pro Bono Program has seen that contributions from members can drop precipitously due to changing regulatory requirements. For example, Pro Bono Program contributions dropped significantly after the District of Columbia government imposed a licensing fee on active members of the Bar in 1992. Therefore, Ms. Syracuse and Ms. Crone recommended that the dues form remain simple, straightforward and not include anything that would cause the lawyer to set it aside for lack of required information.

F. The Committee's Past Review of Dues Collections

The Committee itself was mindful that a previous charge presented to the Committee by the Bar's Board of Governors focused on the dues collection process. The Committee's recommendations on the dues collection process and the Bar's implementation of those recommendations resulted in changes which have shortened the time frame the average D.C. Bar member takes to pay his or her bar dues, reduced the Bar's expenses in collecting dues and also reduced the number of Bar member

suspensions because of late or nonpayment of bar dues. Accordingly, the Committee members were wary of complicating the dues statements in any way that would undermine the advances made so recently.

G. Education Campaign

The Committee met with Bar staff to learn more about the many initiatives underway to educate members about the changes in IOLTA rules. Staff presented a "Member IOLTA Rules Education Campaign."[31] This included articles published in the *Washington Lawyer*, which is distributed to over 90,000 members of the D.C. Bar; past and upcoming CLE classes; *Basic Training* sessions conducted by the Practice Management Advisory Service; meetings with outside groups; and sections events addressing the topic. Additionally, a lead story about the changes to the IOLTA rules was posted on the Bar's website and sent to the membership electronically by *E-Brief*. D.C. Court of Appeals Chief Judge Eric T. Washington also authored a letter to Bar members about the new IOLTA rules that was sent by *E-Brief* and published in *Washington Lawyer*.

H. Number of Members Affected by New Mandatory IOLTA Rules

The Committee also inquired about the number of D.C. Bar members who are, or should be, holding funds in IOLTA accounts and whose principal place of practice is, or could likely be, the District of Columbia. As of October 2010, the Bar had 57,714 members practicing in the D.C. metropolitan area. These are the members of the D.C. Bar whose principal place of practice is most likely to be in the District of Columbia (although many likely principally practice in Virginia or Maryland).

[31] *See* Appendix 18, containing the initiatives for May, June and July 2010. Similar activities for August, September and October 2010 and future months are contained in monthly reports to the Board of Governors.

Of these D.C. metropolitan area lawyers, approximately 5,000 are solo practitioners and another 23,000 work in law firms. Approximately 15,000 of the 23,000 attorneys working in law firms work for the 100 largest firms in the area and/or are employees of firms that participate in the Bar's firm billing program. These large firms and firms in the firm billing program very likely have administrators who manage the IOLTA requirements for lawyers in their firms.

The approximately 8,000 remaining firm lawyers -- who do not participate in the firm billing program and/or are not included in the 100 largest firms, combined with the 5,000 sole practitioners, total approximately 13,000 lawyers who could be subject to IOLTA participation. Thus, the number of active lawyers who are most likely to have their principal place of business in the District of Columbia, who *may* be holding funds subject to mandatory IOLTA requirements and who themselves administer any such accounts is approximately 13,000, or about 14 percent of the total membership.[32]

IV. EVALUATION OF INFORMATION RECEIVED

Based upon a complete review of: information gathered from the D.C. Bar; the history and current practices on monitoring by the D.C. Bar Foundation; the opinions and recommendations of the Bar Foundation, the OBC and the BPR; information gathered from other states; presentations and statements to the Committee; and other written data

[32] As of October 2010, there were 93,969 members of the D.C. Bar. Of those, the Bar had 57,714 members located in the D.C. metropolitan area, of which 49,513 were active members. Many of these members likely also practice in the Maryland and Virginia suburbs of Washington, D.C. *See* Appendix 19.

In 2010, the Bar's firm billing program had a total of 7,698 lawyers billed through that program.

References: Data kept by the D.C. Bar firm billing program (October 2010); data obtained from the websites of 100 law firms with the largest number of D.C. metropolitan area lawyers (January 2011); and a report prepared by *Legal Times* and *National Law Journal*, which listed the 100 firms with the largest number of lawyers in the D.C. metropolitan area. *See* Appendix 20.

gathered within and outside the Bar, the Regulations/Rules/Board Procedures Committee makes the following findings and recommendations.

A. Predicates for the Committee's Deliberations

The Committee's goals in examining the necessity of a monitoring/certification program were to review the information gathered and make recommendations designed to: (1) identify those segments of the Bar membership most likely to be required to participate in the IOLTA program due to their practice areas and settings; (2) continue to ensure the education of Bar members on the mandatory IOLTA program, including how to comply fully, how to notify the Bar Foundation of their account information, and the importance of such actions so that the Bar Foundation can effectively monitor the accuracy of the funds being provided by financial institutions and thus maximize revenues from IOLTA for the Bar Foundation and its charitable endeavors towards access for justice; (3) ensure that monitoring/certification practices, if any are recommended, are clear, fair, legally defensible, compatible with other D.C. Bar and Court programs (e.g., Pro Bono Program, Bar sections, disciplinary system); (4) avoid anything that would interfere with the timely return of Bar member dues and possibly increase the numbers of administrative suspensions for non-payment; and (5) ensure the orderly development of guidelines for the administration of IOLTA by the Bar Foundation (e.g., use of databases, number and content of mailings).

B. Analysis and Recommendations on Monitoring and/or Certification

The Committee considered a number of very different plans for ensuring participation of affected Bar members in the mandatory IOLTA program. In doing so, it considered the purpose of monitoring/certification and the likelihood of success of such

efforts in increasing participation in the IOLTA program; the possible impact on the disciplinary system, the Pro Bono Program and other affected programs; the Bar's ongoing efforts at notifying and educating Bar members affected by the new IOLTA rules; and procedural and administrative issues (e.g., cost to the Bar and/or the Bar Foundation in sending separate forms with the dues statement, avoidance of slowing down payment of dues, database access, security).

1. Should a monitoring system be included in the IOLTA provisions of the Rules, and if so, where is the proper place to include the provisions?

The Committee examined whether the activities used to monitor the compliance of D.C. Bar members with the new mandatory IOLTA requirements should be included in the Rules and, if so, where they should properly be placed. The Committee agreed that, for the purpose of providing notice to members and so that the Bar Foundation could cite clear authority for monitoring activities, the existence and responsibility for such activities should be specified in the Rules.

Because the Bar Foundation not only administers but is a beneficiary of the D.C. IOLTA program, it has a legitimate interest in maximizing IOLTA revenues to be used for its access to justice initiatives. Accordingly, the Bar Foundation must clearly play a significant role in monitoring the accuracy of IOLTA accounts. At the same time, the Bar has multiple responsibilities to its members. Among these responsibilities, two core functions that the D.C. Court of Appeals has assigned the Bar are educating members of the D.C. Bar about the requirements of the rules of the D.C. Court of Appeals and regulating the conduct of those members on the rules. Accordingly, the Bar also must play a major role in any compliance program.

With these respective roles and responsibilities in mind, the Committee recommends that the Bar Foundation be empowered to develop a formal monitoring plan for review and approval by the Bar's Board of Governors. Additionally, the Committee recommends that the Bar Foundation be required to submit an annual report about its monitoring activities to the Board of Governors.

The Committee considered whether to recommend a Rule that did more than authorize the Foundation to develop a plan for its monitoring of IOLTA accounts, i.e., that would include details of such a plan. There was at least brief discussion of delaying any recommended Rule on monitoring until such details could be included. However, it was agreed that, in fact, the inclusion in the Rules of such details, even if presently available, would be a mistake. After all, if the details were included in the Rule, and circumstances arose which led the Foundation to realize that the monitoring plan needed to change in any way, whether small or significant, the Rule itself would first have to be changed. This would lead to delay and additional burdens on the Foundation that the Committee did not support.

In addition, the Committee believed that the D.C. Court of Appeals would likely prefer not to involve itself in the details of the monitoring plan and/or in the necessity of having to consider multiple, perhaps yearly or even more frequent, requests for changes of the Rule for this purpose. Under the new Rule as recommended, whenever the Foundation has new information, new data, new best practices, or just additional experience in monitoring that suggests to the Foundation that changes in the monitoring are appropriate or needed, the Foundation would need only to submit such changes to the Board of Governors for approval.

On the placement of the monitoring provisions within the Rules of the Court of Appeals, the Committee agreed that the provisions governing IOLTA monitoring activities should be the subject of a new Court rule that would cover the responsibilities of both the Bar Foundation and the Bar. The Committee agreed that it would not be appropriate to include the provisions in Rule XI, which is the rule that governs the lawyer discipline process in the District. The Committee agreed strongly that there should not be a disciplinary component to IOLTA monitoring (as opposed to compliance with the substance of IOLTA and other trust account requirements), a view that is shared by the Bar Foundation, the OBC and the BPR. Therefore, the Committee agreed that monitoring provisions should not be included in the Rules of Professional Conduct because a violation of those Rules could result in disciplinary consequences or could lead to violations of IOLTA monitoring Rules that are routinely unenforced or ignored.

2. Should the IOLTA Rules of the D.C. Court of Appeals require mandatory certification?

As was pointed out in the Committee's deliberations, lawyers in the District of Columbia Bar are not asked to certify that they are competent, that they communicate appropriately with their clients, that they do not steal money from clients, that they maintain their clients' confidences, that they appropriately safeguard client property (whether in a trust account or otherwise) or that they are in compliance in any other way with any Rule related to actually serving their clients' interests.

Given this fact, and for the reasons detailed below, the Committee concluded that certification (the act of signing a statement that says one is in compliance with the IOLTA Rules, or being notified that the act of paying one's dues to the D.C. Bar constitutes

certification that one is in compliance with the IOLTA Rules) should not be required.[33] Rather, lawyers must be educated so that identifying information on IOLTA accounts is provided to the Bar Foundation for established accounts whenever a new account is established, and also at any time an existing account is changed. The Committee also believed that lawyers should not have to provide account information on a yearly or even periodic basis absent strong evidence that the benefits of requiring lawyers to do so in the context of IOLTA would outweigh the costs associated with such a process. However, if the Foundation believed that the regular collection of this information by the Foundation would be cost efficient, it could include that in its monitoring plans.[34]

The Committee carefully considered the IOLTA compliance certification programs implemented in other jurisdictions[35], and other data that it collected, but did not find a consistent practice to emulate. In particular, the Committee considered that other large, mandatory bars require, or have required, their lawyers to certify their compliance with the mandatory IOLTA program. For example, as noted, Texas does this by informing lawyers that payment of their annual dues/license fees indicates their compliance with mandatory IOLTA. As also noted, for many years, Florida mailed a separate form to its members with their dues statements and required them to send the form to the Florida foundation providing information as to their IOTA compliance.

[33] One Committee member disagreed with this conclusion and has filed a separate report to the Board of Governors which is enclosed immediately following this report. That member proposed that certification be accomplished by the insertion of a statement on the annual dues statement that, by paying the annual dues, the member certifies that he or she has (1) read the rules pertaining to mandatory IOLTA; and (2) is in compliance with those rules. *See* Appendix 23 (separate statement of Francis D. Carter). The Committee considered this proposal but decided against it as discussed above.

[34] *See* the proposed Rule recommended by the Committee which would authorize the Bar Foundation to develop a plan for monitoring, in Section V B of this report.

[35] *See* staff memorandum to the Committee, dated October 16, 2009, at Appendix 21.

However, Florida now requires its members to sign a statement of certification that the member is in compliance with all of the rules and IOTA is not specifically mentioned.

Although, in theory, the possibility of disciplinary action exists for a member in these states for failure to certify, in practice, members have not been prosecuted solely for failure to comply with IOLTA certification requirements. Whether they are contained on the dues statements or in separate mailings, certification provisions clearly serve as educational tools and not as a predicate for disciplinary action for failure to certify compliance.

Further, certification was not found to be a practice that was without difficulties and expense. To the Committee's knowledge, no information has been collected to determine if certification results in a higher IOLTA compliance rate or in more money being collected by the entities entitled to the funds generated on such accounts. The lack of consistent certification practices appeared to suggest that certification had developed as an ad-hoc practice instead of an industry-wide "best practice" or standard. Instead, the presentations by the other bars, and the D.C. Bar's own experience with other issues and specifically with this issue,[36] led the Committee to conclude that educational efforts by both bars and foundations have made and will make the difference in lawyer compliance, and that certification essentially is one, but not the only, potential means for education.

The Committee was further persuaded that several other factors militated against a rule mandating a membership-wide certification process for IOLTA compliance, particularly a certification process connected to the dues collection form. The Committee concluded that:

[36] The D.C. Bar's ongoing educational program is outlined in Appendix 18.

a. A mandatory rule requiring *all* members to certify compliance with a rule whose application affects a relatively small number of Bar members could cost more than the benefit to the Bar Foundation of increased IOLTA revenues that might result from such certification. Instead, it is anticipated that the Bar Foundation could more effectively monitor only certain segments of the Bar membership.[37]

b. Neither of the two suggested certifications on the dues statement would provide the kind of information that would be useful for the Bar Foundation's administration of the IOLTA program. The Bar Foundation needs information about who holds IOLTA trust accounts, and at what banks the accounts are kept. The proposed certifications would state only that the member has read the IOLTA rules and is in compliance with them.[38]

c. A certification program linked to the dues collection form would almost certainly slow down the rate of returns of dues, and thus would undermine the Bar's recent actions that have sped up and improved the dues collection process.[39] This is because it could cause uncertainty among members which, in turn, could create delays in dues payments as members seek to understand

[37] *See* the previous discussion about the number of members who likely would be required to keep IOLTA accounts under Section III H and in footnote 32 of this report.

[38] Strict statutory restrictions on the use of financial information would make the collection of more detailed financial information difficult. To comply with the Payment Card Industry Data Security Standards (PCI-DSS), the Bar's policies and procedures require that bank and credit card information be deleted almost immediately. The District of Columbia Code also imposes restrictions on the collection of financial information. *See* Consumer Personal Information Security Breach Notification Act of 2006, D.C. Code §§ 28-3851 to 3853 (2007).

[39] The Committee member who has filed his own report acknowledges that the dues collection process likely would be slowed in the first few years of implementation of the certification requirement; but expressed the belief that, once members understand the requirements of the IOLTA rules, aided by the comprehensive education initiative, the delays would subside. *See* Appendix 23.

what is required in order to make the two certifications. The certification proposal would run counter to the Bar's successful efforts to streamline the dues payment process.[40]

d. It would be very difficult for any certification statement to be concise enough to fit on the Bar's dues statement and yet also be informative enough (1) for all members to understand what is expected of them; and (2) to result in the collection of information that would be useful for verifying compliance by those members who do need to maintain IOLTA accounts.

e. Because the D.C. Bar cannot use Bar dues to pay for its Pro Bono Program, any delays in returning the dues form, which also includes a check-off for voluntary contributions to the Pro Bono Program, could have the unintended consequences of correspondingly later or lower Pro Bono contributions. Similar unintended consequences could also impact the Bar's sections, because members pay sections dues via the Bar's dues form.

f. Also, and not insignificantly, because the Bar is already well into its campaign to educate lawyers about the mandatory rules, the timing of instituting certification would likely confuse Bar members and require the Bar to launch a new education process not about IOLTA accounts, but about the certification process itself.

Given the information presented, the Committee's majority does not believe that the D.C. Court of Appeals Rules should mandate a certification program.

[40] The dues payment process overhaul was the subject of a report and recommendations by this Committee which were adopted by the Board of Governors on June 10, 2008.

3. What monitoring language should be adopted?

The Committee recommends the following language for new D.C. Court of Appeals Rule XIV of the Rules Governing the Bar:[41]

> The D.C. Bar Foundation (Bar Foundation) administers the D.C. IOLTA program and uses the funds obtained thereby to fund legal services for the underprivileged. Consistent with its fundamental function of maximizing and collecting the interest revenue generated by D.C. IOLTA accounts, the Bar Foundation may periodically monitor a lawyer's or law firm's participation in the D.C. IOLTA program. A lawyer or law firm is expected to make a good faith effort to respond to a monitoring inquiry from the Bar Foundation.
>
> If the Bar Foundation decides to monitor lawyers' or law firms' participation in the D.C. IOLTA program, it shall develop a plan for the form and manner of such monitoring (the "Plan"). The Plan, and any subsequent changes recommended thereto, shall be subject to review and approval by the District of Columbia Bar's Board of Governors. Further, the Bar Foundation shall, at least once annually, submit a report about its monitoring activities to the D.C. Bar Board of Governors.

4. Should D.C. Bar resources be used to support the monitoring process?

As described in Appendix 18, the D.C. Bar has undertaken and continues to undertake substantial efforts to educate its members about the mandatory IOLTA rules. Prior to the development of a specific monitoring plan, it is impossible to identify the scope and nature of the costs of any such Plan. With that caveat, the Committee offers the following observations about the Bar's responsibilities for paying for the monitoring process.

The D.C. Bar does not today provide financial support to the D.C. Bar Foundation, nor is it permitted to do so.[42] In the Committee's view, requiring the D.C. Bar Foundation

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[41] The current Rules XIV and following would be renumbered so that the new Rule XIV governing IOLTA could be placed in logical substantive order in the Rules.

[42] Certification of IOLTA compliance is included on the dues statements by both the Florida Bar and the State Bar of Texas. According to officials at the two bars, there is no cost to either bar because neither bar collects any information on IOLTA from the dues statement. The bar members in those states are required to provide the requested information *directly to* the foundation. The D.C. Bar is prohibited by membership referenda that limit the use of mandatory dues. As a result, data collected in a D.C. Bar dues statement would require the D.C. Bar to bill the D.C. Bar Foundation for its time in collecting, recording and disseminating the IOLTA data to the foundation (mostly staff time).

to bear the cost of monitoring compliance with the IOLTA rules in order to maximize the funds the Bar Foundation receives from IOLTA accounts is no different than requiring the D.C. Bar Pro Bono Program, or any other charity, to pay the costs of its fundraising.

Finally, the Rule change recommended by the Committee directs the Bar Foundation, if it decides to monitor lawyers' or law firms' participation in the D.C. IOLTA program, to develop a monitoring plan, subject to the review and approval by the District of Columbia Bar's Board of Governors. Any subsequent changes to the plan would also be subject to approval by the Board of Governors. In developing such a plan, the Foundation will be in a position to weigh the costs it would bear against the potential revenue gains associated with any such plan.

V. CONCLUSIONS

The Committee deliberated over the course of many meetings. Each Committee member had the opportunity to review the meeting summaries and materials distributed for each meeting. Discussions ensued about the need for IOLTA enforcement, and, if appropriate, what the nature and scope of the enforcement would be. Questions about the proper role of the Bar and the Bar Foundation in IOLTA education and enforcement were considered. After comprehensive discussion, research and review, the Committee makes the following recommendations:

A. As set forth above, if the Bar Foundation decides to monitor lawyers' or law firms' participation in the D.C. IOLTA program, it shall develop a monitoring plan and present it to the Board of Governors for the Board's review and approval. Any subsequent changes to the plan would also be subject to approval by the Board of Governors.

B. Monitoring language should be inserted into a new Rule XIV as follows:

> The D.C. Bar Foundation (Bar Foundation) administers the D.C. IOLTA program and uses the funds obtained thereby to fund legal services for the underprivileged. Consistent with its fundamental function of maximizing and collecting the interest revenue generated by D.C. IOLTA accounts, the Bar Foundation may periodically monitor a lawyer's or law firm's participation in the D.C. IOLTA program. A lawyer or law firm is expected to make a good faith effort to respond to a monitoring inquiry from the Bar Foundation.
>
> If the Bar Foundation decides to monitor lawyers' and law firms' participation in the D.C. IOLTA program, it shall develop a plan for the form and manner of such monitoring (the "Plan"). The Plan, and any subsequent changes recommended thereto, shall be subject to review and approval by the District of Columbia Bar's Board of Governors. Further, the Bar Foundation shall, at least once annually, submit a report about its monitoring activities to the D.C. Bar Board of Governors.

C. The Bar Foundation should bear the costs of administering any monitoring plan. In developing such a plan, the Foundation will be in a position to weigh the costs it could bear against any potential revenue gains associated with a proposed plan.

D. The D.C. Bar should publicize to its members any monitoring plan by the Bar Foundation that the Bar's Board of Governors approves.

E. The educational process is the best way to inform members of their obligations under mandatory IOLTA. The Bar and the Bar Foundation should jointly engage in an ongoing educational campaign to provide information and guidance to those members holding IOLTA-eligible funds for compliance with the new IOLTA rules. This effort should be reviewed on a periodic basis to ensure that all avenues of education are explored. The Bar implemented such a campaign several months before the publication of this report.[43] Continuing to provide a link to IOLTA provisions in the Rules, on both the Bar's website and the Bar Foundation's website, would also be of benefit.

[43] *See* Appendix 18.

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APPENDIX

1

[1 page]

DISTRICT OF COLUMBIA BAR
BY-LAWS

ARTICLE VI
COMMITTEES

Section 1
There shall be such standing or special committees as shall be determined by the Board of Governors. The President shall be an ex officio member with full voting rights on all committees.

Section 2
(a) There shall be the following standing committees of the Bar which shall be chosen as provided for herein: Attorney/Client Arbitration Board, Audit, Budget, Community Economic Development Pro Bono Project Advisory, Compensation, Continuing Legal Education, Executive, Finance, Governance Integration Advisory, Judicial Evaluation, Lawyer Assistance, Leadership Development, Legal Ethics, Membership, Pension, Practice Management Service, Pro Bono, Publications, Regulations/Rules/Board Procedures, Rules of Professional Conduct Review, and Screening. All other committees shall be designated special committees of the Bar, and shall be automatically terminated two years after their creation unless the Board votes to renew their mandate for additional periods not to exceed one year at a time. The date of creation of a special committee is the date when the Board appoints a majority of its members, unless another date is designated by the Board. Except as provided below, all committees of the Bar shall be appointed by the President with the approval of the Board of Governors. In connection with the creation of any special committee, the sections of the Bar, through their elected representatives, shall be consulted and provision made for their representation on such committees. Except as provided in the preceding sentence, nothing herein applies to the creation or composition of steering committees thereof, which shall be governed by the guidelines promulgated by the Board of Governors with respect to the operation of the sections.
[Amended June 15, 2010] [Emphasis added]

. . . .

REGULATIONS/RULES/BOARD PROCEDURES: The Committee shall consist of five active members of the Bar, appointed by the President with the approval of the Board, for staggered two-year terms, with no person to serve more than three consecutive terms.
[Approved by the Board on July 20, 1999]

APPENDIX

2

[9 pages]

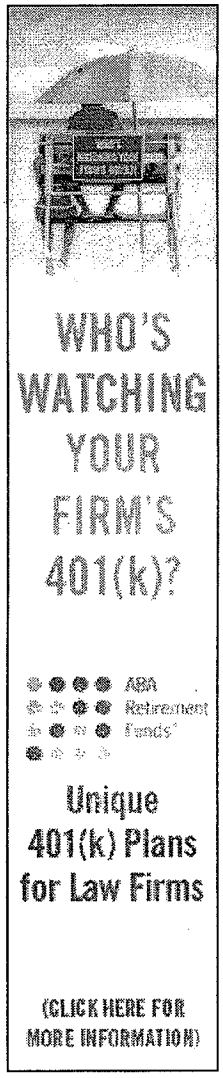
Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).



(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, see D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has

exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted pro hac vice, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[6] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. See D.C. Bar Legal Ethics Committee Opinion 293.

[8] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an

engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16 (d). For the definition of "informed consent," see Rule 1.0(e).

[9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, see Rule 3.4(a).

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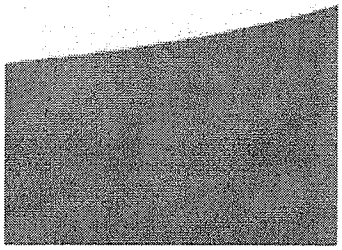

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Rule XI. Disciplinary Proceedings

Section 20. Approved Depositories for Lawyers' Trust Accounts and District of Columbia Interest on Lawyers' Trust Accounts Program

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to

offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR-approved depositories.

(b) Reports to Bar Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:
(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The

institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(i) All interest and dividends transmitted to the Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.
(j) Definitions. As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.
(2) "Foundation" means the District of Columbia Bar Foundation, Inc.
(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-¬market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.
(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.
(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn

income for the client or third party in excess of the costs incurred to secure such income.
(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.
(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

APPENDIX

3

[4 pages]

District of Columbia
Board of Governors Meeting[1]
September 8, 2009

President Kim M. Keenan called the meeting to order at 3:30 p.m. The members of the Board of Governors present at the meeting were: Ronald S. Flagg, Kim M. Keenan, and Benjamin F. Wilson. Johnine P. Barnes, Amy L. Bess, Paulette E. Chapman, Judith M. Conti, Sabine S. Curto, Meredith Fuchs, Ankur J. Goel, Ellen M. Jakovic, Rebecca M. McNeil, Barry C. Mills, Laura A. Possessky, Lena Robins, James W. Rubin, Javier G. Salinas, and R. Justin Smith participated by telephone.

Bar headquarters staff members who attended were: Katherine A. Mazzaferri, Cynthia D. Hill, Joseph P. Stangl, Maureen Thornton Syracuse, Dominick Alcid, Carla J. Freudenburg, Mark Herzog, Cynthia G. Kuhn, Karen Savransky, Hope C. Todd, and Tim Wells. Others in attendance were: Gene Shipp, Office of Bar Counsel; Theodore Hirt, Communications Committee; Elizabeth Branda, Board on Professional Responsibility; W. Mark Smith, D.C. Bar Foundation; Stephen J. Pollak, D.C. Bar Foundation; and Katherine L. Garrett, D.C. Bar Foundation.

IOLTA Monitoring
(Added to the Agenda)

Mark Smith, President, D.C. Bar Foundation, Stephen J. Pollak, immediate past President of the D.C. Bar Foundation, Katherine L. Garrett, Executive Director of the D.C. Bar Foundation, and Elizabeth J. Branda, Executive Attorney of the Board on Professional Responsibility (BPR) joined the meeting.

[1] IOLTA discussion only; all other portions of the minutes are redacted.

Ms. Keenan presented proposed language about "the licensed and principally practices" approach to an exception from the D.C. IOLTA program for members with multi-jurisdictional practices. The proposed exception had been approved in principle by the Board at its July 21, 2009, meeting.

> **ACTION ITEM**: A motion was made to recommend the adoption of language in a new Comment 4 to Rule of Professional Conduct 1.15 that would provide guidance when a lawyer must make a good faith determination of the jurisdiction in which the lawyer principally practices in order to determine whether he or she falls within the exception of the D.C. IOLTA program, located as an attachment to the September 4, 2009, memorandum to the Board from Kim M. Keenan and Ronald S. Flagg. The motion was seconded. The motion passed without objection.

Mr. Flagg described the proposed IOLTA monitoring provisions in a proposed comment to Rule 1.15 and in Section 20 of D.C. Court of Appeals Rule XI. As proposed in the September 4, 2009, Memorandum from Ms. Keenan and Mr. Flagg to the Board of Governors, Mr. Flagg recommended that the Board of Governors transmit its recommended revisions to the IOLTA rules that would (1) make participation in the IOLTA program mandatory for D.C. Bar members; (2) require that banks that wish to qualify as "Approved Depositories" provide interest rate comparability on IOLTA accounts; and (3) house the provisions on interest rate comparability and other provisions about approved depositories in a new section of Rule XI to the D.C. Court of Appeals, but that it reserve the transmittal of proposed amendments about the monitoring of D.C. lawyers' participation in the IOLTA program pending further consideration by the Bar's Regulations/Rules/Board Procedures Committee.

He commented that the existing rules make clear that the Foundation has a significant role in administering the IOLTA program, and that those provisions are

reflected in proposed Comment 3 Rule 1.15 and in the proposed new Section 20 of Rule XI. The purpose of reserving transmittal of proposals about monitoring is so that deliberations about monitoring would not delay the Court's consideration of the substantive provisions.

Mr. Smith recommended that the proposed IOLTA monitoring provisions be transmitted to the Court of Appeals for consideration because they would be subject to the Court's notice and comment procedures.

Ms. Branda discussed the concerns of the BPR that were detailed in the BPR's written comments to the Board of July 30, 2009, about the role and authority of the D.C. Bar Foundation. Inclusion of the monitoring provision in Section 20 of Rule XI of the Rules Governing the District of Columbia Bar could be perceived as imposing on a lawyer the obligation to report to the. Bar Foundation, and that the failure to report to the Bar Foundation could be determined to be a disciplinary infraction. The BPR proposed that provisions related to IOLTA monitoring and the Bar Foundation should be included in a new Court rule governing the Bar, similar to those that exist for the BPR, the Clients' Security Fund, and the mandatory fee arbitration service of the Attorney/Client Arbitration Board (ACAB). Ms. Branda also indicated that the BPR recommends that the entire package of proposed IOLTA revisions, including the proposed monitoring provisions, be transmitted to the Court at the same time. The BPR would then communicate its concerns, comments and recommendations about the monitoring provisions to the Court.

Ms. Chapman made a motion to transmit the proposed mandatory IOLTA and interest rate comparability provisions to the Court, and to reserve the proposed IOLTA

monitoring provisions for clarification, as recommended in the September 4, 2009, Memorandum from Ms. Keenan and Mr. Flagg to the Board of Governors, so that it can be considered by the Rules/Regulations/Board Procedures Committee. The Board discussed the implications of a two-step transmission of the IOLTA recommendations to the Court. Ms. Garrett indicated that the Bar Foundation would support having proposed revisions sent to the Court without Section 20(h)**.**

> **ACTION ITEM**: A motion was made to transmit the proposed mandatory IOLTA and interest rate comparability provisions to the Court and to reserve the proposed IOLTA monitoring provisions for clarification and study and seconded. The motion passed without objection. Ms. Jakovic and Ms. Possessky abstained.

The proposed IOLTA monitoring provisions will be sent to the Rules/Regulations/Board Procedures Committee. Ms. Mazzaferri indicated that this action was recommended because the BPR's recommendation for a new Court rule requires consideration and study by the Rules/Regulations/Board Procedures Committee. Ms. Garrett asked whether there could be an expedited consideration of the proposal to create a new Court rule. She also requested that the BPR, the OBC and the Bar Foundation be involved from the outset in discussions of the Rules/Regulations/Board Procedure Committee to facilitate resolution of the issue.

APPENDIX

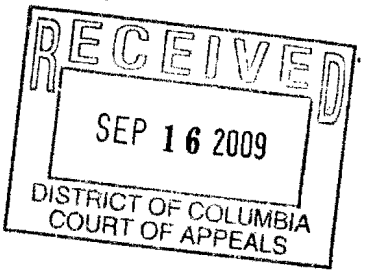
4

[42 pages]

DC BAR

DISTRICT OF COLUMBIA BAR

September 16, 2009



The Honorable Eric T. Washington
Chief Judge
District of Columbia Court of Appeals
Historic Courthouse
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Washington, D.C. 20001

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Re: Transmittal of Proposed Revisions to the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA)

Dear Chief Judge Washington:

On behalf of the District of Columbia Bar, I am pleased to transmit to you for the Court's consideration, proposed amendments to the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA).[1] The proposed amendments to Rule of Professional Conduct 1.15 and a new Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar seek to increase IOLTA interest revenue and provide greater clarity to the trust account ethics rules. In sum, the revisions would make participation in the IOLTA program mandatory for D.C. Bar members; require that banks that wish to qualify as "Approved Depositories" provide interest rate comparability on IOLTA accounts; and house the provisions on interest rate comparability and other provisions about approved depositories in a new section of Rule XI.

The proposed amendments result from a review by the District of Columbia Bar Rules of Professional Conduct Review Committee ("Rules Review Committee")[2] of proposed revisions to the IOLTA rules that were submitted to the Bar by the D.C. Bar Foundation ("Bar Foundation").[3] On September 8, 2009, the Board of Governors approved the proposed amendments discussed above.

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[1] In this letter, "IOLTA Rules" refers to three rules: Rules of Professional Conduct 1.15 and 1.19 and Appendix B of Rule X of the Court Rules Governing the Bar. Currently, a Bar member who receives client money or the money of a third person must consider all three of the rules to be fully compliant with the ethical mandates of this jurisdiction.

[2] The Rules Review Committee is the standing committee of the D.C. Bar charged with the ongoing review of the D.C. Rules of Professional Conduct.

[3] The Bar Foundation submitted its proposed revisions to the Bar on November 6, 2007, after its own 14-month study process.

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On September 8, the Board also voted to reserve the transmittal of proposed amendments about an ancillary issue -- the monitoring of D.C. lawyers' participation in the DC IOLTA program -- pending the outcome of further study by the Bar's Regulations/Rules/Board Procedures Committee.[4]

After 18 months of study and analysis by the Rules Review Committee, a public comment period on the proposed IOLTA revisions by the Rules Review Committee, and numerous meetings with representatives of the Rules Review Committee and the Bar Foundation, the Rules Review Committee and the Bar Foundation came to a consensus on the majority of the proposed amendments. However, the Committee and the Foundation ultimately differed in their approach to one aspect of the proposed rules -- an exception to the IOLTA requirements for Bar members who are multi-state practitioners and may face conflicting or inconsistent trust account requirements in other jurisdictions.[5]

This letter summarizes the proposed amendments to the IOLTA rules and the work of the Rules Review Committee and the Bar Foundation. Details about the background and history of the existing trust account and IOLTA rules in the District of Columbia and the work of the Rules Review Committee and the Bar Foundation are provided in the Bar staff memorandum of July 9, 2009, attached as Appendix I.[6]

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[4] Discussion about the IOLTA monitoring proposal and the Bar Foundation's predecessor proposal of reporting and certification by D.C. lawyers begins on page 9.

[5] The Committee's proposed rule revisions would exempt a member from the D.C. IOLTA program if the member is otherwise compliant with the contrary mandates of a tribunal; or when the member is fully participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the member is licensed and principally practices -- the "licensed and principally practices" approach.

The Bar Foundation's proposed rule revisions would exempt a member from the D.C. IOLTA program only when a lawyer is otherwise compliant with the contrary mandates of a tribunal or the jurisdiction in which the lawyer is licensed and principally practices. If a member obtained the client funds as a result of the member's "out-of-state license," the member would not be subject to the D.C. IOLTA program for those particular funds – the "on your D.C. Bar license/contrary mandates" approach. Additional details and analysis about the two approaches are provided in the Bar staff memorandum of July 9, 2009, attached as Appendix I.

[6] Additional background materials include the February 5, 2009, Report and Recommendations on the D.C. Rules Governing IOLTA by the Rules Review Committee, which includes the Bar Foundation's November 2007 proposal to the Bar; comments received during a public comment period in response to the February 5, 2009, proposed revisions; a June 4, 2009, memorandum from the Rules Review Committee to the Board of Governors that includes a summary of the comments received and certain changes made to the proposed amendments by the Committee in light of the comments; a June 8, 2009, Bar staff memorandum to the Board about the Bar Foundation's initial proposal of an IOLTA certification and reporting requirement by Bar members; and July 30, 2009,

The Proposed Revisions

In 1985, the D.C. Court of Appeals established rules to allow a lawyer or law firm to hold client funds that are nominal in amount, or are to be held for a short period of time, in a single pooled client trust account, commonly known as an IOLTA account. The interest produced by such an account, which would amount to a small sum for each individual client, is distributed to the Bar Foundation, which in turn distributes a predominant amount of the interest revenue collected to legal services providers to help address the unmet legal needs of residents and families in the District. Under the current rules, a lawyer may "opt out" of placing IOLTA eligible funds into a D.C. IOLTA account if the lawyer otherwise properly holds the funds separately from the lawyer's own property. To "opt out" of the D.C. IOLTA requirements, the lawyer must make a one-time filing with the Court. A detailed history of the development of the D.C. IOLTA rules is provided in Appendix I.

However, since 1985, many jurisdictions have adopted changes to rules governing lawyers and IOLTA accounts that have significantly increased the interest revenue available to legal services providers in those jurisdictions.[7] Accordingly, the purpose of the proposed revisions submitted by the Bar is to increase revenue from D.C. IOLTA accounts and to increase the interest paid by banks on funds held in D.C. IOLTA accounts (a practice known as rate comparability). The proposed revisions would effect these changes by:

• Changing the current D.C. IOLTA program from one in which D.C. Bar members may "opt out" of participating to one which is mandatory for all D.C. Bar members. An exception to the mandatory IOLTA proposal is provided when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices. These changes are effected by proposed revisions to Rule of Professional Conduct 1.15 and its comments.

(n. 6 cont.) written comments from the Board on Professional Responsibility about the Bar Foundation's proposal of monitoring DC IOLTA accounts. Although these background materials are not included in this submission to the Court, we are happy to provide these materials to the Court upon request.

[7] At least 40 jurisdictions now have a comprehensive/mandatory IOLTA program, and at least 23 states have adopted some form of interest rate comparability for IOLTA accounts.

• Requiring that banks that wish to qualify as "Approved Depositories" -- institutions where lawyers are allowed to open and maintain client trust accounts -- agree to provide certain interest rates on IOLTA accounts.[8] This change is effected by the creation of a new Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar. Other requirements for banking institutions with IOLTA accounts would also be moved to Section 20 of Rule XI.

Another proposed revision includes:

• The deletion in their entirety of existing Rule of Professional Conduct Rule 1.19 and Appendix B, with appropriate provisions from those rules relocated in Rule 1.15 and new Section 20 of Rule XI. Because these provisions address the jurisdictional authority of the Board of Professional Responsibility (BPR) and the Office of Bar Counsel (OBC) as to the financial institutions that elect to be approved depositories for the District of Columbia Bar, it is appropriate to house these provisions in Rule XI – the disciplinary rule.[9]

A redlined version of the proposed amendments is attached as Appendix II; a clean version is attached as Appendix III. New proposed Section 20 of Rule XI is attached as Appendix IV.

Multi-State Practitioner Exception and Other Concerns

From the outset, the Rules Review Committee supported amendments to the D.C. IOLTA rules that were consistent with the Bar Foundation's goals of increasing IOLTA interest revenue. However, the Committee was concerned that the Foundation's proposed rules could present serious conflict issues for multi-state practitioners because of conflicting or inconsistent trust account requirements in other jurisdictions. The Bar Foundation's proposed rules did not provide a safe harbor for a lawyer facing conflicting jurisdictional obligations.

The Committee was also concerned that the language and placement of the existing trust account rules, including the IOLTA Rules, were confusing. A final

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[8] The D.C. Board on Professional Responsibility approves banks as "Approved Depositories" for D.C. IOLTA accounts.

[9] Section 20 of Rule XI includes the authority of the BPR to approve depositories where D.C. lawyers deposit client funds, reporting obligations of the depositories to the BPR, the Office of Bar Counsel and the Bar Foundation, the proposed "interest rate comparability" rule and the role of the Bar Foundation in administering the IOLTA program. Depending on the outcome of further study by the Bar's Rules/Regulations/Board Procedures Committee, the Bar may subsequently propose that these provisions be housed in a newly created, separate court rule. See infra p. 11.

concern was that the Bar Foundation's proposed broad reach of a mandatory IOLTA rule, superimposed on existing Rule 1.19(b), was likely to increase both administrative burdens and the risk for trust account errors (a serious ethical violation). The Committee believed that the increased burden and risk were likely to fall disproportionately on solo and small firm lawyers who principally practice outside of the District, by requiring such lawyers who might only have a few District matters to open and maintain separate trust accounts in addition to existing operating and home state trust accounts.

The Committee noted the unique posture of the D.C. Bar as to multi-jurisdictional lawyers[10] and the substantial cross-border practice with our sister jurisdictions, Virginia and Maryland. The D.C. Bar has over 68,000 active members; nearly 49,000 of these members practice in the metropolitan Washington, D.C. area, which includes the District and parts of Virginia and Maryland. Of those members, a significant number may not maintain a District office, yet represent District clients. Likewise, there are District lawyers who maintain offices only in the District, but who are also licensed and practice in Virginia and/or Maryland.

Because the Committee did not want to subject District lawyers to mandatory rules that conflicted with mandatory rules of other jurisdictions, absent an appropriate guideline and safe harbor to reconcile conflicting obligations, the Committee proposed an IOLTA rule to which all D.C. Bar members would be subject but that also would provide a means for reconciling conflicting mandatory rules. The Rules Review Committee and the Bar Foundation worked together to develop a rule that would address the primary concerns of both groups. Ultimately, the Rules Review Committee produced a report and recommendations, including a multi-state practitioner exception, that were supported by the Bar Foundation. The proposed recommendations were published in the Rules Review Committee report of February 5, 2009.

Public Comments

The Bar sought comments on the proposed revisions from D.C. Bar members and community leaders during a public comment period from February 10 to April 6, 2009. Copies of the draft report were also made available to members and staff of the Board on Professional Responsibility and the Office of

[10] For example, a lawyer with licenses to practice in at least one other jurisdiction in addition to the District of Columbia. Many of the members of the District of Columbia Bar are admitted to practice in at least one other jurisdiction.

Bar Counsel. Twenty-two comments were received from individuals and organizations. The comments were made available to the Bar Foundation.

Maryland and Virginia

As described in more detail in Appendix I, the Bar received written comments from bar associations and other organizations from its sister jurisdictions of Maryland and Virginia.[11] Maryland expressed concern that the proposed "multi-jurisdictional exception" would have a negative impact on Maryland's IOLTA revenue. Virginia's concerns seemed to arise from confusion in interpreting the proposed language of the exception.

The Rules Review Committee took seriously the concerns expressed by Virginia and Maryland and revised its multi-jurisdictional practitioner exception. The revised exception would exempt a member from the D.C. IOLTA rules when the member is otherwise compliant with the contrary mandates of a tribunal; or when the member is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the member is licensed and principally practices – the "licensed and principally practices" approach. Although the Committee recognized that under its revised proposal, there likely will be some IOLTA revenue generated from District clients or District transactions that is deposited in another jurisdiction's IOLTA account, the amount of that revenue is unquantifiable, and the Committee believed that its approach was clearer and more straightforward than the approach initially recommended by the Bar Foundation (and rejected by the Rules Review Committee) in its November 2007 proposal.

The Bar Foundation did not concur with the Committee's revised exception. The Bar Foundation believed that the amended proposal created an overly broad exemption for Bar members who are licensed and principally practice in another jurisdiction. The Bar Foundation's proposed exception would exempt a member from the D.C. IOLTA rules only when a member is otherwise compliant with the contrary mandates of a tribunal or the jurisdiction in which the lawyer is licensed and principally practices. If a member obtained the client funds as a result of the member's "out-of-state license," the member would not be subject to the D.C. IOLTA program for those particular funds – the "on your D.C. Bar license/contrary mandates" approach.

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[11] The Maryland State Bar Association, the Bar Association of Montgomery County, and the Maryland Legal Services Corporation each submitted a comment. The Legal Services Corporation of Virginia and the Virginia State Bar submitted a joint comment.

Board Meetings of June 9, July 21, 2009, and September 8, 2009

On June 9, 2009, the Rules Review Committee's Chair and Vice-Chair, Eric Hirschhorn and Daniel Schumack, presented the Committee's final recommendations of June 4, 2009, to the Board of Governors. The final recommendations included the Committee's revised multi-jurisdictional practitioner exception that was drafted in response to the comments received from Maryland and Virginia. The Bar Foundation's then-President, Stephen Pollak, and Executive Director, Katherine Garrett, presented proposed revisions to the Rules Review Committee's final recommendation.

On July 21, 2009, the Board considered three IOLTA proposals. Each proposal recommended that participation in the D.C. IOLTA program become mandatory for all D.C. Bar members and interest rate comparability provisions be required for all D.C. approved financial depositories, but differed in its approach to creating an exception for members who are multi-state practitioners and who may face conflicting or inconsistent trust account requirements in other jurisdictions. The three approaches were:

1) No specific exception in the proposed revised rules or comments; [12]
2) A "licensed and principally practices" IOLTA exception for Bar members; and
3) An "on your license/contrary mandates" IOLTA exception for Bar members.

In addition to the Chair and Vice-Chair of the Rules Review Committee and the then-President and Executive Director of the Bar Foundation, the Bar Counsel and the Executive Attorney of the Board on Professional Responsibility were invited to attend and comment on the proposals before the Board. Briefings were also made by Bar staff, including the Assistant Executive Director, Programs; the Director, Regulation Counsel; the Assistant Director for Legal Ethics, Regulation Counsel; and the Manager, Practice Management Advisory Service (PMAS).[13] The Board of Governors found all of the comments helpful in

[12] Because the Bar Foundation had informally indicated that it would support its initial proposals in its November 2007 report, the Board included those proposals for consideration at the July 21, 2009, meeting.

[13] The PMAS manager advises Bar members on the business and management aspects of the practice of law, provides on-site office consultations for Bar members, and conducts intensive training sessions for Bar members about how to run a solo practice.

the Board's deliberations, in particular, those of the PMAS Manager who works with many solo and small firm lawyers. The PMAS Manager noted that many experienced lawyers have misconceptions about IOLTA in particular and trust accounts in general. His experience in working with solos, who often have no staff, and can sometimes make inadvertent mistakes by neglecting administrative and management matters that lead to disciplinary consequences, have led him to conclude that any IOLTA rules that are adopted should be clear and easy to follow.

The Board was mindful that a number of constituencies would be affected by the Board's decision on the proposed IOLTA revisions: members of the D.C. Bar who would be subject to the IOLTA rules; the clients of D.C. lawyers whose money and property the ethics rules protect; the legal services community of the District (who would be the beneficiaries of any increased revenue that results from changes in the IOLTA rules); and other jurisdictions, particularly Virginia and Maryland (and their respective legal communities.).

The Board considered the following questions to keep the various constituencies in mind when considering the proposals:

(1) Does the language of the proposed rule and its requirements provide sufficient clarity to Bar members to help them comply with the rule and to help them avoid an inadvertent violation of the rule (thus avoiding interaction with the disciplinary system)?

(2) Would the proposed rule subject client money to increased risk, which undermines the fundamental purpose of the safekeeping of property ethics rules?

(3) Would the language of the proposed rule potentially cause Maryland and Virginia to adopt new IOLTA rules to counter the District's IOLTA rules? The Bar recognizes that its decisions – particularly proposed changes to the ethics rules -- are in part subject to external reactions and the cooperation of other jurisdictions in the clear application of the rules in practice.

(4) Will the proposed rule benefit the Bar Foundation and the District's legal service providers by increasing IOLTA participation, interest revenue, and/or available interest rates?

After thorough discussion by the Board and the invited representatives at the July 21 Board meeting, the Board of Governors decisively approved the proposal that included the "licensed and principally practices" approach to an exception from the D.C. IOLTA program for members with multijurisdictional practices.

On September 8, 2009, the Board of Governors once again considered the IOLTA issues. Invited representatives from the Bar Foundation and the OBC and

the BPR also attended the September 8 meeting. At the meeting, the Board approved specific language in the proposed amendments. The specific language, in a new Comment [4] to Rule 1.15(b), is intended to provide guidance when a lawyer must make a good faith determination of the jurisdiction in which the lawyer principally practices in order to determine whether he or she falls within the exception of the D.C. IOLTA program.

The Bar Foundation's IOLTA Certification and Monitoring Proposals

On September 8, the Board also voted to reserve the transmittal of proposed amendments about an ancillary issue – the monitoring of D.C. lawyers' participation in the DC IOLTA program -- pending the outcome of further study by the Bar's Regulations/Rules/Board Procedures Committee. Although the Bar is not forwarding a monitoring proposal to the Court at this time, we are providing a brief background about the evolution of the IOLTA monitoring proposal and the IOLTA certification proposal that preceded it.

The Bar Foundation's IOLTA Certification Proposal

The Bar Foundation's 2007 proposal to the Bar included an amendment to the Rules in which lawyers would be required to advise the Bar Foundation of the opening and closing of D.C. IOLTA accounts, and report and periodically certify to the Bar Foundation compliance with, or exemption from, the IOLTA requirements.[14] Non-compliance with the certification requirement would have been treated as a disciplinary violation. The Rules Review Committee's February 5, 2009, proposed revisions left untouched this proposal of the Bar Foundation[15]

In their written comments the BPR and the OBC stated that non-compliance with a certification requirement should not subject a member to disciplinary suspension because a member's failure to do so does not directly implicate the public interest.[16] Additionally, they commented that enforcing a certification requirement would divert the resources of the Office of Bar Counsel from prosecuting serious and contested disciplinary cases. Instead, they

[14] The Bar Foundation believed that gathering and tracking information about Bar members' IOLTA accounts would help to increase its interest revenue.

[15] Because the Committee was not asked to consider the specific "form and manner" of this requirement, it did not analyze this part of the Foundation's proposal and did not take a position on it.

[16] The BPR and the OBC concurred with the Committee's other IOLTA recommendations.

recommended that enforcement of the IOLTA provisions be through administrative suspensions.

Considered analysis of certification was performed by Bar headquarters staff. Ultimately, it was concluded that certification would be unduly administratively burdensome and expensive, with no assurance that imposing such a requirement would produce more revenue for the Foundation or, if more revenue, enough additional revenue to offset the costs of administering a certification program. In addition, the Bar staff concurred with the views expressed by the BPR and the OBC in their written comments that non-compliance with a certification requirement should not be subject to disciplinary suspension. Contrary to the alternative suggested by the BPR and OBC, however, Bar headquarters staff also took the position that non-compliance with a certification requirement should not result in administrative suspension, i.e., the loss of one's license to practice law, under D.C. Bar Rule II or any other Bar rule. Because the certification proposal was withdrawn as described below, however, it appears that this issue is moot.[17]

Monitoring of Bar Members' IOLTA Accounts by the Bar Foundation

At the June 9, 2009, Board of Governors meeting, the Bar Foundation withdrew its proposal for disciplinary enforcement of a certification and reporting requirement. As a result, the Board did not consider this proposal. Instead, the Foundation proposed a provision in a comment to Rule 1.15 and Section 20(h) of Rule XI that would provide notice to Bar members that the Bar Foundation may monitor members' participation in the D.C. IOLTA program. On July 21, the Board approved in principle provisions that would provide notice to Bar members that the Bar Foundation may monitor Bar members' participation in the IOLTA program. At the meeting, Elizabeth Branda, Executive Attorney of the BPR, asked that the BPR have the opportunity to review and comment on any monitoring proposals, because of concerns about disciplinary implications.

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[17] Typically, the non-disciplinary parts of the Bar have had responsibility for handling matters where non-disciplinary enforcement is appropriate.

Although the BPR recommended administrative suspension for non-compliance with a certification requirement, the BPR did not consider the option of no suspension because that question was not before it when it reviewed the Rules Review Committee's report.

BPR Comments of July 30, 2009, on Proposed Provisions for Monitoring IOLTA Accounts by the Bar Foundation

On July 30, the BPR submitted written comments about the proposed monitoring provisions. In its comments, the BPR raised several questions and concerns: (1) Whether the monitoring provisions are necessary given that the Bar Foundation currently conducts monitoring activities; (2) If the proposed provisions are intended to increase the authority of the Bar Foundation, the additional activities that would be authorized need to be identified; and (3) Whether placement of the authority of the Bar Foundation to conduct monitoring activities in Rule XI would suggest that the Bar Foundation plays a role in the disciplinary process. The BPR recommended the creation of a separate new D.C. Bar Rule to address the role of the Bar Foundation in the IOLTA program.

At its September 8 meeting, the Board of Governors reconsidered the proposed monitoring provisions. After thorough discussion by the Board and invited representatives, the Board voted to reserve the proposed monitoring language for clarification. The Board will direct the Bar's Regulations/Rules/Board Procedures Committee to study the implications of the issues raised by BPR and, based on the results of that study, will forward recommendations on IOLTA monitoring to the Court at a later time.

To make a recommendation, the Board will be seeking clarity on what a monitoring plan would entail and what would be its implications for members in a mandatory IOLTA program as compared to the current voluntary program. Other relevant issues such as the applicability of the Bar's policies on membership records and IT policies and procedures will also need to be addressed.

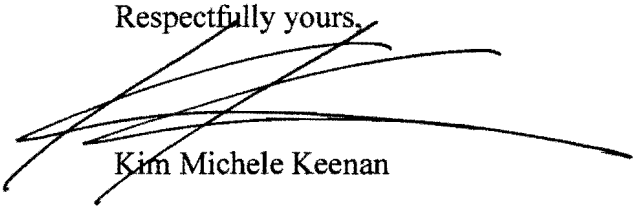
The Bar respectfully asks that the Court consider the attached proposed IOLTA rules. Because monitoring of IOLTA accounts by the Bar Foundation is not anticipated to begin until at least the third year after implementation of the revised IOLTA rules, and is ancillary to the proposed revisions on mandatory IOLTA and IOLTA interest rate comparability, the Bar believes that the Court should not delay adopting provisions that would authorize the implementation of mandatory IOLTA, which would greatly assist the important work of the Bar Foundation. Indeed, assuming that the Court changes the IOLTA rules, the immediate focus for implementation would be on education. The Bar plans to work with the Bar Foundation to conduct an intensive member education campaign to provide notice to Bar members about the new IOLTA rules and how to comply with them.

Timing of Implementation of IOLTA Rules

The Bar also respectfully asks that the Court delay the effective date of the changes to the IOLTA rules, if any, for at least four months after the date of the Court's adoption of the rules. The delay will allow the Bar to begin the process of notifying members about the rules changes; implement a member education program similar to the one conducted in 2006-07 in response to the substantial changes to the Rules of Professional Conduct; and work with the Bar Foundation in educating area banks about the rules changes. Because the Bar has found it helpful for the education of our members, the Bar also respectfully asks that the Court publish any rules changes in a red-lined version, in addition to a clean version.

Please let me know if you or other members of the Court have any questions or require anything further. I can be reached at (202) 380-6200 or by e-mail at keenankim80@gmail.com.

Respectfully yours,



Kim Michele Keenan

Enclosures

cc: Board of Governors
W. Mark Smith, Esq., President, D.C. Bar Foundation
Katherine L. Garrett, Esq., Executive Director, D.C. Bar Foundation
Members, Rules of Professional Conduct Review Committee
Charles J. Willoughby, Esq.
Katherine A. Mazzaferri, Esq.
Cynthia D. Hill, Esq.
Carla J. Freudenburg, Esq.
Hope C. Todd, Esq.

APPENDIX I

MEMORANDUM

TO: Board of Governors

FROM: Hope C. Todd
Assistant Director for Legal Ethics

RE: History of the Existing D.C. Trust Account and IOLTA Rules
And Context for the Proposed Amendments

Date: July 9, 2009

I. Introduction

Today, a D.C. Bar member who receives client money or the money of a third person must consider and understand THREE separate Rules to be fully compliant with the ethical mandates of this jurisdiction:

1) D.C. Rule of Professional Conduct 1.15;
2) D.C. Rule of Professional Conduct 1.19; and
3) Appendix B (Rule X of the Court Rules Governing the Bar).[1]

This memorandum provides a history of the development of these rules. It also provides a framework to understand how the Rules of Professional Conduct Review Committee ("Rules Review Committee") and the D.C. Bar Foundation have developed and arrived at their respective proposed amendments to the Rules Governing the Interest on Lawyer Trust Accounts (IOLTA). The history and framework provide a context in which to understand how the different proposed amendments to the IOLTA rules may affect some Bar members.

Although some provisions of the rules discussed below govern lawyer behavior related to other property (not money), disputed property, and other conduct, this memo focuses only on the provisions of the relevant rules related to maintaining Trust Accounts and IOLTA Accounts, a particular type of Trust Account.

II. History of D.C. Rule 1.15 – Safekeeping Property - and Appendix B – Interest on Lawyers' Trust Accounts Program

From the early 1970s to 1985 the only ethics rule pertaining to client funds existed under the D.C. Code of Professional Responsibility. DR 9-103(a) (the predecessor to D.C. Rule 1.15) provided in pertinent part that:

[1] Rule X is the Rules of Professional Conduct.

"All funds of a client paid to the lawyer ....shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer...shall be deposited therein."

This rule served both to protect the client's money and to avoid the appearance of impropriety.[2]

In 1985, the District of Columbia Court of Appeals adopted Appendix B to *allow a lawyer or law firm to hold client funds that are nominal in amount, or are to be held for a short period of time*, in a single pooled client trust account, commonly known as an IOLTA account ("Interest on Lawyers Trust Account"). The interest revenue produced by such an account, which would amount to a small sum for each individual client, would be distributed to the D.C. Bar Foundation, which in turn distributes a predominant amount of the interest revenue collected to legal services providers serving low income individuals in the District of Columbia. Simultaneously, the Court added paragraph (c) to DR 9-103 that provided that nothing in DR 9-103 would preclude a lawyer from holding client funds consistent with Appendix B and the IOLTA Program.

Appendix B allows a lawyer to "opt out" of placing IOLTA eligible funds into a D.C. IOLTA account if the lawyer otherwise properly holds the funds separately from the lawyer's own property. To "opt out" of the D.C. IOLTA requirements, the lawyer must make a one-time filing with the District of Columbia Court of Appeals.[3]

Effective January 1991, the Court of Appeals replaced the D.C. Code of Professional Responsibility with the D.C. Rules of Professional Conduct. D.C. Rule 1.15 replaced DR 9-103 and became the rule governing the safekeeping of client property.[4] Specifically, D.C. Rule 1.15(e) continued to track the language of former D.C. Code DR 9-103(c), which permitted lawyers to hold eligible funds in IOLTA accounts pursuant to Appendix B.

However, although DR 9-103(a) (cited above), and the ABA Model Rule 1.15 provided that "funds should be kept in a separate account maintained in the state *where the lawyer's office is situated...* ", the Jordan Committee did not recommend this language in 1.15(a). Instead, "the [Jordan] Committee modified paragraph (a) to require that client

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[2] *See* E.C. 9-5. At that time, the ABA Model Code contained a requirement that any client account be labeled as "Client's Funds Account" or "Trust Funds Account" or similar words, but the requirement did not exist in the D.C. rule.

[3] Although Appendix B appears to allow a lawyer to opt out of the IOLTA program only in the month of March, the Rules Review Committee understands that since the adoption of the IOLTA program in 1985, there has been no systematic retention of filings of attorneys "opting out" of the IOLTA program.

[4] The ABA adopted the ABA Model Rules replacing the ABA Model Code in 1982. Shortly thereafter, the D.C. Bar began an intensive review of the D.C. Code and comparison to the ABA Model Rules and ultimately, through a committee chaired by Robert Jordan, recommended to the D.C. Bar Board of Governors adoption of the D.C. Rules. The Rules were in fact adopted by the Court of Appeals to be effective in January 1991.

funds be kept in financial institutions which are authorized to do business in the District of Columbia and which are members of the FDIC, the FSLIC, or successor agencies." There was no overt public policy reason for the Jordan Committee's divergence from the ABA's Model Rule; rather, the only reason for this particular change was a drafting decision to make the language of D.C. Rule 1.15 consistent with the existing language of Appendix B.

This different approach is relevant to the debate because as explained in more detail below, the initial suggestion of the Rules Review Committee in resolving potential multi-jurisdictional conflicts in trust account rules was to recommend that the Bar Foundation's proposed mandatory IOLTA rule be limited to those lawyers with offices located in the District of Columbia. Such a construction is consistent with the general trust rules that have existed and continue to exist in the ABA Model Rule, which many other jurisdictions, including Virginia, have adopted.

With the exception of amendments to Rule 1.15(d) in 1998 dealing with how a lawyer may treat advances in unearned fees and expenses, the requirements of D.C. Rule 1.15 have remained essentially the same since 1991.

III. History of Rule 1.19 – Trust Account Overdraft Notification

D.C. Rule 1.19 is unique to the District of Columbia and has no counterpart in the ABA Model Rules. It was added to the D.C. Rules of Professional Conduct in April 1992 based on recommendations of the Board of Governors and the Board on Professional Responsibility.[5]

Unless a specific exception applies, Rules 1.19(a) and (b) require that all trust funds[6] be placed in an account maintained only in banking institutions approved by the Board on Professional Responsibility ("D.C. Bar Approved Depositories").[7] Such institutions have agreed to report promptly any overdraft notifications on attorney trust accounts to the Office of Bar Counsel, and to respond promptly to any subpoenas from the Office of Bar Counsel seeking such account records.[8] Additionally, 1.19(a) provides for specific labeling of Trust accounts and Rule 1.19(c) through 1.19(f) sets forth the obligations of banks that agree to become approved depositories.

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[5] It was adopted as Rule 1.17 and later renumbered to be Rule 1.19, effective Feb 1, 2007.

[6] Generally, this includes all fee advances (unless the client otherwise gives informed consent pursuant to Rule 1.15[d]), settlement proceeds, and any other funds belonging to a client or to a third party.

[7] Opening a Trust account in a branch office of an approved depository in another jurisdiction is perfectly acceptable under the Rules.

[8] See Rules 1.19(b) and (c).

A. Rule 1.19 and Members who Practice Outside of the District

The most interesting and potentially confusing aspect of Rule 1.19 resides in Rule 1.19(b). Rule 1.19(b) provides direction to lawyers who "practice outside the District of Columbia." The existing Rule operates similarly to a long-arm statute in that it states that if a lawyer is a member of the D.C. Bar and practices law outside the District of Columbia, "D.C. Bar Approved Depositories" shall be used for deposits of trust funds that are related to the District of Columbia under any of these three categories:

1) Trust funds received by the lawyer in the District of Columbia;
2) Trust funds received by the lawyer from, or for the benefit of, parties or persons located in the District of Columbia; and/or
3) Trust funds received by the lawyer that arise from transactions negotiated or consummated in the District of Columbia.

One area of confusion is the intersection of Rule 1.19(b) with Appendix B. Simply put, if a D.C. lawyer has opted out of the D.C. IOLTA program, Rule 1.19(b) operates independently from Appendix B. If a D.C. lawyer has NOT opted out of the D.C. IOLTA program, the two rules must be read and analyzed together.

A. WHEN AN OUT OF STATE D.C. LAWYER HAS OPTED OUT OF THE D.C. IOLTA PROGRAM

When a D.C. lawyer who practices outside of the District of Columbia[9] and has opted out of the D.C. IOLTA program receives D.C.-related money (as defined by Rule 1.19(b)), the lawyer may place those funds in ***any*** out of state trust account ***as long as*** that account is maintained in a branch office of a D.C. Approved Depository.[10]

For example, a D.C. lawyer who practices in Virginia and who has opted out of the D.C. IOLTA program is permitted to hold D.C.-related money in a Virginia trust account -- which is not required to be an IOLTA account -- in a Virginia branch office of Bank of America (because this bank is a D.C. approved depository).

Anecdotally, this is how many smaller firm/solo lawyers who principally practice in Maryland and Virginia operate today. These lawyers place trust funds that are related to D.C. clients or D.C. transactions in their home state's Trust Account (many of which are Maryland or Virginia IOLTA accounts). Again, these accounts must all be in branch offices of D.C. Approved Depositories (e.g., Bank of America, Wachovia, SunTrust, PNC). There are, of course, also multi-state lawyers who maintain two or more IOLTA

[9] The Rule applies to any lawyer who "is a member of the D.C. Bar and practices law outside of the District of Columbia." Thus, on its face, the rule applies to all D.C. multi-jurisdictional members regardless of where they principally practice.

[10] A complete list of D.C. Approved Depositories can be found at http://www.dcbar.org/for_lawyers/ethics/discipline/board_on_professional_responsibility/banks.cfm

accounts and place D.C. client money in the D.C. IOLTA account, and the Maryland and Virginia client money in the Maryland and Virginia IOLTA accounts, respectively.

B. WHEN AN OUT OF STATE D.C. LAWYER PARTICIPATES IN THE D.C. IOLTA PROGRAM

When an out-of-state D.C. lawyer has NOT opted out of the D.C. IOLTA Program, all money that is nominal in amount or to be held for a short duration of time AND is subject to 1.19(b) must be held in a D.C. IOLTA Account at an approved D.C. Bar Approved depository.

For example, a D.C. lawyer who practices in Virginia and who has **not** opted out of the D.C. IOLTA program must hold D.C.-related money in a D.C. IOLTA account. The IOLTA account could, however, be located in a Virginia branch office of Bank of America (because this bank is a D.C. approved depository).

The Bar Foundation's initial proposal of November 2007 would have made this latter example the rule for all IOLTA eligible client funds that are subject to Rule 1.19(b).

IV. 2007 Amendments to the Rules of Professional Conduct

On August 1, 2006, the Court of Appeals amended the D.C. Rules effective February 1, 2007. These amendments were largely based on the work and recommendations of the D.C. Bar's Rules Review Committee. The Rules Review Committee focused its review of the rules on the changes to the ABA Model Rules as recommended by the ABA Ethics 2000 Commission and the ABA Corporate Responsibility Task Force.

Because the ABA did not significantly amend Model Rule 1.15, and because there is no counterpart in the ABA Model Rules to D.C. Rule 1.19 or Appendix B, the Rules Review Committee did not revisit the structure, language or content of Rules 1.15, 1.19, or Appendix B. [11]

V. The Bar Foundation Study Committee

In November 2007, after a 14 month study process, the Bar Foundation proposed revisions to the existing D.C. Rules Governing IOLTA with the primary purpose of increasing interest revenue derived from D.C. IOLTA accounts. The Bar Foundation's proposed revisions would effect two principal changes: (1) all D.C. Bar members who receive "IOLTA eligible funds" must place those funds in a D.C. IOLTA account (thus, the existing voluntary "opt out" program would become mandatory); and (2) for a banking institution to qualify as an "Approved Depository" -- an institution where

[11] Language suggested by the Office of Bar Counsel was added to a few Comments to Rule 1.15, as was a sentence to 1.15(e) explicitly incorporating Appendix B into the rule although the incorporation was already implied in the former rule.

lawyers are allowed to open and maintain client trust accounts -- the bank must agree to provide certain interest rates on IOLTA Accounts (rate comparability).[12]

To achieve these changes, the Foundation in large part superimposed the revised mandatory IOLTA requirements for lawyers and banks on and within the morass of existing D.C. rules governing Trust Accounts, including Rule 1.15, 1.19 and Appendix B (although at the urging of the Office of Bar Counsel, Appendix B was to be renumbered as Rule 1.20, so that lawyers would have clear notice that the rule existed).

VI. The Rules Review Committee

From the outset, the Rules Review Committee has supported and continues to support the Bar Foundation's goals of increasing IOLTA interest revenue by (1) making the IOLTA Program mandatory for members of the D.C. Bar; and (2) adopting rate comparability provisions for approved depositories. Upon consideration of the Bar Foundation's specific proposed revisions of November 2007, however, the Committee concluded that the territorial reach of the proposed rules was overbroad.

Specifically, the Committee was concerned that the reach of the Foundation's proposed rules could present conflict issues for multi-state practitioners because of conflicting or inconsistent trust account requirements in other jurisdictions. A second concern was that the language and placement of the existing trust account rules, including the IOLTA Rules, were confusing. One goal of the Committee was to provide greater clarity to the trust rules.

A final concern was that the broad reach of a mandatory IOLTA rule, superimposed on existing Rule 1.19(b), was likely to increase both administrative burdens and the risk for trust account errors (a serious ethical violation). This increased burden and risk was likely to fall disproportionally on solo and small firm lawyers who principally practice outside of the District of Columbia, by requiring such lawyers who might only have a few D.C. matters to open and maintain separate Trust accounts in addition to existing operating and home state Trust accounts.

Below is a summary of some of the issues and potential solutions discussed by the Rules Review Committee and the Bar Foundation over the past 18 months. Sections VII and VIII describe the current proposals of the Rules Review Committee and the Bar Foundation, respectively, that are before the Board of Governors for its consideration.

A. "WHERE THE LAWYER'S OFFICE IS LOCATED" OPTION

[12] Historically, banks have paid very low interest on IOLTA accounts. A bank voluntarily participates in the IOLTA Program when it chooses to become a depository for attorney trust accounts and is approved by the Board on Professional Responsibility. At least 39 states now have a comprehensive/mandatory IOLTA program, and at least 23 states have adopted some form of rate comparability for IOLTA accounts.

In trying to remedy the perceived overreaching of 1.19(b), the Committee's initial suggestion, in April 2008,[13] was to limit the reach of the Rule to those D.C. lawyers who have offices physically located in the District (to include P.O. boxes). This proposal was consistent with both the ABA Model Rule and the former D.C. Code provision, and is consistent with those rules of those jurisdictions who have adopted Model Rule 1.15.

However, the Bar Foundation expressed that a "where your office is located" test would fail to capture too many IOLTA funds from lawyers whose physical offices were located in other jurisdictions (particularly in Maryland and Virginia) but who nevertheless conducted a substantial amount, maybe even the majority, of their legal business in the District and for D.C. clients.

B. COMPROMISE PROPOSAL: CONTRARY MANDATES OF THE JURISDICTION IN WHICH A LAWYER PRINCIPALLY PRACTICES

The Rules Review Committee and the Bar Foundation worked together to develop a rule that would address the primary concerns of both groups. The result was a rule that would apply to all D.C. Bar members –but would exempt a multijurisdictional lawyer who was subject to contrary rules in a jurisdiction in which that lawyer principally practiced.

The thrust of the "contrary mandates" language was that if the rules of the jurisdiction in which the lawyer principally practiced required particular funds to be placed in that jurisdiction's IOLTA account, the lawyer would be exempt from the D.C. IOLTA Rules.

Both groups agreed to improved clarity of drafting. The Committee proposed a single rule governing all ethical obligations of D.C. lawyers relating to the safekeeping of client property. The Committee therefore revised Rule 1.15, and deleted both Rule 1.19 and Appendix B, moving those provisions that related solely to banking institutions, such as overdraft notification requirements and rate comparability, to a new proposed Section 20 of Rule XI and moving all remaining relevant provisions that apply to lawyers into revised Rule 1.15.

This version of revised Rule 1.15 and Section 20 Rule XI was submitted to the Board of Governors in February 5, 2009. The Bar then published these revised rules for a public comment period from February 11, 2009 to April 6, 2009.

VII. Public Comments (and Unintended Consequences)

As noted above, in its proposal of February 5, 2009, the Rules Review Committee proposed that Rule 1.15 mandate participation in the District of Columbia's IOLTA Program by all active D.C. Bar members, regardless of where the lawyer principally

[13] Through representatives, the Committee and the Bar Foundation held many informal meetings to try to understand each others' concerns and to work to achieve a unified proposal. This memo summarizes these discussions not as "official positions" of either group, but so that the Board can get a sense of the debate and issues discussed.

practices, *except* when the lawyer is required by any tribunal, or by a foreign jurisdiction in which that lawyer principally practices, to follow a contrary rule about particular trust accounts. This would have included the requirements of a foreign jurisdiction's IOLTA Program where the lawyer is voluntarily participating either by failing to "opt out" or by affirmatively "opting in." To the extent that Rule 1.15 did not resolve a multi-jurisdictional conflict, the general conflict of laws provisions of Rule 8.5 would govern.

The Bar received written comments submitted by the Maryland State Bar Association, the Bar Association of Montgomery County, and the Maryland Legal Services Corporation. The primary concern expressed by the Maryland organizations was that Maryland, while a mandatory IOLTA jurisdiction, long has exempted from the Maryland IOLTA rules Maryland lawyers who certify that they are participating in *any jurisdiction's* IOLTA program. The Maryland commentators contended that in the absence of a "contrary mandate" in Maryland, many Maryland/District lawyers will abandon Maryland IOLTA accounts for D.C. IOLTA accounts. The Maryland organizations recommended that the District adopt Maryland's approach of exempting lawyers who certify that they are participating in any state's IOLTA program.

The Bar also received a joint comment from the Legal Services Corporation of Virginia and the Virginia State Bar. Virginia's primary concern was that its voluntary IOLTA program will never pose a contrary mandate. (This was not the intent of the Rules Review Committee but more likely the reflection of confusion in interpreting the "contrary mandate" language in the Committee's original proposal.) Indeed, the Virginia comment posed several questions that evidenced that the language as proposed did not clearly identify when multijurisdictional lawyers would be subject to the D.C. rule and when they would be exempt. The Virginia commentators recommended that the District adopt Maryland's broad exemption.

VIII. Rules Review Committee's Revised Proposal

Upon further reflection, the Rules Review Committee concluded that the "contrary mandates" language was, in fact, confusing and did not achieve the clarity that the Committee hoped would be achieved. The Committee also took seriously the concerns expressed by Virginia and Maryland and revised its recommendation. Specifically, the Committee recommends language that requires each D.C. Bar member to participate in the D.C. IOLTA program but exempts the member from D.C. IOLTA if the member is fully participating in an IOLTA program in the jurisdiction where the member is *licensed and principally practices*. (Lawyers are also exempt if they are following the contrary mandates of a tribunal about deposits that are subject to that tribunal's oversight).[14]

[14] The Committee also recommends that the exceptions in Rule 1.15(b) apply to all attorney trust funds, including those held in non-IOLTA accounts. Thus, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. This recommendation remedies an unintended gap in the originally proposed rule.

The Committee recognizes that under its proposal, there likely will be some IOLTA revenue generated from District clients or District transactions that is deposited in another jurisdiction's IOLTA account, but the amount of that revenue is unquantifiable and the Committee believes that its approach is clearer and more straightforward than the approach recommended by the Bar Foundation. Indeed, Maryland's position is that under Maryland's current IOLTA exemption, some IOLTA revenue from Maryland's clients and transactions is today going to D.C.'s IOLTA program. Under the Committee's revised proposal, lawyers who are licensed in both the District and Maryland but who principally practice in Maryland will be allowed to choose which IOLTA program they wish to participate in, an option that is available to those lawyers under the existing Maryland and District of Columbia rules. Additionally, because Virginia retains an opt-out IOLTA program, those D.C. Bar members who principally practice and are licensed in Virginia, but have opted out of Virginia's IOLTA Program, will now be subject to D.C. IOLTA rules, unless or until those lawyers affirmatively choose to opt into Virginia's program.

The Rules Review Committee's revised proposed 1.15(b) is as follows:

> **Rule 1.15—Safekeeping Property**
>
> **(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account."** ***The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.*** (Italics added.)

IX. Revised Bar Foundation Proposal

The Foundation contends that the Rules Review Committee's amended proposal creates an overly broad exemption for lawyers who are licensed and principally practice in another jurisdiction. Specifically, the Foundation believes that there are significant numbers of D.C. Bar members who are also licensed in Virginia or Maryland and who,

while principally practicing in Virginia or Maryland, nevertheless represent District clients or handle District transactions that potentially generate a significant amount of IOLTA interest revenue.

The Foundation recommends keeping the "contrary mandates" language of the February 5, 2009 proposal, but adding further clarification in the Comments that if a multi-jurisdictional lawyer obtained the client funds as a result of a D.C. lawyer's "out of state license," the lawyer would not be subject to the D.C. rule for those particular funds.

The Bar Foundation's revised proposed 1.15(b) is as follows:

> **(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account."** ***The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal or the jurisdiction in which the lawyer is licensed and principally practices.*** (Italics added.)

The Bar Foundation's revised proposed Comment [3] provides in pertinent part:

> **By way of example, paragraph (b) is intended to exempt, because subject to a contrary mandate, IOLTA-eligible client funds received by an attorney licensed in Maryland as a result of his or her Maryland license, and, for attorneys opting to participate in Virginia's IOLTA program, IOLTA-eligible funds of clients located in Virginia or from a transaction arising in Virginia.**

The Rules Review Committee is concerned that little clarification is provided by such a comment, as it can be difficult for a lawyer to conclude on which license particular funds may have been generated.

APPENDIX II

Red-line Proposed Rule 1.15
September 2009

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). ~~shall be kept in a separate account maintained in a financial institution which is authorized by federal, District of Columbia, or state law to do business in the jurisdiction where the account is maintained and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies.~~ Other property shall be identified as such and appropriately safeguarded.~~; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer under an escrow or similar agreement in connection with a commercial transaction.~~ Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) ~~(b)~~ Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) ~~(c)~~ When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) ~~(d)~~ Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

~~(e) Nothing in this rule shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Appendix – to Rule X of the Court's Rules Governing the Bar of the District of Columbia, and are hereby incorporated into these rules.~~

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. ~~paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.~~ This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other

than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

~~[3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program.~~

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical

location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

~~[4]~~ [6] Paragraphs (c) and (d) recognize that ~~L~~lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

~~[5]~~ [7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

~~[2]~~ [8] Paragraph (e) ~~(d) of Rule 1.15~~ permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

~~[6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.~~

~~[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.~~

~~[8]~~ [9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

APPENDIX III

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law

firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[6] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law

to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[8] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

APPENDIX IV

Proposed Rule XI § 20
Approved Depositories for Lawyers' Trust Accounts
and
District of Columbia Interest on Lawyers Trust Accounts Program

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR-approved depositories.

(b) Reports to Bar Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when

the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA. accounts and non-IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the

sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:

(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(i) All interest and dividends transmitted to the Foundation shall, after

deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

(j) Definitions. As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.

(2) "Foundation" means the District of Columbia Bar Foundation, Inc.

(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.

(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.

(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.

(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

RULE OF PROFESSIONAL CONDUCT 1.19 – TRUST ACCOUNT OVERDRAFT NOTIFICATION

[Delete in its entirety.]

APPENDIX B OF THE RULES GOVERNING THE DISTRICT OF COLUMBIA BAR-INTEREST ON LAWYERS' TRUST ACCOUNTS PROGRAM

[Delete in its entirety.]

APPENDIX

5

[13 pages]

District of Columbia
Court of Appeals

No. M-235-09

BEFORE: Washington, *Chief Judge*; Ruiz, Reid, Glickman, Kramer, Fisher, Blackburne-Rigsby, Thompson, and Oberly, *Associate Judges*.

O R D E R
(FILED - March 22, 2010)

On consideration of the recommendations by the Board of Governors of the District of Columbia Bar to amend the Rules Governing Interest on Lawyers' Trust Accounts (IOLTA), and of the comments received in response to the Court's Notice of proposed amendments published on November 19, 2009, it is hereby

ORDERED that the proposed amendments are hereby adopted, and it is

FURTHER ORDERED that to allow time to educate area banks and the members of the Bar about these changes, this order shall take effect on August 1, 2010. It is

FURTHER ORDERED that Rule 1.19 of the District of Columbia Rules of Professional Conduct ("Trust Account Overdraft Notification") and Appendix B of the Rules Governing the District of Columbia Bar ("Interest on Lawyers Trust Accounts Program") are hereby deleted. It is

FURTHER ORDERED that Rule 1.15 of the District of Columbia Rules of Professional Conduct ("Safekeeping Property") and the related commentary are hereby amended as indicated in the red-lined copy attached to this order as Appendix I. A "clean" copy of new Rule 1.15 is attached as Appendix II. It is

FURTHER ORDERED that a new Section 20 to Rule XI of the Rules Governing the District of Columbia Bar is hereby adopted as set forth in Appendix III to this order. It is

FURTHER ORDERED that the Clerk of the Court shall publish this order and its appendices on the website of the District of Columbia Court of Appeals, www.dcappeals.gov , and shall transmit this order and its appendices electronically and by written copy to the District of Columbia Bar, the Board on Professional Responsibility, and Bar Counsel on this date.

ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

Appendix I

Redline Version of D.C. Rule of Professional Conduct 1.15 as Amended, Effective August 1, 2010.

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). ~~shall be kept in a separate account maintained in a financial institution which is authorized by federal, District of Columbia, or state law to do business in the jurisdiction where the account is maintained and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies.~~ Other property shall be identified as such and appropriately safeguarded.~~; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer under an escrow or similar agreement in connection with a commercial transaction.~~ Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) ~~(b)~~ Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) ~~(c)~~ When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) ~~(d)~~ Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

~~(e) Nothing in this rule shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Appendix – to Rule X of the Court's Rules Governing the Bar of the District of Columbia, and are hereby incorporated into these rules.~~

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. ~~paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.~~ This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the

applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

~~[3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program.~~

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly

and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[4] [6] Paragraphs (c) and (d) recognize that ~~L~~lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[5] [7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[2] [8] Paragraph (e) ~~(d) of Rule 1.15~~ permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

~~**[6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.**~~

~~**[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.**~~

[8] [9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Appendix II

Clean Version - D.C. Rule of Professional Conduct 1.15 as Amended, Effective August 1, 2010

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute

shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a

lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[6] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds

should be promptly distributed.

[7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[8] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Appendix III

Amended D.C. Bar Rule XI, § 20 (New), Effective August 1, 2010

Section 20. Approved Depositories for Lawyers' Trust Accounts and District of Columbia Interest on Lawyers Trust Accounts Program.

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial

limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR- approved depositories.

(b) Reports to Bar Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees

shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:

(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(i) All interest and dividends transmitted to the Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

(j) Definitions. As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.

(2) "Foundation" means the District of Columbia Bar Foundation, Inc.

(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.

(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.

(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.

(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

APPENDIX

6

[75 pages]

THE RULES OF PROFESSIONAL CONDUCT REVIEW COMMITTEE REPORT AND RECOMMENDATIONS ON THE D.C. RULES GOVERNING IOLTA

February 5, 2009

Introduction

For more than twenty years, the D.C. Bar Foundation, through the interest revenue generated from D.C. IOLTA accounts, has distributed thousands of dollars to legal services providers to help address the large unmet legal needs of residents and families in the District of Columbia. In 1985, the District of Columbia Court of Appeals established rules to allow a lawyer or law firm to hold client funds that are nominal in amount, or are to be held for a short period of time, in a single pooled client trust account, commonly known as an IOLTA account ("Interest on Lawyers Trust Account"). The interest produced by such an account, which would amount to a small sum for each individual client, is distributed to the D.C. Bar Foundation, which in turn distributes a predominant amount of the interest revenue collected to legal services providers serving low income individuals in the District of Columbia.

Much good has been accomplished through the D.C. IOLTA Program, but it appears that the District of Columbia has not kept pace with changes that have occurred and are occurring in IOLTA programs in a majority of jurisdictions throughout the country. In many jurisdictions, changes to rules governing lawyers and IOLTA accounts have significantly increased the interest revenue available to legal services providers in those jurisdictions.

For this reason, in July 2006, the D.C. Bar Foundation commenced an in-depth review of the rules governing the D.C. IOLTA Program.[1] Ultimately, in October 2007, the Foundation completed its review and recommended revisions to the D.C. Rules governing the IOLTA program, including Rules 1.15 and 1.19 of the D.C. Rules of Professional Conduct and Appendix B of the Court of Appeals Rules Governing the Bar. Those recommendations were adopted by the Foundation's Board of Directors and forwarded to the D.C. Bar President, Melvin White on November 6, 2007.[2]

Shortly thereafter, the D.C. Bar leadership asked the Rules of Professional Conduct Review Committee ("Rules Review Committee" or "Committee") to consider the Bar Foundation's proposed amendments and to make recommendations to the Board of Governors.[3] The Rules Review Committee[4] is pleased to present its review of the Bar

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[1] That review included the hiring of an expert consultant and the formation of a subcommittee that included members of various groups, including representatives from the Bar Foundation, Office of Bar Counsel, Board on Professional Responsibility, and the D.C. Bar. The Foundation's subcommittee reviewed and compared D.C.'s IOLTA Program and the rules of other jurisdictions and engaged knowledgeable individuals from the banking industry, the American Bar Association, and IOLTA programs country wide.

[2] The D.C. Bar Foundation's original proposal dated November 6, 2007, is attached as Appendix A.

[3] The Rules Review Committee is the standing committee of the D.C. Bar charged with the ongoing review of the D.C. Rules of Professional Conduct.

[4] The Committee Chair, Eric Hirschhorn, appointed a subcommittee to review the Bar Foundation's proposal and to make recommendations to the full committee for its consideration. Serving on this subcommittee were Daniel Schumack, as subcommittee Chair, and Joel Perrell, Faith Mullen, and Susan Carle as members.

Foundation's proposed amendments and its recommendations for revising the Rules governing the D.C. IOLTA Program.

This report includes a summary of the existing D.C. IOLTA rules, a summary of the Committee's analysis of the Bar Foundation's November 2007 proposed amendments, and the Committee's proposed recommendations and amendments to the Rules governing the D.C. IOLTA program.

Because of concerns about the Foundation's initial proposal raised by the Rules Review Committee (and discussed herein), the Bar Foundation has worked closely with the Rules Review Committee during the past several months to resolve those concerns within the text of the rules. The Bar Foundation supports the Rules Review Committee's proposed amendments to the IOLTA Rules as attached.

The Existing D.C. IOLTA Rules

Under D.C. Rules 1.15, 1.19, and Appendix B, lawyers in the District of Columbia must hold all IOLTA eligible funds in one or more pooled client trust accounts in a banking depository approved by the Board on Professional Responsibility. IOLTA-eligible funds are defined by Rule 1.15(e) as client funds that are "nominal in amount or to be held for a short period of time."

Pursuant to Appendix B, however, a lawyer currently can "opt out" of placing IOLTA eligible funds into a D.C. IOLTA account if the lawyer otherwise properly holds the funds separately from his or her own property in accordance with Rules 1.15(a) and 1.19(a) and (b). To "opt out" of the D.C. IOLTA requirements, a lawyer must make a one-time filing with the District of Columbia Court of Appeals.[5]

Rules 1.19(a) and (b) require that funds that come into the possession of a lawyer and are to be held apart from the lawyer's funds[6] must be placed in an account maintained only in banking institutions approved by the Board on Professional Responsibility ("D.C. Bar Approved Depositories"). Pursuant to Rule 1.19(b) and (c), such institutions have agreed to report promptly any overdraft notifications on attorney trust accounts to the Office of Bar Counsel, and to respond promptly to any subpoenas from the Office of Bar Counsel seeking such account records.

Rule 1.19(b) also provides direction to lawyers who practice outside the District of Columbia. The existing Rule states that if a lawyer is a member of the D.C. Bar and

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[5] It is the Committee's understanding that since the adoption of the IOLTA program in 1985, there has been no systematic retention of filings of attorneys "opting out," essentially rendering a determination of who may have appropriately opted out of the IOLTA program impossible. Presumably, it would also make difficult the prosecution of an attorney not in compliance with Appendix B because he/she could, in some instances, merely claim that he/she had previously properly opted out.

[6] Generally, this includes all fee advances (unless the client otherwise gives informed consent pursuant to Rule 1.15[d]), settlement proceeds, and any other funds belonging to a client or to a third party.

practices law outside the District of Columbia, "D.C. Bar approved depositories" shall be used for deposits of trust funds that are transactionally-related to the District of Columbia under any of these three categories:

1) trust funds received by the lawyer in the District of Columbia;
2) trust funds received by the lawyer from, or for the benefit of, parties or persons located in the District of Columbia; and/or
3) trust funds received by the lawyer that arise from transactions negotiated or consummated in the District of Columbia.

The IOLTA opt-out provision of Appendix B does not, on its face, relieve lawyers practicing outside of the District of Columbia from utilizing approved depositories for trust funds that are transactionally-related to the District of Columbia.

As a practical matter, when an attorney opens a D.C. IOLTA account at a branch office of a D.C. Bar Approved Depository (whether within the District of Columbia or elsewhere), the bank is supposed to complete and submit a form to the D.C. Bar Foundation in which it agrees to forward the interest from the D.C. IOLTA Account to the D.C. Bar Foundation on a quarterly basis.

The Bar Foundation's Initial Proposal

The Bar Foundation's proposed revisions would effect two principal changes: 1) all D.C. Bar members who receive "IOLTA eligible funds" must place those funds in a D.C. IOLTA account (thus, the existing voluntary "opt out" program would become mandatory); and 2) for a banking institution to qualify as an "Approved Depository" -- an institution where lawyers are allowed to open and maintain client trust accounts -- the bank must agree to provide certain interest rates on IOLTA Accounts (rate comparability).[7]

The purpose of the proposed revisions is to increase revenue from D.C. IOLTA accounts. This increase is intended to be accomplished in two ways: (1) by increasing the number of IOLTA accounts and funds placed into those accounts. (This is accomplished by making the program mandatory for all D.C. Bar lawyers holding IOLTA-eligible funds, and by ensuring that lawyers place appropriate IOLTA-eligible funds into D.C. IOLTA accounts); and (2) by increasing the interest paid by banks on funds held in D.C. IOLTA accounts (rate comparability).[8] The revisions are also intended to clarify when and how a D.C. lawyer must maintain such accounts.

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[7] At least 38 states now have a comprehensive/mandatory IOLTA program, and at least 23 states have enacted some form of rate comparability for IOLTA accounts.

[8] Historically, banks have paid very low interest on IOLTA accounts. A bank voluntarily participates in the IOLTA Program when it chooses to become a depository for attorney trust accounts and is approved by the Board on Professional Responsibility.

Rules Review Committee's Analysis

As an initial matter, the Rules Review Committee supports amendments to the D.C. IOLTA Rules that are consistent with the Bar Foundation's goals of increasing IOLTA interest revenue by 1) making the IOLTA Program mandatory for members of the D.C. Bar; and 2) adopting rate comparability provisions for approved depositories. Upon consideration of the Bar Foundation's proposed revisions, however, the Committee concluded that the territorial reach of the proposed rules might be overbroad. Specifically, the Committee was concerned that the reach of the Foundation's proposed rules could present serious conflict issues for multi-state practitioners because of conflicting or inconsistent trust account requirements in other jurisdictions.

The Committee recognizes that some of the concerns with the proposed revisions are actually caused by weaknesses in the existing Rules that, until now, have been relatively benign because a lawyer has the right to opt out of the current provisions.[9] Although existing Rule 1.19(b) purports to have the same extraterritorial reach as the Foundation's proposed Rule, commanding out-of-state lawyers to use a D.C.-approved trust depository under certain specified conditions, the proposed requirement that interest on those out-of-state trust accounts be paid to the D.C. IOLTA program creates an additional difficulty. This proposed mandatory requirement is, in some instances, inconsistent with the requirements governing trust funds of other jurisdictions.

Significantly, Rule 1.19(b) as initially proposed by the Bar Foundation would have provided no safe harbor for a lawyer facing conflicting jurisdictional obligations. The plain language of Rule 1.19(b) would have trumped Rule 8.5, the general rule that governs disciplinary authority choice of law. The Committee is unaware of any instance where Bar Counsel has enforced the current text of Rule 1.19(b) against an out-of-state practitioner who is otherwise compliant with his/her home state's trust requirements. Under the proposed revisions, however, this would no longer have been merely a question of protecting client property vis-à-vis trust accounts (which a foreign jurisdiction is presumptively capable of doing). Rather, non-compliance will result in a monetary loss to the D.C. IOLTA program and potentially a disciplinary proceeding brought against the lawyer by D.C. Bar Counsel. Multijurisdictional lawyers would have been compelled to decide which jurisdiction's IOLTA rules control, risking discipline if Bar Counsel were to disagree.

It is important to underscore the unique posture of the D.C. Bar with respect to multi-jurisdictional lawyers[10] and the substantial cross-border practice with our sister jurisdictions, Virginia and Maryland. The District of Columbia Bar has over 66,000

[9] This is true whether lawyers formally opted out by means of a court filing or did so merely by failing to comply with the existing rules. It is the Committee's understanding that, absent other improper conduct by a lawyer, the existing IOLTA provisions are enforced infrequently by the disciplinary system.

[10] I.e., a lawyer with licenses to practice in at least one other jurisdiction in addition to the District of Columbia.

active members, nearly 48,000 of whom practice in the Metropolitan D.C. area, which includes the District of Columbia and parts of Virginia and Maryland. Of those members, a significant number may not maintain a D.C. office, yet represent D.C. clients. Likewise, there are D.C. lawyers who maintain offices only in D.C., but who are also licensed and practice in Virginia and/or Maryland.

The Committee did not want to subject D.C. lawyers to D.C. mandatory rules that conflict with mandatory rules of other jurisdictions, absent an appropriate guideline and safe harbor to reconcile conflicting obligations.[11] The Committee accordingly sought to draft an IOLTA rule to which all D.C. Bar members would be subject but that also would provide a means for reconciling conflicting mandatory rules.

The Committee also considered whether the provisions pertaining solely to banking institutions, such as the requirement that depositories gain approval from the Board on Professional Responsibility, were appropriately housed in the D.C. Rules of Professional Conduct, as both the existing and proposed Rules provide. The Committee concluded that because the Rules of Professional Conduct regulate the conduct of lawyers and not banking institutions, provisions that do not apply to lawyers should not appear in the text of the Rules. The Committee concluded that such requirements would be more appropriately located in Court Rule XI of the Rules Governing the D.C. Bar, which governs the disciplinary system, including the BPR.

Finally, as a general matter, the Committee agreed with the Foundation that the Rules and Comments should provide clear direction to lawyers about their obligations under the IOLTA Rules to the greatest extent possible.

The Committee chair, IOLTA subcommittee chair, and Bar Ethics Counsel had numerous meetings and other communications with representatives of the Bar Foundation about the concerns expressed above. We are pleased to report that the recommendations that accompany this report are supported by the Bar Foundation.

Committee Recommendations

In light of the foregoing analysis, the Committee proposes amendments to D.C. Rule 1.15 to govern the obligations of D.C. lawyers and IOLTA accounts,[12] and the creation of a new subsection of Rule XI § 20[13] to address the requirements of banking institutions with

[11] For example, the Virginia rule states that a Virginia lawyer who receives trust funds should deposit those funds in a trust account located in the jurisdiction in which the lawyer maintains his/her principal office. If a Virginia lawyer does not affirmatively opt out of the Virginia IOLTA program, IOLTA-eligible funds must be placed in a Virginia IOLTA account. Thus, if a VA/D.C. lawyer who principally practices in VA received a D.C. client's money, that lawyer under the Bar Foundation's initial proposal could be subject to two mandatory requirements without means for reconciling contrary requirements.

[12] Proposed Rule 1.15 is attached as Appendix B. A red-line document showing the proposed amendments to existing Rule 1.15 is attached as Appendix C.

[13] Proposed Rule IX § 20 is attached as Appendix D.

respect to such accounts.[14] The Committee recommends that existing Rule 1.19 and Appendix B be deleted entirely, with appropriate provisions being relocated as proposed to Rule 1.15 and Court Rule XI.

To address the Committee's primary concern of D.C. lawyers facing conflicting mandatory trust requirements, the Committee proposes that Rule 1.15 mandate participation in the District of Columbia's IOLTA Program by all active D.C. Bar members, regardless of where the lawyer principally practices, *except* when the lawyer is required by any tribunal, or by a foreign jurisdiction in which that lawyer principally practices, to follow a contrary rule regarding particular trust accounts. This would include requirements of a foreign jurisdiction's IOLTA Program where the lawyer is voluntarily participating either by failing to "opt out" or by affirmatively "opting in." To the extent that Rule 1.15 does not resolve a multi-jurisdictional conflict, the general conflict of laws provisions of Rule 8.5 will govern. The Committee believes that this proposed Rule will increase IOLTA revenues, by generally mandating compliance of D.C. Bar members, while simultaneously ensuring that D.C. lawyers are not subject to conflicting mandatory rules.

The Committee further recommends adopting the Bar Foundation's provisions relating to rate comparability, which the Committee anticipates will produce increased revenue for the Foundation. As discussed above, however, the Committee recommends that all provisions relating to bank approval and institutional requirements be placed in section 20 of Court Rule XI.

The Committee's proposed revisions to Rule 1.15(b) contain a reporting and periodic certification requirement to the D.C. Bar Foundation, "in the form and manner prescribed by the Bar Foundation." The Committee has not been asked to consider the specific "form and manner" of this requirement, and as such takes no position on it.

Finally, the Committee recommends that the Board of Governors publish these proposed Rule revisions for public comment. The Committee is prepared, upon request, to review any comments received and to make appropriate recommendations to the Board.

[14] Some of the proposed revisions to Rule 1.15 merely delete redundant language contained within the existing Rules. Much of the language of proposed Rule XI § 20 is adopted directly from existing provisions of Rule 1.19, addressing banking requirements, and/or proposed language of the D.C. Bar Foundation's November 2007 proposal relating to banks and rate comparability.

Appendix A

THE DISTRICT OF COLUMBIA BAR FOUNDATION

FUNDING LEGAL SERVICES FOR THOSE IN NEED

MEMORANDUM

TO:	Melvin White, President, District of Columbia Bar
FROM:	Robert N. Weiner, President, DC Bar Foundation RNW
RE:	**Revision of Rules Governing the District of Columbia IOLTA Program**
DATE:	November 6, 2007

A committee of the D.C. Bar Foundation has completed a 14-month, in-depth review of the Rules Governing the District of Columbia IOLTA Program and submitted its report reflecting the results of that review. The committee recommends revision of the IOLTA Rules (1) to update the IOLTA program in accordance with the guidance provided by *Brown v. Legal Foundation of Washington*, 538 U.S. 210 (2003), which upheld the constitutionality of the IOLTA program of the State of Washington; (2) to enhance and systematize the generation of IOLTA revenue through measures that other States have adopted since the District of Columbia adopted its IOLTA rules in 1985, including moving to a comprehensive program instead of the current "opt-out" system and adding comparability of IOLTA rates to the criteria the Board on Professional Responsibility uses in approving financial institutions as depositories for IOLTA-eligible funds; and (3) to strengthen and clarify the operation of the IOLTA program.

The Board of Directors of the Bar Foundation has unanimously approved a resolution accepting the committee's report and directing that it and the proposed revised rules be transmitted to the Board of Governors of the District of Columbia Bar. The Foundation requests that the Bar submit a petition to the District of Columbia Court of Appeals seeking adoption of the proposed revised IOLTA rules.

Accordingly, I transmit for appropriate review and action by the Board of Governors, proposed revisions to Rules 1.15 and 1.19 of the District of Columbia Rules of Professional Conduct and to Appendix B to Rule X of the Rules Governing the D.C. Bar, which together constitute the Rules Governing the Interest on Lawyers Trust Accounts Program. I have also attached the Report of the DC Bar Foundation's IOLTA Rules Review Subcommittee explaining the proposed revisions. Based on our experience administering the District of Columbia's IOLTA program, we at the Foundation believe these changes will strengthen the program and increase funding for legal services to the District of Columbia's poor and underserved. As stated in the committee's report, "Underlying and inspiring the proposed rules changes is the bedrock principle that lawyers have an obligation to assist in meeting the need for legal services of persons who, by reason of economic status or other disadvantage, do not have access to them."

Encl.

November 2, 2007

REPORT OF THE DC BAR FOUNDATION'S IOLTA RULES REVIEW SUBCOMMITTEE PROPOSING REVISION OF THE RULES GOVERNING THE DISTRICT OF COLUMBIA IOLTA PROGRAM

The IOLTA Rules Review Subcommittee has conducted an in-depth review of the Rules Governing the District of Columbia IOLTA Program and transmits herewith the product of that review, proposed revised Rules Governing the DC IOLTA Program. We ask the Board of Directors of the Bar Foundation to approve the revised rules and transmit them, along with this report, to the D.C. Bar with a request that the Board of Governors petition the Court of Appeals for the District of Columbia to adopt the revised rules. Enclosed herewith are:

(1) Proposed revised IOLTA rules, including

(a) Rule 1.20 of the Rules of Professional Conduct ("RPC"), replacing and revising Appendix B to Rule X of the Rules Governing the District of Columbia Bar entitled "Interest on Lawyers Trust Accounts Program";[1]

(b) Rule 1.15 of the RPC entitled "Safekeeping Property"; and

(c) Rule 1.19 of the RPC entitled "Trust Account Overdraft Notification."[2]

(2) A redlined version of Rules 1.15 and 1.19 highlighting the proposed revisions and a copy of Appendix B as it presently reads. The volume of proposed changes to Appendix B makes redlining unhelpful.

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[1] The Rules of Professional Conduct are Appendix A to Rule X of the Rules Governing the DC Bar.

[2] Up until the recent revisions of the RPC, the current Rule 1.19, was Rule 1.17 of the RPC.

This report identifies and describes the proposed revisions, sets forth briefly relevant background information and the reasons for the more significant changes, and responds to several questions raised by representatives of the DC Bar and Bar Counsel.

Generally, the proposed revisions are drawn to achieve three purposes: first, to update the DC IOLTA program to respond to guidance provided by the Supreme Court's decision upholding the constitutionality of the IOLTA program of the State of Washington, *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); second, to add to the IOLTA rules revenue enhancement measures that have been adopted in other States since 1985 when the DC IOLTA Rules were issued, including moving from the current "opt-out program" to a comprehensive one and making comparability of IOLTA rates a condition to Board on Professional Responsibility approval of financial institutions as depositories for IOLTA funds; and third, to strengthen and clarify the operation of the IOLTA program.

Underlying and inspiring the proposed rules changes is the bedrock principle that lawyers have an obligation to assist in meeting the need for legal services of persons who, by reason of economic status or other disadvantage, do not have access to them.[3] As directed by provisions of the current IOLTA rule, to which no change is proposed, earnings on IOLTA accounts are devoted by the Bar Foundation to this purpose. Thus, in

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[3] The Courts of the District of Columbia have recognized this obligation of members of the bar. Rule 6.1 of the RPC provides that lawyers "should participate in serving those persons * * * who are unable * * * to obtain counsel." The comments to Rule 6.1 make plain that the responsibility for ensuring the availability of legal services for the poor "ultimately rests upon the individual lawyer, and that every lawyer, regardless of professional prominence or professional work load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged." This responsibility can be discharged, when personal service is not feasible, by financial support. The Judicial Conference of the District of Columbia Circuit also recognizes this obligation. In 1998, the Judicial Conference passed a resolution noting the "persistent crisis in the delivery of legal services," and calling on lawyers to support the delivery of legal services in the District of Columbia.

strengthening IOLTA procedures and enhancing the earnings on IOLTA accounts, the revised rules advance the cause of serving the legal needs of disadvantaged persons.

We describe below the development of the proposed revised rules and the structure of the present IOLTA program. Thereafter, we explain the proposed revisions and respond to questions posed variously by representatives of the Bar and Bar Counsel.

1. IOLTA Rules Review Subcommittee

The Bar Foundation's IOLTA Committee, chaired by Steve Pollak, established a Rules Review Subcommittee to examine the current IOLTA rules and, as warranted, to develop and propose needed revisions. The Bar Foundation invited the DC Bar to nominate representatives to serve on the Rules Review Subcommittee to provide, among other things, advice and counsel on matters of concern to the Bar. The Bar designated Cornish Hitchcock, Antonia Ianiello, and Hope Todd in addition to Keely Parr, Director of the DC Bar Practice Management Advisory Service. The other members of the subcommittee are Bar Counsel Gene Shipp; Lawrence Bloom of the Office of Bar Counsel; Elizabeth J. Branda, Executive Attorney of the Board on Professional Responsibility ("BPR"); Carrie Fletcher, pro bono associate, Crowell & Moring; Steve Pollak and John Yang, members, and Andy Marks, a former member, of the DC Bar Foundation Board; and Foundation Executive Director Katia Garrett.[4] The subcommittee met on October 18, 2006, to discuss the process to be followed in reviewing the IOLTA rules. Successive drafts of the revised rules and this report were circulated to the subcommittee

[4] The three representatives designated by the DC Bar and Ms. Parr have participated in the deliberations of the subcommittee, and their comments and suggestions have been taken into account in developing the revised rules and this report. Out of deference to the role of the DC Bar Board of Governors in the process for amendment of the Rules Governing the DC Bar, they have abstained from joining in this report. Elizabeth Branda and John Yang joined the subcommittee after the work of preparing this report and the revised IOLTA rules was substantially completed, and for that reason are not included in the list of those in whose behalf the report is submitted.

which met again on February 21 and July 3, 2007, to review and discuss the proposed revisions, to resolve open issues, and to identify needed changes in the draft revisions. Katherine Mazzaferri and Cynthia Hill, respectively, DC Bar Executive Director and Deputy Executive Director, attended the July 3 meeting.

2. Development of the Proposed Revised IOLTA Rules

Effective September 5, 2006, the DC Bar Foundation retained Kelly Carmody of Carmody & Associates, Phoenix, Arizona, to assist in revising the DC IOLTA Rules to incorporate (1) best practices in light of the *Brown* decision, (2) revenue enhancement measures, and (3) administration and enforcement efficiencies among the DC Bar, the DC Board on Professional Responsibility ("BPR"), the Office of Bar Counsel for the District of Columbia, and the DC Bar Foundation. Ms. Carmody came highly recommended by professional colleagues active in review and drafting of IOLTA rules and in the conduct of IOLTA programs. Prior to launching Carmody & Associates in 2004, Ms. Carmody had served for five years as director of the IOLTA program of the State of Arizona. In that capacity, she conducted a review and developed a revision of the rules governing that State's IOLTA program comparable to what the subcommittee is doing here. Ms. Carmody's additional experience includes both legislative and policy work directly relevant to the issues the DC IOLTA program addresses, including work with the Center on Budget & Policy Priorities and the National Legal Aid & Defender Association.

As background to the drafting of proposed revisions to the Rules Governing the DC IOLTA program, Ms. Carmody surveyed IOLTA rules in 14 states (Alabama, Arizona, Connecticut, Florida, Indiana, Massachusetts, Minnesota, Michigan,

New Jersey, Ohio, Pennsylvania, South Carolina, Texas, and Utah) and interviewed IOLTA directors and staff at the ABA Commission on IOLTA.

Ms. Carmody provided to Mr. Pollak and Ms. Garrett a draft of proposed revised rules on October 31, 2006. In accordance with her suggestion, the draft was circulated to a committee of experts on IOLTA rules, including Bev Groudine and David Holterman of the ABA Commission on IOLTA, Jane Curran, Executive Director of the Florida Bar Foundation and its IOTA program, and Linda Rexer, Executive Director of the Michigan State Bar Foundation and the State's IOLTA program. Ms. Curran and Ms. Rexer are also members of the Technical Assistance Committee of the National Association of IOLTA Programs. The plan was to review the revised rules and then engage in a line-by-line analysis in telephone conferences with the committee of experts, including Ms. Carmody. Steve Pollak and Katia Garrett held two such extended conferences on November 15 and 21, 2006 and also exchanged numerous e-mails addressing issues as they were identified. The resulting draft of the revised IOLTA rules along with a draft of this report were circulated on January 29, 2007 to the Rules Review Subcommittee, and discussed in detail at a meeting of the subcommittee on February 21, 2007. The proposed rules and report were revised to reflect matters discussed at the meeting. Updated drafts were circulated on June 1, 2007, discussed at the subcommittee's meeting on July 3, 2007, further revised to incorporate suggested changes and additions, and recirculated, as revised, to the subcommittee on July 24 and October 11, 2007.

3. Structure of the Present DC Bar IOLTA Program

In 1985, the District of Columbia Court of Appeals adopted rules launching the District of Columbia IOLTA Program, including primarily Appendix B to Rule X of the Rules Governing the DC Bar which established the program; Rule 1.15 of the RPC,

entitled "Safekeeping Property," which specifies how lawyers are to handle client funds and identifies those funds that may be placed in IOLTA accounts; and Rule 1.19 of the RPC, "Trust Account Overdraft Notification," which outlines the circumstances in which lawyers must set up client trust accounts and the requirements financial institutions must meet in order to be approved by the BPR as depositories for such accounts. Together, these three rules establish the framework within which the DC IOLTA Program is currently operating. Bar Counsel Shipp proposed that Appendix B be moved into the RPC to improve lawyers' access to and understanding of the IOLTA rules. The Rules Revision Subcommittee adopted this suggestion and Appendix B, as revised, is now proposed as a new Rule 1.20 of the RPC.[5]

The BPR is currently responsible for approving financial institutions as IOLTA depositories once they have complied with Rule 1.19(b) which requires that they file an undertaking promptly to report to Bar Counsel each instance of an overdraft of an IOLTA account and agree to respond to subpoenas from Bar Counsel for account records. Financial institutions need not make commitments with respect to the rates to be paid on IOLTA accounts or the fees to be charged to such accounts. The Office of Bar Counsel has authority to investigate and take appropriate disciplinary action against lawyers who fail to comply with the requirements of the IOLTA rules.

The DC Bar Foundation administers the IOLTA program and works with financial institutions and lawyers to assist them in understanding and complying with the IOLTA rules. Lawyers coming into possession of client funds required to be placed in

[5] The Bar Counsel proposed three alternatives for improving lawyers' access to and understanding of Appendix B: (a) moving Appendix B into current Rule 1.15, at the end; (b) moving Appendix B into a new Rule 1.20; or (c) always printing Appendix B at the end of the RPC, a practice that is not currently followed. We propose renaming Appendix B as Rule 1.20, as that option seems to be the most efficient and effective manner of incorporating the core IOLTA rules into the RPC.

interest-bearing IOLTA accounts must do so unless they file a notice with the District of Columbia Court of Appeals opting out of the IOLTA program. In that event, they may deposit funds that would otherwise be required to be placed in an IOLTA account in an appropriately designated separate account which is not covered by the IOLTA rules. Earnings on IOLTA accounts are required to be remitted to the Bar Foundation for use primarily in funding D.C. legal services providers, after deduction of IOLTA program administration expenses.

General information and education about the IOLTA program is currently provided by the Office of Bar Counsel as part of a training course for lawyers on the handling of client funds. In addition, the DC Bar's Practice Management Advisory Service, staffed by Keely Parr, provides one-on-one advice to lawyers and law firms with questions about handling IOLTA-eligible funds.

4. Proposed Revisions to Reflect Guidance Provided by Brown v. Legal Foundation

Brown v. Legal Foundation of Washington upheld the constitutionality of Washington State's IOLTA program in a five-to-four decision by Justice Stevens.[6] The Court held that even assuming that a law requiring transfer of interest on client funds in IOLTA accounts to a different owner – *e.g.*, a state IOLTA program – amounted to a taking under the Fifth Amendment, the taking was for a valid public use and the amount of just compensation due was zero.[7] Since that decision, IOLTA programs around the country have updated their governing rules to respond to guidance reflected in the

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[6] 538 U.S. 216 (2003).

[7] Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, dissented on the grounds that a different test should apply to determining whether just compensation was due. Id. at 241. Justice Kennedy authored a separate dissent raising First Amendment concerns. Id. at 253.

Court's decision, and to clarify the constitutional scope of the programs. It is appropriate for the District of Columbia to follow this course.

a. Eligible Client Funds

Under *Brown*, only client funds that cannot earn any net income (income in excess of costs) for the client are permitted to be held in IOLTA accounts. Typically, client funds that are nominal in amount or are to be held for a short period of time are unlikely to earn net income if placed in a separate account. Appendix B currently allows funds "nominal in amount or to be held for a short period of time" to be placed in an IOLTA account, but makes no reference to the standard referred to by the Supreme Court in *Brown* – funds that cannot earn any net income. We recommend revising the rules to incorporate this benchmark set out in *Brown* and to provide express guidance to lawyers as to how to identify which of their client funds meet this benchmark. The following proposed revised rules are drawn to accomplish these purposes:

> Appendix B/Rule 1.20, subsection (a)(6) – defines "eligible funds";
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> Appendix B/Rule 1.20, section (c) – places decisions about eligibility of funds for IOLTA in the good faith judgment of lawyers and law firms and clarifies that lawyers and law firms will not be charged with breaching ethical duty/rules for having exercised good faith judgment whether client funds are eligible for IOLTA;
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> Appendix B/Rule 1.20, section (d) – outlines general factors to be used by lawyers and law firms in determining whether funds can earn income in excess of costs and so be eligible for IOLTA;
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> Appendix B/Rule 1.20, section (e) – requires periodic review by attorneys and law firms of IOLTA accounts to ensure that factors determining eligibility have not changed; and

Rule 1.15, section (e) and Comment [3] – requires lawyers and law firms to place IOLTA-eligible funds in IOLTA accounts.

b. Refund of Interest

In line with most programs following *Brown*, *Bank Guidelines* issued by the DC Bar Foundation currently provide for refund of earnings on IOLTA accounts remitted to the Bar Foundation as a result of a mistake or overpayment.[8] Most jurisdictions address this issue in program guidelines rather than by rule or statute. We propose continuing to follow this course and, accordingly, no change is recommended to the IOLTA rules on this point.

5. Proposed Revisions to Enhance IOLTA Revenues and Promote Program Efficiencies

a. Moving from an "opt-out" to a comprehensive program

In 1985, the District of Columbia became one of the first jurisdictions to start an IOLTA program. Most programs, like DC, were set up then as "opt-out" programs. In the ensuing 22 years, IOLTA programs have been established in every State. Most IOLTA programs, at last count 36 out of 52, are now comprehensive programs, including the Washington State IOLTA program reviewed in *Brown*. States with comprehensive IOLTA programs require all lawyers admitted to practice in their state to place into IOLTA accounts all IOLTA-eligible funds. Nine states started out with comprehensive IOLTA programs, and at least 27 states have converted to comprehensive IOLTA programs. Included in this latter group are Alabama, Indiana, Maine, Mississippi, Missouri,

[8] This means that if funds in an IOLTA account actually earn net income, those earnings can be restored to the client.

North Carolina, Oklahoma, South Carolina, and Utah that converted in the last three years.[9]

There are two principal reasons for converting to a comprehensive IOLTA program: (i) enhancement of IOLTA revenue, and (ii) facilitation of administration of the IOLTA program and enforcement of the obligations of attorneys and participating financial institutions. Our expert advisors tell us that converting to a comprehensive IOLTA program has produced measurable revenue benefits. For example, in the six months before converting to comprehensive IOLTA participation, South Carolina averaged approximately $177,000 per month in IOLTA revenue. In the eight months following its March 2005 conversion, monthly IOLTA revenues averaged approximately $325,000 – an increase of over 83%. Indiana's monthly IOLTA income increased by roughly 93% following the State's July 2005 conversion to a comprehensive IOLTA program, and Utah's monthly IOLTA income increased by 30%. Oklahoma, which converted in July 2004, tripled its annual IOLTA revenue.[10]

The precise impact of conversion to a comprehensive program will depend on three factors: the number of DC lawyers who currently hold IOLTA-eligible client funds but have opted out of, or unilaterally failed to participate in, the DC IOLTA Program;

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[9] Conversion to comprehensive programs in Alabama, Maine, Missouri and North Carolina becomes effective January 1, 2008.

[10] Indiana, Mississippi, South Carolina and Utah adopted rules requiring financial institutions to pay "comparable rates" on IOLTA accounts at the same time as they converted to comprehensive programs. Oklahoma did not. Utah, however, had not yet implemented the rate comparability provisions of its IOLTA rule, largely due to staffing constraints. The program director in South Carolina has advised us that the revenue increase following conversion was due to the increase in number of lawyers opening IOLTA accounts and to increases in the balances of existing IOLTA accounts as lawyers placed all, rather than only a portion of, eligible funds in IOLTA accounts. Indiana estimates that roughly 20% of its revenue gain was due to increased participation in the IOLTA program, with the remaining 80% resulting from rate increases on IOLTA balances. Mississippi moved to a comprehensive program and comparable rates effective January 1, 2007. Data reflecting the effect of these changes are not yet available.

the amount of client funds eligible for deposit in DC IOLTA accounts, but not currently held in such accounts; and the interest rate provided by the financial institutions holding such accounts. We have been unable to identify the number of lawyers currently not participating in the DC IOLTA program, in part because the District of Columbia Court of Appeals has no solid mechanism for tracking which lawyers have "opted out." In some measure that is because opt-outs must be completed by an *individual lawyer*, while IOLTA accounts can be opened and held by *law firms*. In addition, there have been mis-communications between lawyers and financial institution staff about when IOLTA accounts are required and what vehicle qualifies as an IOLTA account.

We also do not know whether all lawyers currently participating in the District's IOLTA program place all IOLTA-eligible funds in DC IOLTA accounts. According to our expert advisors, anecdotal information from some of the recently-converted programs suggests that prior to conversion, many lawyers were placing some, but not all, IOLTA-eligible funds in IOLTA accounts. The shift to a comprehensive IOLTA program increased the total amount of funds held in IOLTA accounts, thus increasing IOLTA revenues. Also, conversions have been accompanied by outreach and training of both attorneys and financial institutions, which no doubt further enhanced compliance.

We have been advised that jurisdictions that have converted to a comprehensive rule have experienced little opposition to this change. In the case of recent conversions, this may be due to the fact that the change enjoyed strong and visible support of judicial and bar leaders. It is the sense of those involved that this strong support facilitated the conversion process.

The draft revised rules require every lawyer admitted to practice in D.C. periodically to certify, personally or through the law firm with which the lawyer is associated, in a form and manner approved by the DC Bar, that all eligible funds are held in an IOLTA account. Certification is a reasonable and necessary mechanism to assure that lawyers, law firms, and financial institutions understand and are complying with the IOLTA rules. We anticipate that responsibility for certification and the administrative expenses associated therewith will be shared by the Bar Foundation and the Bar and that details of reaching out to attorneys about the rule changes and phasing in, implementing, and funding the certification process will be worked out mutually by the two organizations and embodied in a memorandum of understanding.[11] We do not envision that failure or refusal to comply with the rule requiring periodic certification would subject the Bar member to administrative suspension. Rather, as at present, noncompliance with any of the IOLTA rules would be addressed by the Office of Bar Counsel pursuant to the normal disciplinary process.

Proposed changes converting the District's IOLTA program from "opt-out" to "comprehensive" are:

> Appendix B/Rule 1.20, section (b) – changes IOLTA participation from opt-out to comprehensive;
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> Appendix B/Rule 1.20, section (j) – requires DC Bar members, personally or through their law firms, to certify, periodically, in a form and manner approved by the DC Bar, how they are holding IOLTA-eligible funds; and

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[11] According to data reported by 49 IOLTA programs for 2006, 42 required attorneys to report their IOLTA compliance status on a regular basis, often with their annual payment of bar dues or registration statement. *See* "IOLTA Compliance Reporting Information 2006" attached as Attachment No. 1. For example, Maryland, New Jersey, Oklahoma, and Texas require attorneys to report IOLTA information annually. Each jurisdiction takes a slightly different approach to reporting, but the end results are comparable: the IOLTA program has a record of attorney compliance with the State's IOLTA rules, and can determine the need for further outreach and education to secure better compliance.

Rule 1.15, section (e) and Comment [3] – requires lawyers who hold IOLTA-eligible funds to place them in an IOLTA account.

b. Rate comparability

In recent years, banks in D.C. have paid low interest rates on IOLTA accounts, sometimes as low as one-tenth of one percent. As of May 2007, with the Federal Funds rate at 5.25%, IOLTA rates in D.C. averaged 1.6%, and ranged from a low of 0.15% to a high of 4.25%. Putting to one side advances at five banks brought about by the Foundation's DC-IOLTA Preferred Bank Initiative, through which the Foundation negotiates with individual banks to provide higher rates on IOLTA accounts, most of the DC IOLTA accounts were held at banks paying rates of 0.987% or lower.[12] Plainly, a move to rate comparability will materially enhance earnings on IOLTA accounts.

The proposed revised rules incorporate the concept of rate comparability for IOLTA accounts. To be approved by the BPR as a depository for IOLTA funds, financial institutions will have to file with the BPR an undertaking agreeing to pay on their IOLTA accounts interest or dividend rates, and charge fees, that are comparable to the rates they pay and fees charged on similarly situated non-IOLTA accounts.

The shift to rate comparability in D.C. will be implemented by several rules changes, including: setting of guidelines for determining what are comparable rates; allowing funds in IOLTA accounts to be invested overnight in repurchase agreements and money-market funds, vehicles available to non-IOLTA depositors that offer opportunities

[12] As a result of the Foundation's DC-IOLTA Preferred Bank Initiative, several banks have increased their rates. As of August 2007, two IOLTA Preferred Banks paid a flat rate of 4% and one a flat rate of 4.25%, but these three had very few IOLTA accounts. Citibank, the fourth Preferred Bank, paid rates up to 4%, tiered to the size of the account, and had the largest number of accounts and the highest IOLTA deposits of any bank in the District of Columbia. SunTrust, the most recent bank to join the ranks of Preferred Banks, paid tiered rates up to 75% of the Federal Funds rate, and had the fifth largest number of IOLTA accounts.

for earnings greater than those customarily produced by the interest-only accounts in which most IOLTA funds are now placed; and spelling out protections to secure the safety of the IOLTA funds where so invested.

i. Setting a comparable rate

Nothing in the current DC IOLTA Rules establishes minimum interest rates for IOLTA accounts and, as noted, these rates in D.C. have lagged well-behind the Federal Funds rate. The process of negotiating with individual banks to secure higher rates, engaged in by the Bar Foundation for almost two years, has proven to be a time-consuming and less than satisfactory option. Negotiations take many months and ground gained can be easily lost when there is a change in personnel or a realignment of responsibilities at a financial institution that requires the education and negotiation process to start anew.[13] Some banks have not responded to communications from the Bar Foundation inviting discussion of the Preferred Bank Initiative.

Under the revised rules, financial institutions' participation in the IOLTA program would continue to be voluntary. However, if a financial institution wishes to be approved as a depository for IOLTA accounts, it will be required to file with the BPR an undertaking both to pay interest and dividend rates on those accounts comparable to the rates their non-IOLTA customers receive for comparably sized non-IOLTA accounts

[13] By way of example, the Bar Foundation worked for nine months to secure a meeting with one financial institution that was paying between 0.16% to 1.6% on total IOLTA holdings of roughly $13 million, generating monthly IOLTA income of roughly $16,000. In contrast, the October 2006 balance of $14 million at a DC Preferred Bank generated monthly income of $48,000. As another example, one of the Foundation's IOLTA Preferred Banks realigned responsibility for IOLTA accounts to a regional manager, resulting in a decrease in the IOLTA rate and the loss of Preferred Bank status for that institution.

and to assess only customary, reasonable fees and charges against such earnings.[14] The revised rules provide that a financial institution may fulfill its undertaking either by (a) setting rates that can be verified as comparable to those paid on non-IOLTA accounts, or (b) offering the "benchmark" rate set periodically by the Foundation pursuant to the IOLTA rules.

As noted at the outset of this memorandum, amendment of the IOLTA rules to make rate comparability a condition to approval by the BPR of financial institutions as depositories for IOLTA funds should enhance significantly the funding for legal services for the disadvantaged. The Courts of the District of Columbia have recognized the provision and funding of such services as a major obligation of all members of the bar. Channeling attorneys' IOLTA funds into institutions offering comparable rates will help fund legal services for the disadvantaged.

Recommended changes are:

> Appendix B/Rule 1.20, subsection (f)(1)(A) – identifies "comparable rates";
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> Appendix B/Rule 1.20, subsection (f)(1)(B) – provides for setting of a "benchmark" rate; and
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> Appendix B/Rule 1.20, subsections (f)(1)(A)(ii) and (2) – allow banks to pay higher rates on IOLTA.

ii. Approval and monitoring of financial institutions <u>as depositories for IOLTA-eligible funds</u>

Under current rules, the BPR maintains a list of approved depositories for IOLTA funds. To be approved, financial institutions must file with the BPR an undertaking to report overdrafts on IOLTA accounts to the Office of Bar Counsel and to respond to sub-

[14] The undertaking proposed in the revised rules also makes explicit the financial institutions' agreement to provide standard reports to the Bar Foundation about the IOLTA accounts they hold. Such reports are to be provided under the existing rules, but compliance has been spotty.

poenas from the Office of Bar Counsel for account records. See Rule 1.19(c). Proposed revisions add another requirement to approval by the BPR: the financial institution must file with the BPR an undertaking to pay comparable rates on IOLTA accounts as defined by the IOLTA rules, to assess only customary and reasonable fees on such accounts, and to report to the Bar Foundation data respecting their IOLTA accounts from which the comparability of rates and fees can be monitored. For programmatic and staffing reasons, we propose that the Bar Foundation perform the responsibility of (a) monitoring whether financial institutions are fulfilling their undertakings to pay comparable rates and (b) reporting any findings of noncompliance to the BPR. Bar Foundation staff already work with the financial institutions on their IOLTA programs, and this task follows naturally from this relationship. We contemplate that the Bar Foundation will publish, and keep updated, in the *Bank Guidelines,* the procedures to be followed in determining comparability of rates for those institutions which do not choose the "benchmark" option. Relevant changes are:

> Rule 1.19, section (c) -- provides that to be approved by the BPR as a depository for IOLTA funds, financial institutions must file an undertaking to fulfill the requirements of Appendix B/Rule 1.20 (f) and (g) for payment of comparable rates, assessment of reasonable fees, and reporting data respecting IOLTA accounts to the Bar Foundation.
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> Appendix B/Rule 1.20, section (h) states that the Foundation shall monitor fulfillment by financial institutions approved as IOLTA depositories of their undertaking to pay comparable rates, assess reasonable fees, and provide periodic reports, and shall transmit to the BPR findings of noncompliance.

iii. Expanding the kinds of accounts authorized to receive and hold IOLTA Funds

Under existing rules, IOLTA funds must be held in interest-bearing "trust" or "escrow" accounts subject to withdrawal upon request and without delay. Such accounts must be at federally-insured depository institutions. See Appendix B, Sections (a), (b). Those institutions must be approved by the BPR in order to hold client trust funds. While the rules do not otherwise limit the kind of investments in which the balances in such IOLTA accounts can be placed, as a matter of practice IOLTA funds have been held in interest-bearing checking accounts without investment in available vehicles that offer higher returns.

The proposed changes allow IOLTA funds to be deposited in checking accounts with a "sweep" feature allowing investment in daily overnight financial institution repurchase agreements and open-end money-market funds. These investment products are available to non-IOLTA customers and produce higher rates of return than do ordinary interest-bearing checking accounts.

The proposed rules, patterned after rules adopted in other jurisdictions, are drawn to minimize the risk to IOLTA funds while they are invested in such products. As set forth in Rule 1.20(a)(4), the repurchase agreements must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately-capitalized" as those terms are defined by federal statutes and regulations. To be eligible for IOLTA funds, open-end money-market funds must be invested solely in U.S. Government Securities, must hold themselves out as a "money-market fund" as that term is defined by federal statutes and regulations, and, at the time of the investment, must have total assets of at least $250 million.

Account security comes both from the level of collateralization required as well as from the investment limitations imposed on funds in IOLTA accounts – namely, that investments must be backed by US Government Securities. Jurisdictions that have studied and implemented changes allowing banks and other depositories for IOLTA funds to offer checking accounts with a sweep feature have found the legal and banking communities to be largely receptive to the changes we are proposing. Florida and Massachusetts, for example, worked closely with their respective state bankers associations in finalizing and implementing the change to rate comparability. We hope that a similar approach can be followed in D.C.

The revised rules retain unchanged the definition of "financial institutions" eligible as depositories for IOLTA funds. Compare revised Rule 1.19(h) with existing Rule 1.19(g). Under this provision, the institutions authorized as depositories for IOLTA accounts are banks, savings and loan associations, credit unions, savings banks and other businesses that accept for deposit funds held in trust by lawyers or law firms whose accounts are insured by an agency or instrumentality of the United States. See proposed sections:

> Appendix B/Rule 1.20, subsections (a)(4) and (5) – define authorized accounts and specify required protections for IOLTA funds;
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> Appendix B/Rule 1.20, subsection (f)(1)(A)(i) – authorizes overnight investment of balances in IOLTA accounts in daily (overnight) financial institution repurchase agreements or open-end money-market funds;.
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> Rule 1.19(h) and Appendix B/Rule 1.20, subsection (a)(2) – define financial institutions eligible as depositories for IOLTA accounts.

iv. Rate comparability programs in other States

Sixteen States have adopted the rate comparability elements proposed in the proposed revised rules – namely, requiring lawyers to place IOLTA funds in financial institutions that provide comparable rates; allowing IOLTA funds to be invested in checking accounts with a sweep feature allowing daily overnight investment of balances in financial institution repurchase agreements and money-market funds; and de-linking IOLTA rates from particular products such as consumer checking accounts. Eight such programs took effect recently (Connecticut on September 1, 2006; Massachusetts and Mississippi on January 1, 2007; Arkansas on February 1, 2007; Texas on March 1, 2007; Illinois and Minnesota on June 1 and July 1, 2007, respectively; and New York on August 15, 2007). Two other programs, Maine and Missouri, become effective on January 1, 2008. The Governor of California has signed legislation calling for comparable rates which is to become effective in 2008. Five other programs (Alabama, Florida, Michigan, New Jersey, and Ohio) implemented rate comparability earlier.[15] New Jersey implemented its rate comparability program in 2004. Its experience is relevant: IOLTA revenue more than doubled (from $15.4 million in 2004 to $32.2 million in 2005), and interest rates have risen from an average of 0.6% to an average of over 2%. In addition to these 16 States, four other States have incorporated some, but not all, of the three core rate comparability elements into their IOLTA programs.[16]

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[15] In addition, other States have made significant progress towards implementing comparability. Louisiana has filed rules with their courts to implement comparability. The Maryland Bar has presented revised rules to implement requirements for full comparability of rates on IOLTA accounts to the State Court of Appeals which has scheduled a hearing for December 3, 2007.

[16] These four states are Indiana, Pennsylvania, South Carolina, and Utah.

c. Specifying allowable fees financial institutions may charge

Many IOLTA programs have clarified what service charges and fees can be charged against interest and dividends earned on IOLTA accounts, and what charges and fees must be paid by the attorney or law firm holding the account. The current DC IOLTA Rules do not do so. The proposed changes both provide such clarification and ensure that IOLTA accounts will be on even footing with similar, non-IOLTA accounts as far as fee charges are concerned. Recommended changes are:

> Appendix B/Rule 1.20, subsection (a)(1) – defines "allowable reasonable fees";
>
> Appendix B/Rule 1.20, subsection (f)(3) – requires fees and charges to be set in line with customary practice for non-IOLTA accounts, and eliminates "negative netting";[17]
>
> Rule 1.19, section (c): provides that to be approved as an IOLTA depository financial institutions must undertake to comply with the reasonable fee requirements of Appendix B/Rule 1.20, subsection (f)(3).

6. Response to Questions Posed by the District of Columbia Bar and Bar Counsel

Following receipt and review of the proposed IOLTA rules revisions and supporting materials circulated June 1, 2007, DC Bar representatives and Bar Counsel asked the IOLTA Rules Review Subcommittee to consider and address several questions. We summarize here both the questions and our responses.

(a) Is there an affirmative legal basis for the Court/DC Bar to prohibit a lawyer from having an IOLTA account at a bank which does not offer IOLTA accounts at comparable rates? It would be helpful

[17] "Negative netting" refers to the practice of assessing a flat per-account fee (e.g., a monthly fee of $10) on each IOLTA account held at a particular bank, and deducting the total of such fees from the total interest earned on all such IOLTA accounts. As a result, even if a single IOLTA account only earns $2 in interest, the bank recoups its service fee by deducting it from interest earned on that account and all other IOLTA accounts. One bank with DC IOLTA accounts currently follows this practice, and deducts over $1,000 per month in total fees. This bank does not aggregate the IOLTA accounts for any other purpose.

not only to know that there have been no challenges raised in other jurisdictions, but also to have affirmative support for the proposition that the Court has the authority to mandate comparable rates as part of an IOLTA program.

Our expert advisors tell us that the authority to issue rules mandating IOLTA resides in the well-recognized jurisdiction of state supreme courts over the practice of law and the regulation of lawyers.[18] All but five jurisdictions mandate IOLTA programs through rules of their highest courts. This authority, according to the ABA Commission on IOLTA, has not been challenged in any legal proceeding. Our IOLTA advisors tell us that many courts have adopted rules prohibiting lawyers from establishing and maintaining any general trust accounts in banks that have not agreed to advise lawyer regulation authorities of trust account overdrafts. These overdraft notification requirements, which have existed for many years in more than 40 States, are an example of courts requiring lawyers to use only those banks that comply with that rule. As with the IOLTA rules, such requirements are voluntary: If financial institutions do not wish to give such notifications, they are under no obligation to offer such accounts to lawyers.

(b) How great are the odds that banks currently participating in IOLTA will decide to pull out if a comparability rule is adopted because the cost of offering IOLTA accounts will become unacceptable?

Our IOLTA experts advise that to date no bank has pulled out of IOLTA to avoid paying comparable rates. They say that the odds are low that financial institutions would do so. Even with comparable rates, which, of course, are paid on similarly situated private accounts, IOLTA accounts are profitable. This is so because, when approved, the

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[18] See *Brown v. Legal Foundation of Wash.*, 538 U.S. at 220 ("[I]n Washington, as in most other States, the IOLTA program was established by the State Supreme Court pursuant to its authority to regulate the practice of law."). This authority of the court was cited by the district court in *Roth v. King*, Civ. No. 03-1109-RMV, 2005 WL 4436163 (D.D.C. 2005), as the foundation for issuance of a new Superior Court rule establishing panels of counsel for appointment in family court cases.

revised rules will only require financial institutions to make available to IOLTA accounts investment products they have previously decided to offer to non-IOLTA customers, presumably because those products make money for the institutions. By refusing to offer comparable rates, financial institutions would also risk losing the earnings they enjoy on lawyers' and law firms' operating accounts which, almost uniformly, are located at the same institution as the IOLTA accounts.

Most of DC's IOLTA accounts are held by banks that operate nationally or regionally, and that already offer IOLTA accounts in jurisdictions with comparability rules.[19]

(c) Annual certification on or with the DC Bar's dues statement probably is problematic. The dues statement is already complicated. Obviously, a stand-alone letter is an option. What are other viable options? Can the goals of certification be accomplished by some other means?

A number of States incorporate IOLTA participation certification into their annual attorney registration process. Some require such certification with their dues form; others request, but do not require it; and others have a separate form available either in hard copy or electronically. IOLTA certification, according to information from other IOLTA programs, is an important part of an effective IOLTA program. Several jurisdictions are moving to on-line IOLTA certification. Database software and sample IOLTA certification language are available through the ABA IOLTA Clearinghouse and our contacts with other IOLTA programs. The Foundation will work with the DC Bar to identify and

[19] DC has a large legal community but a small banking community. Only 28 banks currently participate in DC's IOLTA program, and only 20 of these banks reported holding any IOLTA accounts as of June 1, 2007. This is in contrast to other jurisdictions in which comparably sized legal communities have 100 or more banks from which to choose.

develop useful, practical models for certification and the administrative expenses associated therewith.

> (d) How will compliance be monitored and by whom? For example, what happens when lawyers fail to certify? If suspension is the consequence, is the suspension a disciplinary one?

The "IOLTA Compliance Reporting Information 2006," attached as Attachment No. 1, reports for 48 States and the District of Columbia whether penalties exist for not certifying participation in IOLTA and, if so, what those penalties are. Jane Curran, Executive Director of the Florida Bar Foundation and its IOTA program, advises that in Florida and the other States with comprehensive IOLTA programs, except Texas, there is no specific discipline provided for failure to put IOLTA eligible funds into an IOLTA account. Rather, the disciplinary process is the same as it is for failure to comply with any rule governing lawyers. The Bar Foundation will continue to work with the DC Bar and the Office of Bar Counsel to identify sound and reasonable compliance practices and procedures. As noted, supra, p. 12, administrative suspension for failure to certify compliance with the IOLTA rules is not envisioned. Failure to certify would be subject to the regular disciplinary process.

> (e) Have there been any legal challenges to IOLTA rate comparability rules based on a claim that limiting IOLTA accounts to financial institutions that pay comparable rates tortuously interferes with contractual relationships between those institutions and their client law firms and attorneys?

According to the ABA staff of the Commission on IOLTA, there have been no such challenges or arguments raised in any of the jurisdictions that have adopted comparability rules.

> (f) In the event a forged check is drawn on an IOLTA account and honored, would the account enjoy the same level of protection

> from such a loss under the revised rules that it enjoys under the current rules? Assuming that under the current rules, FDIC insurance or bonding insurance would make the IOLTA account whole for any such loss, would there be a risk under the revised rules that some or all of the loss would have to be made up by the Client Security Fund?

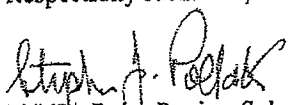
Having reviewed this question with our IOLTA expert advisors, we believe that any risk that a loss due to a forged check would have to be made up by the Client Security Fund would be no greater under the revised IOLTA rules than it is today under the current IOLTA rules. As noted earlier in this report, the subcommittee proposes no change in the institutions eligible as depositories for IOLTA accounts. Today such institutions have bonding insurance that covers loss due to forged checks. These institutions purchase such insurance because it is no longer economic for them to check the signature on each check against the signature cards account holders have filled out that are on file with the institution. Rather than dishonoring forged checks because the signatures do not match, the institutions generally honor such checks and rely on their bonding insurance to cover the losses. The revised rules do not change either the institutions or their customary practices in protecting against losses to account holders due to forged checks.

7. Conclusion

Based on the foregoing, the IOLTA Rules Review Subcommittee (DC Bar representatives abstaining) request that the attached proposed revisions to the Rules Governing the DC IOLTA Program be approved by the Board of Directors of the Foundation and transmitted, along with this report, to the D.C. Bar with a request that the Board of

Governors petition the Court of Appeals for the District of Columbia to adopt the revised rules.

Respectfully submitted,



IOLTA Rules Review Subcommittee
Lawrence Bloom
Carrie Fletcher
Katherine L. Garrett
Andrew H. Marks
Wallace E. Shipp, Jr.
Stephen J. Pollak, Chair

Attachments

ATTACHMENT 1

IOLTA Compliance Reporting Information 2006

Source: IOLTA Clearinghouse Database - Self Reporting by Programs

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Alabama	N						
Alaska	Y	Alaska Bar Association	Dues Notice	Each Year	Y	Administrative suspension	Y
Arizona	Y	The State Bar of Arizona	Their dues statement	Annually	Y	Disciplinary action by the State Bar	Noncompliance information
Arkansas	Y	to the Clerk of the Arkansas Supreme Court	IOLTA Compliance Statement	Annually	Y	They are reported to the Office of Professional Conduct	Y
California	N						
Colorado	Y	Colorado Supreme Court	Certification form	Annually	N		Y
Connecticut	Y	Statewide Grievance Committee	Attorney Registration Form	Annually	Y	Under certain circumstances	Y
Delaware	Y	Supreme Court of Delaware	Yearly registration	Annually	Y	Without registration lawyers may not practice law, failure to report IOLTA at the courts discretion	Y
District of Columbia	N						
Florida	Y	The Florida Bar	Annual Bar Fee Statement	Annually	Y	Same as for any violation of The Rules Regulating The Florida Bar	Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Georgia	N						
Hawaii	Y	To the Hawaii Justice Foundation	Part IV, IOLTA Certification Form	Annually	Y	If the form is not completed, they are administratively suspended. If they misrepresent, the Office of Disciplinary Counsel may take action when this is discovered.	Y
Idaho	Y	Idaho State Bar	Idaho State Bar Trust Account Certification	Annually	Y	Cannot be Licensed (but loosely enforced)	Y
Illinois	Y	To the Supreme Court via ARDC	Annual Registration	Annually	Y	Suspension of license	N
Indiana	Y	Clerk of the Indiana Supreme Court	Attorney Annual Registration Fee Form	Annually	Y	May be subject to administrative suspension	Y
Iowa							
Kansas	Y	Kansas Clerk of the Supreme Court					Y
Kentucky	Y	Kentucky IOLTA Fund Board of Trustees	Kentucky IOLTA Fund Compliance Certification Form	Every Other Year	N		Y
Louisiana	Y	Office of Disciplinary Counsel	State bar registration statement	Annually	Y		Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Maine	Y	Board of Overseers of the Bar	Annual Trust Account Report and IOLTA Election	Yearly	N		Y
Maryland	Y	Maryland Court of Appeals	Annual IOLTA Compliance Report	Annually	N	None are specified in the Rule	Y
Massachusetts	Y	Massachusetts Board of Bar	Registration statement	Annually	Y	Administrative suspension	Y
Michigan	Y	State Bar of Michigan	Bar Dues Statement	Annually	Y	Delay of licensing	Y
Minnesota	Y	Minnesota Supreme Court	Attorney Registration Statement	Annually	Y	Suspension for failure to pay annual fee; Failure to maintain account may result in professional discipline	Y
Mississippi	Y						
Missouri	Y	Clerk of the Supreme Court	Annual Attorney Enrollment Form	Annually	N		Y
Montana	Y	State Bar On Montana	Compliance form provided by State Bar	Annually			N
Nebraska	Y	Bar Association	Trust Account Affidavit	Annually	N		The NLTAF receives a copy of the affidavit

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Nevada	Y	Supreme Court of Nevada	Form provided by the court	Annually	N		Y
New Hampshire	Y	New Hampshire Foundation	IOLTA Verification Form	Annually	N		Y
New Jersey	Y	The IOLTA Fund of the Bar of New Jersey	IOLTA Registration Form	Annually	Y	Declared administratively ineligible to practice law by court order	Y
New Mexico	Y	Clerk of New Mexico Supreme Court	Annual certification on State Bar dues	Yearly	N		Y
New York	N				N		
North Carolina	Y	NC State Bar	Annual Dues notice	Annually	N		Y
North Dakota							
Ohio	Y	Supreme Court	Biennial registration form	Every 2 years	Y	Handled by Supreme Court of Ohio's Disciplinary Council	Y
Oklahoma	Y	Oklahoma Bar Association	Annual dues statement	Annually	Y	Members are faced with possible disciplinary action through the association	Y
Oregon	Y	Oregon State Bar	Annual Certification of Compliance	Annually		Under review	Y
Pennsylvania	Y	Disciplinary Board of The Supreme Court of PA	PA Attorney's Annual Fee Form	Annually		The form will not be processed without the certification	Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Rhode Island	Y	Send compliance form to Bar Foundation	IOLTA notice and certification of compliance form	Annually	N		Bar Foundation keeps compliance form on file
South Carolina	Y	South Carolina Bar	License fee statement	Annually	N		Y
South Dakota							
Tennessee	Y	Board of Professional Responsibility	Registration statement	Annually	N		Y
Texas	Y	Texas Equal Access to Justice Foundation	Paper forms mailed-in 2006 can report on line	Annually	Y	A list of non-compliance is sent to the Supreme Court and attorneys are subject to suspension.	Y
Utah	Y	Utah Bar Foundation/Utah Supreme Court	IOLTA Trust Account Certification	Annually		That will be determined by Supreme Court this October.	Y
Vermont	Y	Attorney Licensing	License Renewal	Every two years	Y	Attorney License will not be renewed	Y
Virgin Islands	N						
Virginia	N						
Washington	Y	WSBA	Trust account attestation	Annually			Y
West Virginia	Y	West Virginia Bar Foundation	Bar Foundation Form	Annually	Y	Violation of Rules of Professional Conduct	Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Wisconsin	Y	Wisconsin Office of Lawyer Regulation (OLR)	Wisconsin State Bar dues statement; OLR forms	Annually	Y	Suspension	N
Wyoming	Y	Wyoming State Bar	Annual license fee statement	Annually	Y		Y

REVISED RULES

November 2, 2007

Proposed Revised Rule 1.15 Safekeeping Property

(a) A lawyer or law firm shall hold property of clients or third persons that is in the lawyer's or law firm's possession in connection with a representation separate from the lawyer's or law firm's own property. Funds shall be kept in a separate account maintained in a financial institution as defined in Rule 1.19(h). Other property shall be identified as such and appropriately safeguarded; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer or law firm under an escrow or similar agreement in connection with a commercial transaction. Complete records of such account funds and other property shall be kept by the lawyer or law firm and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(c) When in the course of representation a lawyer or law firm is in possession of property in which interests are claimed by the lawyer or law firm and another person, or by two or more persons to each of whom the lawyer or law firm may have an obligation, the property shall be kept separate by the lawyer or law firm until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer or law firm until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a).

(d) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(e) A lawyer or law firm that holds funds for a client or third party that are nominal in amount or to be held for a short period of time and that cannot earn income for the client or third party in excess of the costs incurred to secure such income shall place those funds in one or more interest- or dividend-bearing accounts for the benefit of the charitable

purposes of an "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Rule 1.20.

(f) Nothing in this rule shall prohibit a lawyer or law firm from placing a small amount of the lawyer's or law firm's funds into a trust account for the purposes of defraying financial institution charges or to obtain a waiver of service charges or fees that may be made against that account.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (d) of Rule 1.15 permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," *see* Rule 1.0(e).

[3] The District of Columbia Court of Appeals has promulgated specific rules requiring lawyers and law firms to place clients' funds that are nominal in amount or that are to be held for a short period of time and cannot earn income for the client or third party in excess of the costs incurred to secure such income into interest- or dividend-bearing accounts for the benefit of the charitable purposes of an "Interest on Lawyers Trust Account (IOLTA)" program.

[4] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[5] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

November 2, 2007

Proposed Revised Rule 1.19 Trust Account Overdraft Notification

(a) Funds coming into the possession of a lawyer or law firm that are required by these Rules to be segregated from the lawyer's or law firm's own funds (such segregated funds hereinafter being referred to as "trust funds") shall be deposited in one or more specially designated accounts at a financial institution. The title of each such account shall contain the words "Trust Account" or "Escrow Account," as well as the lawyer's or the lawyer's law firm's identity, except that each such account established pursuant to Rule 1.20 shall contain the words "IOLTA Account" as well as the lawyer's or the lawyer's law firm's identity.

(b) The accounts required pursuant to paragraph (a) shall be maintained only in financial institutions that are listed as "D.C. Board on Professional Responsibility (BPR)-approved depositories" on a list maintained for this purpose by the Board on Professional Responsibility, unless (1) the account is permitted to be held elsewhere or in a different manner by law or court order, or (2) a lawyer or law firm holds trust funds under an escrow or similar agreement in connection with a commercial transaction. If a lawyer is a member of the District of Columbia Bar and practices law outside the District of Columbia, BPR-approved depositories shall be used for deposit of any: (3) trust funds received by the lawyer or law firm in the District of Columbia; (4) trust funds received by the lawyer or law firm from, or for the benefit of, parties or persons located in the District of Columbia; and/or (5) trust funds received by the lawyer or law firm that arise from transactions negotiated or consummated in the District of Columbia. If such funds are IOLTA-eligible funds as defined in Rule 1.20(a)(6), interest and dividends on such funds shall be remitted to the District of Columbia Bar Foundation in accordance with Rule 1.20(g).

(c) To be listed as an approved depository, a financial institution shall file an undertaking with the BPR, on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain IOLTA accounts, to fulfill the requirements of Rule 1.20(f) and (g). In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain IOLTA accounts, to fulfill the requirements of Rule 1.20(f) and (g), approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised

based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of D.C. BPR- approved depositories.

(d) Reports to Bar Counsel by approved depositories pursuant to paragraph (c) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(e) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(f) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (c) above.

(g) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(h) Definitions:

"Law Firm" – Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

"Financial Institution" – Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

November 2, 2007

Proposed Revised Rule 1.20 Interest on Lawyers' Trust Accounts Program

(a) As used in this Rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee.

(2) "Eligible institution" means a financial institution as defined in Rule 1.19(h).

(3) "Foundation" means the District of Columbia Bar Foundation, Inc.

(4) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.

(5) "IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at an eligible institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.

(6) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time ("short-term funds"), and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.

(b) A lawyer or law firm that holds IOLTA-eligible funds shall create and maintain an IOLTA account in an eligible institution that meets the requirements of this Rule and is on the list of BPR-approved depositories maintained pursuant to Rule 1.19(b). All IOLTA-eligible funds shall be deposited in the lawyer's or law firm's IOLTA account unless, in the lawyer's or law firm's good faith judgment, the funds can earn income for the client or third party in excess of the costs incurred to secure such income.

(c) The determination of whether funds are nominal in amount or short-term so that they cannot earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer or law firm shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(d) In the exercise of a lawyer's or law firm's good faith judgment in determining whether funds can earn income in excess of costs, a lawyer or law firm may take into consideration all reasonable factors including, without limitation:

(1) the amount of the funds to be deposited;

(2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(3) the rates of interest or yield at the financial institution where the funds are to be deposited;

(4) the cost of establishing and administering a non-IOLTA account for the benefit of the client or third party, including service fees, the cost of the lawyer's services, accounting fees, and tax reporting costs and procedures;

(5) the capability of a financial institution, a lawyer or a law firm to calculate and pay income to individual clients or third parties; and

(6) any other circumstances that affect the ability of the funds to earn a net return for the client or third party.

(e) A lawyer or law firm shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third party.

(f) Participation by financial institutions in the IOLTA program is voluntary. An eligible institution that elects to offer and maintain IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates

for its non-IOLTA customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is an IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on an IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" net yield rate set periodically by the Foundation. The benchmark net yield rate shall be a percentage of the Federal Funds Target Rate net of allowable reasonable fees.

(2) Nothing in this Rule shall preclude an eligible institution from paying a higher interest rate or dividend on an IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest or dividends earned on an IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one IOLTA account for any period shall not be taken from interest or dividends earned on any other IOLTA account or accounts or from the principal of any IOLTA account. Nothing in this rule shall preclude an eligible institution from electing to waive any fees and service charges on an IOLTA account.

(g) The lawyer or law firm depositing funds in an IOLTA account shall direct the eligible institution on forms approved by the Foundation:

(1) To remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The eligible institution may remit the interest or dividends on all of its IOLTA accounts in a lump sum; however, the eligible institution shall

provide, for each individual IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) To transmit with each remittance to the Foundation a report showing the following information for each IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) To transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall monitor fulfillment of the requirements of paragraphs (f) and (g) of this Rule by institutions that elect to offer and maintain IOLTA accounts and report findings of noncompliance to the BPR.

(i) Lawyers or law firms shall advise the Foundation of the establishment and closing of an account for IOLTA-eligible funds. Such notice shall be given in a form and manner prescribed by the Foundation.

(j) Every lawyer admitted to practice in the District of Columbia shall, personally or through the law firm with which the lawyer is associated, certify periodically, in a form and manner approved by the District of Columbia Bar, that all IOLTA-eligible funds are held in one or more IOLTA accounts or that the lawyer or law firm is exempt because the lawyer or the law firm does not hold IOLTA-eligible funds.

(k) The Foundation shall maintain records of each remittance and statement received from financial institutions for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's IOLTA accounts.

(l) All interest and dividends transmitted to the Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

November 2, 2007

Proposed Revised Rule 1.15 Safekeeping Property

Proposed Revisions to Existing Rule – Redlined

(a) A lawyer or law firm shall hold property of clients or third persons that is in the lawyer's or law firm's possession in connection with a representation separate from the lawyer's or law firm's own property. Funds shall be kept in a separate account maintained in a financial institution as defined in Rule 1.19(h). Other property shall be identified as such and appropriately safeguarded; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer or law firm under an escrow or similar agreement in connection with a commercial transaction. Complete records of such account funds and other property shall be kept by the lawyer or law firm and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(c) When in the course of representation a lawyer or law firm is in possession of property in which interests are claimed by the lawyer or law firm and another person, or by two or more persons to each of whom the lawyer or law firm may have an obligation, the property shall be kept separate by the lawyer or law firm until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer or law firm until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a).

(d) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(e) A lawyer or law firm that holds funds for a client or third party that are nominal in amount or to be held for a short period of time and that cannot earn income for the client or third party in excess of the costs incurred to secure such income shall place those funds in one or more interest- or dividend-bearing accounts for the benefit of the charitable

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purposes of an "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Rule 1.20.

(f) Nothing in this rule shall prohibit a lawyer or law firm from placing a small amount of the lawyer's or law firm's funds into a trust account for the purposes of defraying financial institution charges or to obtain a waiver of service charges or fees that may be made against that account.

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COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (d) of Rule 1.15 permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," *see* Rule 1.0(e).

[3] The District of Columbia Court of Appeals has promulgated specific rules requiring lawyers and law firms to place clients' funds that are nominal in amount or that are to be held for a short period of time and cannot earn income for the client or third party in excess of the costs incurred to secure such income into interest- or dividend-bearing accounts for the benefit of the charitable purposes of an "Interest on Lawyers Trust Account (IOLTA)" program.

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[4] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[5] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

November 2, 2007

Proposed Revised Rule 1.19 Trust Account Overdraft Notification

Proposed Revisions to Existing Rule – Redlined

(a) Funds coming into the possession of a lawyer or law firm that are required by these Rules to be segregated from the lawyer's or law firm's own funds (such segregated funds hereinafter being referred to as "trust funds") shall be deposited in one or more specially designated accounts at a financial institution. The title of each such account shall contain the words "Trust Account" or "Escrow Account," as well as the lawyer's or the lawyer's law firm's identity, except that each such account established pursuant to Rule 1.20 shall contain the words "IOLTA Account" as well as the lawyer's or the lawyer's law firm's identity.

(b) The accounts required pursuant to paragraph (a) shall be maintained only in financial institutions that are listed as "D.C. Board on Professional Responsibility (BPR)-approved depositories" on a list maintained for this purpose by the Board on Professional Responsibility, unless (1) the account is permitted to be held elsewhere or in a different manner by law or court order, or (2) a lawyer or law firm holds trust funds under an escrow or similar agreement in connection with a commercial transaction. If a lawyer is a member of the District of Columbia Bar and practices law outside the District of Columbia, BPR-approved depositories shall be used for deposit of any: (3) trust funds received by the lawyer or law firm in the District of Columbia; (4) trust funds received by the lawyer or law firm from, or for the benefit of, parties or persons located in the District of Columbia; and/or (5) trust funds received by the lawyer or law firm that arise from transactions negotiated or consummated in the District of Columbia. If such funds are IOLTA-eligible funds as defined in Rule 1.20(a)(6), interest and dividends on such funds shall be remitted to the District of Columbia Bar Foundation in accordance with Rule 1.20(g).

(c) To be listed as an approved depository, a financial institution shall file an undertaking with the BPR, on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain IOLTA accounts, to fulfill the requirements of Rule 1.20(f) and (g). In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain IOLTA accounts, to fulfill the requirements of Rule 1.20(f) and (g), approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised

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based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of D.C. BPR approved depositories.

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(d) Reports to Bar Counsel by approved depositories pursuant to paragraph (c) above shall contain the following information:

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(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(e) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

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(f) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (c) above.

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(g) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

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(h) Definitions:

"Law Firm" – Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

"Financial Institution" – Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

APPENDIX B

APPENDIX B. INTEREST ON LAWYERS TRUST ACCOUNTS PROGRAM

(a) Unless an election not to do so is submitted in accordance with the procedure set forth in section (f) of this appendix, a lawyer or law firm with which the lawyer is associated who receives client funds shall maintain a pooled interest-bearing depository account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. Such an account shall comply with the following provisions:

(1) The account shall include only clients' funds which are nominal in amount or are expected to be held for a short period of time.

(2) No interest from such an account shall be made available to a lawyer or law firm.

(3) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm.

(4) Notification to clients whose funds are nominal in amount or to be held for a short period of time is not required.

(b) Any interest-bearing trust account established pursuant to section (a) of this appendix may be established with any financial institution which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the lawyer's or law firm's office is situated and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies. Funds deposited in such accounts shall be subject to withdrawal upon request and without delay.

(c) Lawyers or law firms depositing client funds which are nominal in amount or to be held for a short period of time in an interest-bearing depository account under section (a) of this appendix shall direct the depository institution:

(1) to remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practice for other depositors, at least quarterly, to the District of Columbia Bar Foundation.

(2) to transmit with each remittance to the District of Columbia Bar Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied.

(d) The District of Columbia Bar Foundation shall maintain records of each remittance and statement received from depository institutions for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records and statements pertaining to that lawyer's or law firm's account.

(e) All interest transmitted to the District of Columbia Bar Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Bar Foundation for operation of the IOLTA program, be distributed by that entity for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

(f)(1) A lawyer or law firm that elects to decline to maintain accounts described in section (a) of this appendix for the twelve months beginning March 1, 1985, shall submit a Notice of Declination in writing, on a form provided by the clerk, to the Chief Judge of this court or the Chief Judge's designee, on or before November 1, 1985. Any such submission need not be renewed for any ensuing year.

(2) Any lawyer or law firm that has not filed a Notice of Declination on or before July 1, 1985, may elect to decline to participate in any ensuing year by filing a Notice of Declination with the Chief Judge or the Chief Judge's designee, within a thirty-one day period commencing on the first day of March of each year.

(3) Notwithstanding the foregoing, any lawyer or law firm may petition the court at any time and, for good cause shown, may be granted leave to file a Notice of Declination at a time other than those specified above. An election to decline participation may be revoked at any time by filing with the Chief Judge or the Chief Judge's designee a request for enrollment in the program.

(4) A lawyer or law firm that does not file with the Chief Judge or the Chief Judge's designee a Notice of Declination in accordance with the provisions of this appendix shall be required to maintain accounts in accordance with section (a) of this appendix.

Appendix B

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal or the jurisdiction in which the lawyer principally practices. A lawyer shall, in the form and manner prescribed by the District of Columbia Bar Foundation (Foundation), (1) advise the Foundation of the establishment and closing of a DC IOLTA Account; and (2) certify periodically to the Foundation compliance with the IOLTA requirements of this rule or exemption from those requirements.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraphs (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives

informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer principally practices, except when the lawyer is required by a tribunal, or by a foreign jurisdiction where the lawyer principally practices, to follow a contrary rule regarding particular trust deposits. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. An IOLTA program (however named) in the foreign jurisdiction where a lawyer principally practices will be deemed mandatory even though a lawyer has the right to opt out of, or not to opt into, that program; provided, however, that a lawyer who exercises a right to opt out of, or not to opt into, a foreign jurisdiction's IOLTA program (however named) shall not be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac*

vice, to hold trust funds as may be directed by that tribunal. This rule contemplates that a law firm may, in the form and manner prescribed by the Foundation, act in behalf of lawyers associated with the firm to advise the Foundation of the establishment and closing of DC IOLTA Accounts and to certify periodically to the Foundation compliance by such lawyers with the IOLTA requirements of this rule or exemption from those requirements. With regard to monitoring by the Foundation of compliance with the IOLTA reporting requirements of this rule, see Rule XI § 20(h) of the Rules Governing the DC Bar. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI and the Foundation's web site www.dcbarfoundation.org.

[4] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[5] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[6] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[7] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," *see* Rule 1.0(e).

[8] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Appendix C

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal or the jurisdiction in which the lawyer principally practices. A lawyer shall, in the form and manner prescribed by the District of Columbia Bar Foundation (Foundation), (1) advise the Foundation of the establishment and closing of a DC IOLTA Account; and (2) certify periodically to the Foundation compliance with the IOLTA requirements of this rule or exemption from those requirements.

Deleted: a separate account maintained in a financial institution which is authorized by federal, District of Columbia, or state law to do business in the jurisdiction where the account is maintained and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies.

Deleted: ; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer under an escrow or similar agreement in connection with a commercial transaction.

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(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

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(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraphs (a) and (b).

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(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives

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informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Deleted: (e) Nothing in this rule shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Appendix – to Rule X of the Court's Rules Governing the Bar of the District of Columbia, and are hereby incorporated into these rules. ¶

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

Deleted: paragraph (a)

Deleted: Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

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[2] Paragraph (d) of Rule 1.15 perm advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," *see* Rule 1.0(e). ¶

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer principally practices, except when the lawyer is required by a tribunal, or by a foreign jurisdiction where the lawyer principally practices, to follow a contrary rule regarding particular trust deposits. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. An IOLTA program (however named) in the foreign jurisdiction where a lawyer principally practices will be deemed mandatory even though a lawyer has the right to opt out of, or not to opt into, that program; provided, however, that a lawyer who exercises a right to opt out of, or not to opt into, a foreign jurisdiction's IOLTA program (however named) shall not be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac*

vice, to hold trust funds as may be directed by that tribunal. This rule contemplates that a law firm may, in the form and manner prescribed by the Foundation, act in behalf of lawyers associated with the firm to advise the Foundation of the establishment and closing of DC IOLTA Accounts and to certify periodically to the Foundation compliance by such lawyers with the IOLTA requirements of this rule or exemption from those requirements. With regard to monitoring by the Foundation of compliance with the IOLTA reporting requirements of this rule, see Rule XI § 20(h) of the Rules Governing the DC Bar. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI and the Foundation's web site www.dcbarfoundation.org.

[4] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[5] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[6] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[7] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," *see* Rule 1.0(e).

[8] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Deleted: [3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. ¶

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Deleted: [6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. ¶

¶

[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

Appendix D

Proposed Rule XI § 20
Approved Depositories for Lawyers' Trust Accounts
and
District of Columbia Interest on Lawyers Trust Accounts Program

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR-approved depositories.

(b) Reports to Bar Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when

the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA. accounts and non-IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the

sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:

(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation may monitor 1) fulfillment of the requirements of paragraphs (f) and (g) of this Rule by institutions that elect to offer and maintain DC IOLTA accounts; and 2) compliance by lawyers with the IOLTA reporting requirements of Rule 1.15(b) of the DC Rules of Professional Conduct.

(i) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(j) All interest and dividends transmitted to the Foundation shall, after deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

(k) Definitions. As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.

(2) "Foundation" means the District of Columbia Bar Foundation, Inc.

(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.

(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible

funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.

(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.

(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

APPENDIX

7

[6 pages]

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

Charles J. Willoughby
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Executive Attorney

Nancy C. Crisman
Assistant Executive Attorney

Erica S. Simpson
Assistant Executive Attorney

DCBAR

April 6, 2009

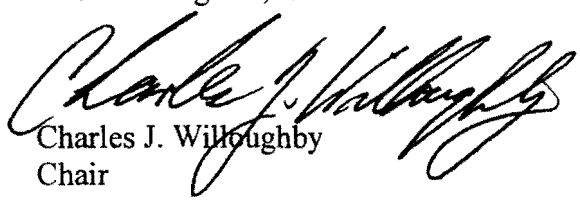
Eric L. Hirschhorn, Esquire
Chair
The Rules of Professional Conduct Review Committee
c/o Hope C. Todd, Esquire
The District of Columbia Bar
1250 H Street, N.W.
Sixth Floor
Washington, D.C. 20005-5937

Dear Mr. Hirschhorn:

On behalf of the Board on Professional Responsibility (the "Board"), I submit herewith the Board's comments on the proposed amendments to Rule 1.15 of the D.C. Rules of Professional Conduct and proposed D.C. Bar R. XI, § 20, which stem from the recommendations of the District of Columbia Bar Foundation and the D.C. Bar's Rules of Professional Conduct Review Committee ("Rules Review Committee"). The Board concurs with the recommendations of the Rules Review Committee with one exception, which is set forth in the attached comments.

The Board hopes that our comments are of assistance to the Rules Review Committee and the D.C. Bar Board of Governors. We would be pleased to respond to any questions concerning our comments.

With best regards,



Charles J. Willoughby
Chair

cc: Wallace E. Shipp, Jr., Esquire
Robert J. Spagnoletti, Esquire

409 E Street, N.W., Building B, Room 208, Washington, DC 20001 ▪ 202-638-4290, FAX 202-638-4704

COMMENTS OF THE BOARD ON PROFESSIONAL RESPONSIBILITY ON PROPOSED CHANGES TO THE DISTRICT OF COLUMBIA RULES GOVERNING THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

INTRODUCTION

The D.C. Bar Foundation (the "Bar Foundation") has proposed to the D.C. Bar certain revisions to the District of Columbia's IOLTA rules. At the request of then-D.C. Bar President Melvin White, the D.C. Bar's Rules of Professional Conduct Review Committee (the "Rules Review Committee") considered those proposed amendments and on February 5, 2009, submitted its Report and Recommendations.

The Board on Professional Responsibility (the "Board") concurs with the recommendations of the Rules Review Committee with one exception. Specifically, we urge that the proposed reporting and periodic certification requirements should not be made part of the Rules of Professional Conduct nor should a violation subject the offending lawyer to discipline, but should instead be treated as administrative requirements of Bar membership under D.C. Bar Rule II.

A. The Proposals for Enforcement of New IOLTA Reporting Requirements

The Bar Foundation's proposal includes new requirements that attorneys report the establishment and closing of IOLTA accounts and periodically certify their compliance with or exemption from the IOLTA Rules.[1] Further, the proposal would make a failure to comply with these requirements a violation of the disciplinary rules. As the Bar Foundation noted:

[1] The Bar Foundation proposes to amend the Rules of Professional Conduct to include a new Rule 1.20. Proposed Rule 1.20(i) would require lawyers or law firms to advise the Foundation of the establishment and closing of IOLTA-eligible accounts. Proposed Rule 1.20(j) would require that every lawyer periodically certify that all IOLTA-eligible funds are being held in an IOLTA account.

> We do not envision that failure or refusal to comply with the rule requiring periodic certification would subject the Bar member to administrative suspension. Rather, as at present, noncompliance with any of the IOLTA rules would be addressed by the Office of Bar Counsel pursuant to the normal disciplinary process.

Bar Foundation's November 2, 2007 Report at 12.

The Rules Review Committee recommended that these and other provisions relating to IOLTA accounts be placed in a proposed Rule 1.15(b),[2] but it was not asked to, and did not, comment on how these requirements should be enforced. It did, however, agree that the Bar Foundation should be empowered to monitor compliance with the reporting and certification requirements.[3].

B. <u>The Board's Comments</u>

While the Board supports the reporting and certification requirements, it disagrees with the proposal to make failure to comply with those requirements a violation of the Rules of Professional Conduct. Rather, the Board recommends that the proposed reporting and certification requirements be treated as administrative requirements of Bar membership under D.C. Bar R. II, rather than in proposed Rule 1.15(b) as subjects of disciplinary enforcement. Doing so will enable a fast response to a lawyer's failure to comply and will also avoid diverting the resources of the disciplinary system from cases involving conduct that seriously affects the courts, the public, and the profession.

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[2] Proposed Rule 1.15 (b) states, in relevant part:

> A lawyer shall, in the form and manner prescribed by the District of Columbia Bar Foundation (Foundation), (1) advise the Foundation of the establishment and closing of a DC IOLTA Account; and (2) certify periodically to the Foundation compliance with the IOLTA requirements of this rule or exemption from those requirements.

[3] As endorsed by the Rules Review Committee, proposed D.C. Bar R. XI, § 20(h) would provide: "The Foundation may monitor . . . compliance by lawyers with the IOLTA reporting requirements of Rule 1.15(b) of the DC Rules of Professional Conduct."

Rule 1.15 sets forth a lawyer's ethical obligations regarding the proper handling of entrusted funds. Violations of its provisions are serious. Intentional or reckless misappropriation ordinarily results, almost automatically, in disbarment and even a negligent misappropriation results in a lengthy suspension, as may a commingling violation. By contrast, the reporting and certification requirements set forth in the proposed amendments to Rule 1.15(b) are prophylactic measures intended to remind attorneys of their IOLTA obligations. They do not prescribe the manner in which a lawyer must handle entrusted funds, but instead require a lawyer to state that he or she has fulfilled those substantive duties. The courts, the profession, and the public must be protected from lawyers who mishandle entrusted funds, but a lawyer who complies with these duties does not pose a risk to the public merely because he or she fails to report or certify that compliance. In short, the certification and reporting requirements do not directly implicate the public interest; they are a means to an end, not an end in themselves. With the exception of the requirement to report professional misconduct in Rule 8.3, which is critical to a self-regulating profession, the D.C. Rules of Professional Conduct contain no administrative reporting requirement that carries disciplinary sanctions for noncompliance.[4]

Rather, reporting and certification regarding the handling of IOLTA funds are more properly included among the administrative requirements of Bar membership set

[4] Imposing disciplinary sanctions based on noncompliance with rules that have not been adopted by the Court also raises serious questions. The proposed reporting and certification rules would delegate to the Bar Foundation the authority to develop the reporting and certification requirements that the disciplinary system would then be asked to enforce. We believe that discipline should be reserved for violation of ethical norms established by the Court.

forth in D.C. Bar Rule II. Other such requirements include: periodic registration;[5] maintaining on file a current address; paying Bar dues; and, for new lawyers, completion of a mandatory ethics course. These important requirements enable the Bar to operate smoothly, and noncompliance exposes a lawyer to an administrative suspension.

Administrative suspension is far more likely than disciplinary action to promote quick compliance with the reporting requirements at relatively little cost. As in the case of failure to register or to pay Bar dues, the Bar would be able to act promptly and on its own initiative, following notice that a lawyer has failed to make the required report and/or certification. No lengthy proceedings are necessary. The disciplinary system, by contrast, involves layers of procedural requirements, culminating, in most cases, in review before the D.C. Court of Appeals, before any sanction is imposed, and the process is often lengthy. Although this deliberate process is suitable for enforcing ethical norms, it is not well adapted to compelling the timely submission of reports and certifications. If the expectation is that an initial inquiry from Bar Counsel would stimulate compliance, surely the same can be said of a notice of administrative suspension by the Bar.

The recent amendments to Rule XI reflect a clear indication from the Court that only serious and contested cases should command the resources of the disciplinary system. We do not think that noncompliance with a reporting requirement, when the lawyer may be complying with substantive ethical obligations, meets this threshold. To divert the resources of Bar Counsel, the lawyers and public members who volunteer their time, and members of the Court to enforce reporting requirements seems contrary to the

[5] Perhaps lawyers could be required to file the necessary certification regarding compliance with or exemption from the IOLTA requirements with the annual registration statement.

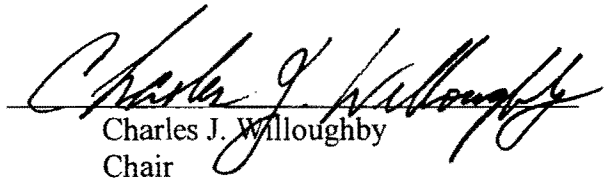
Court's direction. It is, moreover, ill-advised, especially at a time when the number of complaints may increase due to the current economic environment.

CONCLUSION

The Board appreciates the opportunity to submit its comments on the proposed changes to the IOLTA rules. We hope they are of assistance to the Rules Review Committee and the D.C. Bar Board of Governors.

Respectfully submitted,

THE BOARD ON PROFESSIONAL RESPONSIBILITY

By: 
Charles J. Willoughby
Chair

APPENDIX

8

[9 pages]

MEMORANDUM

TO: **D.C. Bar Board of Governors**

FROM: **Katherine A. Mazzaferri, Cynthia D. Hill, Carla J. Freudenburg**

DATE: **June 8, 2009**

SUBJECT: **Staff Recommendations on Certain IOLTA Proposals**

Introduction

As an overarching principle, the Rules of Professional Conduct Review Committee ("Rules Review Committee"), the Bar staff and the Bar Foundation agree that a comprehensive IOLTA rule will further the important mission of the Bar Foundation -- to make funding available to legal service providers in the District of Columbia by increasing the revenue available to the Bar Foundation. The Bar Foundation and the Bar staff further agree that member education will be important to the success of implementing any revised IOLTA rules.

However, there are several aspects of the proposed revisions to Rule 1.15 to which the Rules Review Committee, the Bar Foundation, and Bar staff have each taken a different approach. These different approaches involve proposals for a limited exception to compliance with the IOLTA rules for lawyers who engage in multijurisdictional practice; a requirement that members certify their compliance with or exemption from the IOLTA rules; certain additional reporting requirements for members who are required to maintain IOLTA trust accounts; and enforcement mechanisms.

Multijurisdictional Practice Exemption

The Rules Review Committee and the Bar Foundation have taken different approaches to determining who is covered under the proposed multijurisdictional ("MJP") practice exemption in Rule of Professional Conduct 1.15(b).

The attached memoranda from the Rules Review Committee and the Bar Foundation provide details about the approach and rationale each has taken in drafting the exception to RPC 1.15.

Member IOLTA Rules Education Campaign

The Bar staff consensus is that the most productive, cost-effective way to notify members about the new IOLTA rules and to facilitate compliance is through a comprehensive, in-depth program education effort, to be conducted under the Bar's Rules Education Program. This emphasis on extensive member education is particularly important because the requirements of the different jurisdictions in which some D.C. Bar members are licensed to practice may initially complicate those members' understanding

of how the revised rules would apply to them. The Bar Foundation supports the Bar's proposed member education campaign, and it is anticipated that the Bar Foundation would be involved in education and outreach to members.[1]

The Bar can draw on its successful experience in conducting the 2007 Rules Education Program on the substantial changes to the D.C. Rules of Professional Conduct. For example, all CLE courses devoted to the Rules changes received "good" to "excellent" ratings; most courses and faculty received "excellent" ratings; almost every course had feedback about the useful and practical nature of the courses; and many individual attendees commented that it was the best CLE they had attended. The 2007 Bar Conference was wholly devoted to the Rules changes, and the changes were highlighted in the *E-Brief* and the *Washington Lawyer*. The outreach has been ongoing: in FY 2007-08, 1,869 people attended 31 different courses that were in the Rules Education Program.

Additionally, the Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice, which is offered 12 times a year, receives consistently high ratings and reaches approximately 3,500 members annually. "Basic Training," a popular, intensive seminar for solo practitioners produced by the Practice Management Advisory Service, receives consistently outstanding feedback.

The Rules Education program on revised IOLTA rules would include:

1. *Washington Lawyer*: Bar president's page; "Speaking of Ethics" column; "Bar Counsel" column; and feature article(s). Articles and columns on the topic could appear in consecutive issues.

2. Continuing Legal Education: A new course about the new IOLTA rules could be developed, or the topic could be included as part of the existing CLE course on Ethics and Trust Accounts. The course could be offered free of charge to members; also available on a CD and online (if this latter method of delivery becomes available).

3. Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice: The topic would be included in the ethics, disciplinary system and regulation counsel segments of Course sessions.

4. Sections: Educational events sponsored by the solo and small firm committee of the Law Practice Management Section.

5. D.C. Bar Website: A lead story about changes to the IOLTA rules would be posted periodically on the Bar's website.

[1] Although the Bar Foundation supports a member education campaign, it does not view the member education campaign as an alternative to an IOLTA certification and reporting plan.

6. Regulation Counsel Staff: Legal ethics counsels and the manager of the Practice Management Advisory Service (PMAS) would educate members one-on-one through phone and e-mail consultations about the new rules and compliance.

7. "Basic Training" seminar: Sponsored by the Practice Management Service Committee, this intensive seminar for new and current solo practitioners is held once or twice a month by the PMAS manager. During sessions of this seminar, the manager and Bar Foundation staff would be available to educate members about the new IOLTA rules.

8. Bar Foundation: Through its work of managing and distributing IOLTA funds, the Bar Foundation has established relationships with area banks and large District law firms. It is anticipated that the Bar Foundation would continue its outreach and education efforts about the new IOLTA rules to the banks and law firms.

9. Online surveys to selected groups of members (particularly to solo practitioners and to attorneys in small, medium and large firms) before and after implementation of the IOLTA rules to assess members' awareness of the IOLTA rules and the effectiveness of the Bar's notice to members, and to identify ways in which the Bar could facilitate members' compliance. This idea originated from a recent discussion with the Bar Foundation.

10. The Bar can provide to the Bar Foundation contact information on the firm administrators for the largest law firms located within the District of Columbia, which would enable the Bar Foundation to reach approximately 9,000 lawyers.

11. After two years, an evaluation and cost/benefit analysis should be considered to determine if a certification plan would be appropriate, and if so, how it might effectively be designed.

Certification Requirement

The Bar Foundation has proposed that D.C. Bar members be required to certify whether they are complying with the IOLTA rules or whether they are exempt from them. Under the Foundation's proposal, non-compliance with the certification requirement would be treated as a disciplinary violation.

Although the Rules Review Committee's Report includes an IOLTA certification requirement in RPC 1.15 (b),[2] originally proposed by the Bar Foundation, the Rules Review Committee has taken no position on the merits of the form and manner of this requirement.[3]

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[2] "A Bar member shall in a form and manner prescribed by the Foundation… (2) certify periodically to the Foundation compliance with the IOLTA requirements of this rule or exemption from those requirements."

[3] The Bar Foundation's proposal was in proposed RPC 1.20, and it specified that certifications would be submitted to the D.C. Bar.

In comments filed about the proposed IOLTA rule changes, the Board on Professional Responsibility (BPR) and the Office of Bar Counsel (OBC) stated their belief that non-compliance with a certification requirement should not subject a member to disciplinary suspension because a member's failure to do so does not directly implicate the public interest, which the Rules of Professional Conduct are intended to protect. Additionally, enforcing a certification requirement would divert the resources of the Office of Bar Counsel from prosecuting serious and contested disciplinary cases. Instead, they recommended that enforcement of the IOLTA provisions be through administrative suspensions.

The Bar staff believes, however, that certification would be unduly administratively burdensome and expensive, and there is no assurance that imposing such a requirement would produce the desired result -- more revenue for the Foundation – or, if more revenue, enough additional revenue to offset the costs of administering a certification program. In addition, the Bar staff concurs with the views expressed by the BPR and the OBC that non-compliance with a certification requirement should not be subject to disciplinary suspension. Contrary to the alternative suggested by the BPR and OBC, however, Bar headquarters staff also believes that non-compliance with a certification requirement should not result in administrative suspension, i.e., the loss of one's license to practice law, under D.C. Bar Rules II or any other Bar rule.[4]

Sanctions for Non-Compliance

Information from other jurisdictions demonstrates that there are a variety of approaches to the issues of whether to require certification of IOLTA compliance and, if so, how to enforce the requirement.[5] For example, although Maryland requires lawyers to report their compliance with, or exemption from the IOLTA rule or statute, its Rules do not specify any penalties for non-compliance. New York reports that lawyers are not required to certify. Pennsylvania lawyers are obligated to certify, and the attorney's annual registration form will not be processed if he or she does not certify IOLTA compliance or exemption. In addition, even where it appears that there are sanctions for non-compliance, imposition of the sanctions may be inconsistent. For example, although Texas lawyers are subject to suspension for failing to certify, sometimes this penalty is

[4] Typically, the non-disciplinary parts of the Bar have had responsibility for handling matters where non-disciplinary enforcement is appropriate.

Although the BPR recommended administrative suspension for non-compliance with a certification requirement, the BPR did not consider the option of no enforcement because that question was not before it when it reviewed the Rules Review Committee's report. As a preliminary view, the BPR leadership has a concern about the non-enforcement proposal of the Bar headquarters staff; however, the full BPR has not had the opportunity to consider the matter.

[5] Chart, IOLTA Compliance Reporting Information 2006, IOLTA Clearinghouse Database – Self Reporting by Programs.

not enforced. California also has a certification requirement, but it appears that it is not currently being enforced.[6]

Certification itself, as opposed to compliance with the underlying ethical requirement of properly maintaining an IOLTA account, is a technical process that does not – and, in this jurisdiction, should not -- rise to the level of becoming an ethical requirement.[7] None of the other ethical requirements of the D.C. Rules of Professional Conduct have certification requirements.

Disciplinary or administrative suspension for non-compliance with a certification requirement would likely fall disproportionately on solo and small firm practitioners. Unlike large-firm practitioners, who have support systems in place to monitor and respond to a certification requirement, it is typically more of a challenge for solo and small-firm practitioners to handle administrative and business tasks related to their practices. Moreover, in the current economic climate, more attorneys, including recent law school graduates, are opening solo practices, and current solo and small firm practitioners are struggling with diminished revenue and resources. We believe that Bar resources would be better spent on notice to our members about the new IOLTA rules through intensive education efforts instead of punishing lawyers for failing to certify compliance or exemption with the IOLTA rules.

Cost Effectiveness Analysis

A certification requirement is expensive, and not known to be cost effective. As of November 2008, it was estimated that it would cost approximately $208,000 during the first year to reach 88,000 members by postal mail[8] and nearly $160,000 annually in subsequent years. This estimate includes only the cost of postage, and the labor costs for database design and data collection; it does not include the costs of ongoing editing, maintenance or analysis of the data, creating reports, etc.[9] These costs would only rise as the Bar's membership increases and postage and labor costs increase.

The costs of certification would have to be absorbed by the Bar Foundation. The 1980 member referendum prohibits the use of Bar dues for administering this program.

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[6] Maryland, New York and Pennsylvania are voluntary bar jurisdictions; California, Florida and Texas are unified bars.

[7] Without a track record of applying other methods, such as massive education, to secure compliance, certification and sanctions would be a particularly harsh response to a member who properly maintains all accounts but fails to submit a certification that he or she is complying with the IOLTA rules, or the member who clearly is exempt from the IOLTA requirements but fails to submit a certification to that effect.

[8] Given the unreliability of e-mail (e.g., incorrect and outdated addresses, member restrictions on usage, spam filters, employer rules about receipt of non-employment e-communications, etc.), e-mail would not be a viable alternative for effective notice to members who would be subject to the new requirements.

[9] The Bar staff also has not attempted to design or to estimate the costs of administering a process for administrative suspension of members who do not comply with a certification requirement, as proposed by the Bar Foundation.

If asked by the Court of Appeals for its opinion on using dues funds for certification, the BOG would have to determine, as a policy matter, if it thought that this use of dues was an appropriate, and a good use of dues, given the other Bar programs that the Bar is not permitted to fund with dues[10], as well as the limitations on available resources for those activities that are currently dues-funded.

Certification is unlikely to be cost effective for the Bar Foundation. The Bar Foundation has told us that $208,000 is the equivalent of nearly two months of revenue for it. However, given the current economic climate, the Foundation is now facing a $1,000,000 shortfall in interest revenue this year, and if a certification requirement were in effect, the costs of certification would absorb a higher percentage of its income – almost 20%.[11]

We are unaware of any way to quantify the amount of extra interest revenue that the Bar Foundation might gain through a certification requirement that would enable it to cross-check banking data and track down revenue that it otherwise may be "missing." There is no way of knowing whether a certification requirement would net the Foundation a "profit" in excess of the funds it would expend on certification.

Because there is not a uniform method for administering a certification requirement that can be duplicated reliably to produce enough revenue to justify the significant costs to administer it, we believe that it would be prudent initially to take a careful approach before implementing a certification program in this jurisdiction.

IOLTA Account Reporting Requirements

The Rules of Professional Conduct Review Committee's Report also includes an IOLTA reporting requirement in RPC 1.15(b)(1): "A Bar member shall in a form and manner prescribed by the Foundation (1) advise the Foundation of the establishment and closing of a DC IOLTA account . . ."

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[10] Including the CLE Program, which assists members in complying with their ethical obligations under RPC 1.1 to maintain the requisite knowledge and skills to represent clients competently.

[11] The variety of approaches among other jurisdictions may reflect how much IOLTA revenue is reliably anticipated as compared to with how much it costs to administer a certification requirement. For example, in 2007-08, Florida received $44 million in IOLTA revenue; California received $22 million in 2008; Texas, $20 million in 2007; Pennsylvania, $12.1 million in 2008; and Maryland, $6.7 million in 2008.

Although we do not know the break-out of the costs of administering California's IOLTA certification, California administers IOLTA accounts, the California Equal Access Fund, the Justice Gap Fund and the administration of grants to legal services providers with a $1.5 million operating budget. Three full-time staff work on IOLTA administration. Texas administers IOLTA compliance with two full-time staff who spend 50 to 60% of their time on compliance work during an approximately six-month period, and one assistant who provides full-time support during the same six months. Members comply through their law firms, online, or by mail. Last year, the Texas certification process moved more fully online; members were mailed only one paper reminder.

As with the proposed certification requirement, included in the Bar Foundation's report, the Rules Review Committee has taken no position on the form and manner of its implementation. [12]

The Bar Foundation has proposed that non-compliance with the reporting requirement should be treated as a disciplinary violation. While disagreeing with this approach, the BPR and the OBC have suggested that failure to report the opening and closing of IOLTA accounts should be subject to administrative suspension.[13]

Based on the research about some other jurisdictions, there is lack of uniformity and indeed, considerable ambiguity about whether there are penalties for bar members who fail to report the opening and closing of IOLTA accounts. For some jurisdictions, it is difficult to determine whether reporting is even required. For example, in Maryland and Pennsylvania, it is unclear whether attorneys are required to report the opening and closing of IOLTA accounts. According to IOLTA instructions given to California and Texas attorneys, it appears that they are required to report, but it is not clear that this is a rule-based requirement. Florida's ethical rules do require a member to report the opening of an IOLTA account (but are silent about whether the attorney must report the closing of such accounts), and failure to do so presumably subjects a member to disciplinary sanctions.

For the reasons expressed about certification, we do not think that there should be any consequences for the failure of a D.C. Bar member to notify the Bar Foundation of the opening and closing of an IOLTA account. In addition, Bar staff also believes that non-compliance should not result in administrative suspension under D.C. Bar Rule II or any other Bar rule.

However, we recognize that there are public policy reasons why the Bar Foundation would want members to notify it when they establish and close IOLTA accounts. For example, under current Appendix B(c)(1) and (2) to Rule X of the D.C. Bar Rules and the form used to establish an IOLTA account, the depository is directed by the lawyer or law firm to remit the interest, other financial information and the name of the lawyer or law firm associated with the IOLTA account to the D.C. Bar Foundation. The form also directs the lawyer to send a copy to the Bar Foundation (DC IOLTA Account Election Form attached). However, the Bar Foundation reports that banks and Bar members are inconsistent in providing this information. Thus, the Bar Foundation's proposed notice requirement would enable Foundation staff to cross check for accuracy the IOLTA account information and interest that the banks are providing to the Bar Foundation.

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[12] The Bar Foundation's proposal was in proposed RPC 1.20, and specified that notice would be made to the Bar Foundation in a form and manner prescribed by the Bar Foundation.

[13] As was the case with its consideration of the certification requirement, the BPR did not consider the alternative of no enforcement of an account reporting requirement because that question was not before it. While the BPR leadership preliminarily has a concern about the non-enforcement proposal, the full BPR has not had the opportunity to consider the matter.

The Rules Review Committee's proposed Section 20(g)(1) through (3) to Rule XI of the Rules Governing the Bar mirrors the purpose and function of current Appendix B(c)(1) and (2). The Bar Foundation agreed with the Rules Review Committee's placement of this language in Rule XI instead of an RPC.[14] The current language of Appendix B(c) states that lawyers or law firms depositing client funds . . . shall direct the depository institution to remit the interest to the Bar Foundation, etc. In comparison, the proposed language of Rule XI Section 20(g) does not include the language "lawyers or law firms shall direct the depository institution." Instead, Section (g) states that "On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall . . ." However, the obligations of the banks to the Bar Foundation are the same under the current and proposed rules.

Although we do not believe that there should be disciplinary or administrative consequences for the failure of a Bar member to report the opening and closing of an IOLTA account to the Bar Foundation, we support the idea that there should be a strong statement by the Court of Appeals as to the importance of lawyers reporting this information to the Bar Foundation. Additionally, there needs to be clarity on this point for our members and for our staff experts in the Legal Ethics and Practice Management programs who typically field these kinds of inquiries. In a manner analogous to RPC Rule 6.1, where members are encouraged to either provide pro bono representation or contribute to legal services providers, we suggest that members should be encouraged – although not required -- to notify the Bar Foundation of the establishment and closing of IOLTA accounts.

Conclusion

We strongly believe that an intensive education effort by the Bar and the Bar Foundation will accomplish the goal of educating Bar members about their new obligations under the revised IOLTA rules and will increase interest revenue to the Bar Foundation without the significant drain on revenue and staff resources that reporting and certification requirements would entail. The Bar already has a successful member education program to draw on in designing this effort. Several years after implementation of the IOLTA rules, an assessment can be considered to determine if certification and/or account reporting requirements are necessary to enhance the Bar Foundation's revenue and work significantly.

We also support surveys of our members to measure compliance with the IOLTA rules and to help us improve our efforts to facilitate member compliance.

Because we recognize that there are public policy reasons why the Bar Foundation would want members to notify it when they establish and close IOLTA accounts, we support a voluntary program accompanied by a strong statement from the

[14] The Rules Review Committee believed that the obligations of the approved depositories were more appropriately housed in Rule XI instead of a Rule of Professional Conduct, which governs obligations of lawyers.

Court within the Rules of Professional Conduct to encourage Bar members to notify the Bar Foundation when they open and close IOLTA accounts.

APPENDIX

9

[3 pages]

District of Columbia Bar
Board of Governors Meeting[1]
June 9, 2009

Call to Order
(Agenda Item 1)

President Robert J. Spagnoletti called the meeting to order at 2:35 p.m.

The members of the Board of Governors present at the meeting were President-elect Kim M. Keenan, and Board members Johnine P. Barnes, Amy L. Bess, Paulette E. Chapman, Judith M. Conti, Sabine S. Curto, Judy Deason, Natalie F. P. Gilfoyle, Ankur J. Goel, Ellen M. Jakovic, Charles Lowery, Jr., Barry Mills, Laura A. Possessky, Christina G. Sarchio, Melvin White, and Benjamin Wilson.

Bar Headquarters staff in attendance included Katherine A. Mazzaferri, Cynthia D. Hill, Joseph P. Stangl, Maureen Thornton Syracuse, Kathryn Alfisi, Elvira French, Carla J. Freudenburg, Mark Herzog, Cynthia D. Kuhn, Karen Savransky, Candace Smith-Tucker, and Hope C. Todd. Also in attendance were Katherine L. Garrett, Executive Director, D.C. Bar Foundation, Eric L. Hirschhorn, Chair, Rules of Professional Conduct Review Committee, Stephen J. Pollak, President, D.C. Bar Foundation, James E. Rocap III, Chair, Sections Council, Daniel Schumack, Vice-Chair, Rules of Professional Conduct Review Committee; and Gene Shipp, Bar Counsel.

Proposal on Amendments to the IOLTA Rules
(Agenda Item 9)

Eric L. Hirschhorn, Chair, and Daniel Schumack, Vice-Chair, of the Rules of Professional Conduct Review Committee presented their recommendations on revisions to the IOLTA rules located behind Tab 9. The committee's recommendations were in

[1] IOLTA discussion only; all other portions of the minutes are redacted.

response to proposals originally submitted to the Bar by the D.C. Bar Foundation and to comments filed during a public comment period. The presentation by Mr. Hirschhorn and Mr. Schumack was followed by presentations by Katherine L. Garrett, Executive Director, and Stephen J. Pollak, President of the D.C. Bar Foundation. It was noted that there was agreement that the Board of Governors should recommend to the Court of Appeals the adoption of mandatory IOLTA and rate comparability, but the Rules Review Committee and the Bar Foundation differed on how to define which Bar members would be subject to the new rules and which would be exempt. In particular the issue was the application of the rules to attorneys with multijurisdictional practices, i.e., how to address the possibility that they could be subject to conflicting rules among the District and other jurisdictions.

It was also noted that the Bar Foundation had originally proposed that the IOLTA rules require attorneys to certify whether they maintained IOLTA accounts or were exempt and to report to the Foundation on the opening and closing of such accounts, and that attorneys be subject to disciplinary suspensions for failing to certify or to report. However, in response to comments from the disciplinary system opposing disciplinary suspensions and a briefing memo from the Bar headquarters staff recommending that the Board support an extensive member education campaign instead of recommending certification and/or reporting requirements with administrative suspensions, Ms. Garrett stated that the Foundation would explore developing a program of monitoring and voluntary reporting to complement the education campaign, instead of continuing to recommend certification and reporting.

She suggested that this might involve a two-year period focused on education by the Bar and the Foundation and outreach by the Foundation, which would be followed by two more years of the outreach possibly including heightened requests for information, with evaluation and assessment of the effectiveness of the education and outreach efforts in the fifth year. Mr. Pollak suggested that the proposed revisions to Rule XI, Section 20(h) of the Rules Governing the Bar could be further revised to provide that the Bar Foundation would be authorized to engage in monitoring in lieu of certification and mandatory reporting.

It was noted that attorneys would continue to be subject to disciplinary action for failing to maintain their IOLTA accounts properly.

After a lengthy discussion of the multijurisdictional practice issue, the Board of Governors requested that the presenters prepare several scenarios that would illustrate how each of the proposals would apply in various multijurisdictional practice settings. In addition, President-elect Keenan asked that the Bar Foundation present to the Board a description of how a monitoring effort would work.

APPENDIX

10

[4 pages]

District of Columbia Bar
Board of Governors Meeting[1]
July 21, 2009

Call to Order
(Agenda Item 1)

President Kim M. Keenan called the Board of Governors to order at 1:15 p.m.

The members of the Board of Governors present at the meeting were: Johnine P. Barnes, Paulette E. Chapman, Judith M. Conti, Sabine S. Curto, Judy Deason, Ronald S. Flagg, Meredith Fuchs, Nathalie F.P. Gilfoyle, Ankur J. Goel, Ellen M. Jakovic, Kim M. Keenan, Barry C. Mills, Laura A. Possessky, James W. Rubin, and R. Justin Smith. Amy L. Bess, Charles R. Lowery, Jr., Christina G. Sarchio, and Robert J. Spagnoletti participated by telephone.

The Honorable Eric T. Washington, Chief Judge, D.C. Court of Appeals, and the Honorable Lee Satterfield, Chief Judge, D.C. Superior Court, joined the meeting. Bar headquarters staff members who attended were Katherine A. Mazzaferri, Cynthia D. Hill, Joseph P. Stangl, Maureen Thornton Syracuse, Carla J. Freudenburg, Mark Herzog, Cynthia G. Kuhn, Daniel Mills, Karen Savransky, and Hope C. Todd. Others in attendance were Elizabeth Branda, Board on Professional Responsibility; Katherine Garrett, D.C. Bar Foundation; Eric L. Hirschhorn, Rules of Professional Conduct Review Committee; Virginia A. McArthur, Continuing Legal Education Committee; Stephen J. Pollak, D.C. Bar Foundation; Daniel Schumack, Rules of Professional Conduct Review Committee; and Gene Shipp, Office of Bar Counsel.

Proposal on Amendments to IOLTA Rules
(Agenda Item 14)

Ms. Hope Todd summarized the three proposals for revisions to the IOLTA Rules to make IOLTA mandatory for D.C. Bar members and to require interest rate comparability for all

[1] IOLTA discussion only; all other portions of the minutes are redacted.

approved depositories. These included a November 2007 proposal of the D.C. Bar Foundation, a June 4, 2009 proposal of the Rules of Professional Conduct Review Committee ("Rules Review Committee"), and a June 9, 2009, proposal of the D.C. Bar Foundation. The critical distinction among the three proposals is how each rule addresses exemptions for members with multi-jurisdictional practices.

Mr. Daniel Schumack, Vice-Chair of the Rules Review Committee, presented the Rules Review Committee's recommendation, which would allow an exemption if the lawyer is otherwise compliant with contrary mandates of a tribunal or is participating in, and compliant with the trust accounting rules and IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices. He highlighted the committee's concerns about a transaction-based rule, e.g., the risks that attorneys would have to maintain multiple trust accounts, incur additional expense to manage and maintain them, and potentially commit disciplinary violations if funds were placed in the wrong accounts. He expressed the committee's desire to simplify and to clarify the IOLTA and trust accounting rules.

Mr. Eric L. Hirschhorn, Chair of the Rules Review Committee, also described the differences among the proposals.

Mr. Stephen J. Pollak, immediate past President of the D.C. Bar Foundation, and Ms. Katherine L. Garrett, Executive Director of the Bar Foundation, described the Foundation's November 2007 proposal, which would take a transactional approach and would require that all IOLTA funds arising out of transactions with a nexus to the District of Columbia be placed in D.C. IOLTA accounts. In response to the Rules Review Committee proposal, the Bar Foundation also put forward its June 9, 2009 proposal, which considers the practitioner's principal place of practice and would permit an exception to the D.C. IOLTA rule only when there is a conflict between the D.C. rule and the contrary mandates of a tribunal or another jurisdiction's rules.

Mr. Shipp described the Bar Counsel's analysis of disbursement irregularities and overdraft notices related to IOLTA accounts. He concluded that the number of matters involving trust accounts docketed by Bar Counsel is very small in relation to the total number of complaints received about other matters.

Mr. Mills discussed the impact on solo and small firm practitioners of maintaining multiple IOLTA accounts. He noted that in his Basic Training seminar, he receives many basic questions about trust accounts. He commented that any IOLTA rule adopted should be clear and easy for practitioners to follow.

The discussion moved to the merits of a transaction based or principal place of practice approach to addressing multi-jurisdictional practice considerations, the ease of practice for attorneys, and the increase in the amount of money potentially available for IOLTA.

> **ACTION ITEM:** Ms Keenan requested the sense of the Board as to Option 1, the Bar Foundation's proposal of November 2007 of a transaction-based approach. The sense of the Board of Governors was to reject option 1.
>
> **ACTION ITEM**: A motion was made and seconded to vote between options 2, the Rules Review Committee proposal of June 4, 2009 (rate comparability required for approved depositories and IOLTA participation mandatory for attorneys with exemption based on "licensed and principally practices") and 3, the Bar Foundation proposal of June 9, 2009 (rate comparability required for approved depositories and IOLTA participation mandatory for attorneys with exemption based on "contrary mandates"). Through a ballot vote by the voting members of the Board of Governors, the Board decisively approved recommending option 2 to the Court of Appeals.

Ms. Garrett then discussed the Bar Foundation's proposal on IOLTA monitoring by the Bar Foundation. Citing potential disciplinary consequences, Ms. Elizabeth Branda requested an opportunity to review and comment on any proposal on IOLTA monitoring. Ms. Mazzaferri discussed concerns related to sharing member records with the Bar Foundation for its monitoring efforts. She noted that those concerns could be addressed in a transmittal letter to the Court of Appeals. The Board then considered two separate proposals for draft language, one submitted by the Bar Foundation and the other by the D.C. Bar staff.

ACTION ITEM: A motion was made and seconded to approve in principle an IOLTA monitoring concept, with the specific language to be developed by the Bar Foundation and the Rules Review Committee, for final approval by the Executive Committee. The motion was accepted without objection.

APPENDIX

11

[25 pages]

DCBAR

DISTRICT OF COLUMBIA BAR

MEMORANDUM

TO: Board of Governors

FROM: Katherine A. Mazzaferri

RE: Update on IOLTA

DATE: September 4, 2009

Kim M. Keenan
President

Ronald S. Flagg
President-elect

Meredith Fuchs
Secretary

R. Justin Smith
Treasurer

Board of Governors
Johnine P. Barnes
Amy L. Bess
Paulette E. Chapman
Judith M. Conti
Sabine Curto
Judy Deason
Nathalie F. P. Gilfoyle
Ankur J. Goel
Ellen M. Jakovic
Charles R. Lowery Jr.
Rebecca M. McNeill
Barry C. Mills
Laura A. Possessky
Lena Robins
James Rubin
Christine Guerola Sarchio
Javier G. Salinos
Robert J. Spagnoletti
Benjamin F. Wilson

Timothy K. Webster
General Counsel

Katherine A. Mazzaferri
Executive Director

Cynthia D. Hill
Assistant Executive Director, Programs

Joseph P. Stangl
Assistant Executive Director, Administration and Finance

Bar President Kim Keenan has added an IOLTA matter to the September Board meeting agenda. She would like the Board to act on two outstanding items from the July 21, 2009 meeting about the proposed revisions to the IOLTA rules. Although the Board had delegated to the Executive Committee authority to approve the final language, in view of the timing of the upcoming Board meeting on September 8, Kim has determined that action by the Board seems most appropriate. This item will be taken up at approximately 4:35 p.m. on Tuesday, September 8, 2009.

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DCBAR

DISTRICT OF COLUMBIA BAR

MEMORANDUM

TO: Board of Governors

FROM: Kim Michele Keenan
Ronald S. Flagg

RE: Action Items for the Board of Governors on IOLTA

DATE: September 4, 2009

Kim M. Keenan
President

Ronald S. Flagg
President-elect

Meredith Fuchs
Secretary

R. Justin Smith
Treasurer

Board of Governors
Johnine P. Barnes
Amy L. Bess
Paulette E. Chapman
Judith M. Conti
Sabine Curto
Judy Deason
Nathalie F. P. Gilfoyle
Ankur J. Goel
Ellen M. Jakovic
Charles R. Lowery Jr.
Rebecca M. McNeill
Barry C. Mills
Laura A. Possessky
Lena Robins
James Rubin
Christine Guerola Sarchio
Javier G. Salinas
Robert J. Spagnoletti
Benjamin F. Wilson

Timothy K. Webster
General Counsel

Katherine A. Mazzaferri
Executive Director

Cynthia D. Hill
Assistant Executive Director, Programs

Joseph P. Stangl
Assistant Executive Director, Administration and Finance

Below are two action items for the September meeting.

The first item is to approve language in a new Comment 4 to Rule of Professional Conduct 1.15. The language would provide guidance on good faith determinations about where a lawyer "principally practices" for multi-jurisdictional practitioners.

The second item is to approve our recommendation that the Bar not include provisions about the monitoring of Bar members' participation in IOLTA by the Bar Foundation in the package of proposed IOLTA revisions to be transmitted to the Court of Appeals.

A. Comment 4: Good Faith Determination

Background

At the July 21 Board meeting, the Board approved the concepts in the IOLTA proposal recommended by the Rules of Professional Conduct Review Committee ("Rules Review Committee"), with specific language of the final rule to be drafted by the Rules Review Committee for approval by the Executive Committee. The specific language is a new comment to Rule 1.15(b). Rule 1.15(b) includes an exception to the mandatory IOLTA rule where the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices. The new comment is intended to provide guidance where a lawyer must make a good faith determination of the jurisdiction in which the lawyer principally practices. The new Comment [4], drafted by the Chair and Vice-Chair of the Rules Review Committee, and the Assistant Director for Legal Ethics, appears below.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to layer the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

B. IOLTA Monitoring

Background

On July 21 the Board also approved in principle provisions that would provide notice to Bar members that the Bar Foundation may monitor Bar members' participation in the IOLTA program, with the specific language to be developed by the Bar Foundation and the Rules Review Committee, for final approval by the Executive Committee. The specific language that was developed by representatives of the Bar, the Board and the Bar Foundation is below.

Rule 1.15, Comment 4:[1]

> The D.C. Bar Foundation (Foundation) administers the DC IOLTA program. The Foundation may monitor lawyers' participation in the DC IOLTA program. Additional elements of the IOLTA program are found in Section 20 of Rule XI of the Rules Governing the District of Columbia Bar. More information is available on the Foundation's website www.dcbarfoundation.org.

Rule XI, Section 20(h):

> The Foundation may monitor 1) fulfillment of the requirements of paragraphs (f) and (g) of this Rule by institutions that elect to offer and maintain DC IOLTA accounts; and 2) lawyers' participation in the DC IOLTA program.

You may recall that at that meeting, Betty Branda, Executive Attorney of the Board on Professional Responsibility (BPR), asked that BPR have the opportunity to review and

[1] At the time of drafting, the comment about IOLTA monitoring was designated as Comment 4. However, proposed Comment 4 is now intended to be the comment about a lawyer's good faith determination about his/her principal place of practice as described above.

comment on any monitoring proposals, because of concerns about potential disciplinary implications. In comments received on July 30, BPR raised several issues about the proposed monitoring provisions that will require further review. We intend to ask the Bar's Regulations/Rules/Board Procedures Committee to study those and related issues – including issues related to any enforcement mechanism and remedies for non-compliance -- in order to make a recommendation to the Board on what should ultimately be proposed to the Court.

In light of BPR's concerns and our view that further study is warranted, we are recommending that the Bar not forward the proposed monitoring language to the Court at this time. We anticipate that the Bar would forward proposed amendments that address monitoring by the Bar Foundation and these other related issues at a later time, based on the study and recommendations of the Regulations/Rules Committee.

In sum, our proposal is to move forward with revisions to the IOLTA rules in two steps. Step one would involve modification of the rules to adopt mandatory IOLTA and rate comparability. We propose to ask that the Court not delay its consideration of the attached proposed rules revisions implementing this step. Assuming that the Court changes the IOLTA rules, the immediate focus for implementation would be on member education. The Bar plans to work with the Bar Foundation to conduct an intensive member education campaign to provide notice to Bar members about the new IOLTA rules and how to comply with them.

Step two would cover the monitoring and enforcement provisions. Monitoring of IOLTA accounts by the Bar Foundation is not anticipated to begin until at least the third year after implementation of the revised IOLTA rules – and only after public notice and comment on the monitoring provisions. Under these circumstances, we believe that adoption of the mandatory IOLTA and rate comparability provisions should not be delayed by the time required for further consideration of the monitoring and enforcement issues.

Last month, the Bar Foundation's Executive Director was informed in response to her inquiry that in light of the issues raised by the BPR's comments, the Bar might decide not to forward the IOLTA monitoring provisions to the Court at this time. The Executive Director urged that the monitoring provisions be included in the IOLTA proposal to be forwarded to the Court. Because, as noted above, the BPR's comments also highlight the existence of open questions concerning the enforcement and remedies related to non-compliance with the IOLTA rules, we believe the more prudent course is to follow the two-step approach summarized above.

Attachments

cc: Katherine A. Mazzaferri, Esq.
Cynthia D. Hill, Esq.
Carla J. Freudenburg, Esq.

BOARD ON PROFESSIONAL RESPONSIBILITY

July 30, 2009

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DCBAR

Re: Proposed Changes to the District of Columbia Rules Governing IOLTA

Dear Ms. Keenan:

On behalf of the Board on Professional Responsibility, I submit herewith comments on the most recent proposed changes to the District of Columbia rules governing the Interest on Lawyers' Trust Accounts (IOLTA).

The Board hopes that our comments are of assistance to the Board of Governors in making its recommendations to the D.C. Court of Appeals.

We would be pleased to respond to any questions concerning the Board's comments.

With best regards,

Charles J. Willoughby
Chair

cc: Wallace E. Shipp, Jr., Esquire
Bar Counsel

Ronald S. Flagg, Esquire
President-Elect
District of Columbia Bar

Katherine L. Garrett, Esquire
Executive Director
District of Columbia Bar Foundation

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SUPPLEMENTAL COMMENTS OF THE BOARD ON PROFESSIONAL RESPONSIBILITY ON PROPOSED CHANGES TO THE DISTRICT OF COLUMBIA RULES GOVERNING THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

INTRODUCTION

The Board has been asked to comment on proposed language authorizing the Bar Foundation to monitor compliance with IOLTA requirements. The new language provides, in relevant part: "The Foundation may monitor lawyers' participation in the DC IOLTA program." Proposed Comment 4 to Rule 1.15. Two classes of entities are subject to monitoring: (1) financial institutions that hold IOLTA accounts; and (2) lawyers, with respect to their participation in the IOLTA program.[1] The proposal will require changes to the Comments to Rule 1.15 (safekeeping of property) and a new section of D.C. Bar Rule XI ("Rule XI") to address trust accounts. The monitoring provision would appear as Rule XI, § 20(h).

The Board has been advised that, for many years, the Foundation has monitored the opening of IOLTA accounts at financial institutions. The institution notifies the Foundation, which can then reconcile the interest payments to ensure that the Foundation is receiving funds from that IOLTA account. We understand that the Foundation intends to continue this practice, in the expectation that new IOLTA accounts will be opened if participation in IOLTA becomes mandatory, as the Board of Governors will propose. We are told that this monitoring has been occurring for more than 20 years, and the Foundation has not previously considered express authorization necessary. Further, we are told that the Foundation from time to time makes inquiries to individual lawyers.

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[1] Proposed Rule XI, § 20(h) provides that "[t]he Foundation may monitor 1) fulfillment of the requirements of paragraphs (f) and (g) of this Rule [setting forth dividend and interest rates and the remittance and reporting obligations of participating financial institutions] by institutions that elect to offer and maintain DC IOLTA accounts; and 2) lawyers' participation in the DC IOLTA program.

In the Board's view, these proposed amendments raise three issues:

1. **Is additional authority necessary?**

The rule seems superfluous in light of the fact that the Foundation currently monitors the opening of new accounts and may under its existing authority make inquiries of lawyers. If the rule is instead intended to increase the authority of the Foundation, it is important to identify the additional activities that the Foundation would be authorized to take.

2. **Placing the IOLTA rules in Rule XI will make them less prominent.**

Rule XI addresses the jurisdiction and operation of the disciplinary system. The IOLTA rules now appear as an appendix to the D.C. Rules of Professional Conduct. A violation of these provisions subjects a lawyer to discipline. As we understand, the Board of Governors approved the recommendation of the Rules of Professional Conduct Review Committee to move the IOLTA provisions from the appendix to a new section of Rule XI, which would separate them from the ethics rules governing lawyer conduct. Our understanding is that one objective of this change is to make the IOLTA rules more prominent.

We believe that the change will have the opposite effect. In the Board's experience, the vast majority of lawyers are not familiar with Rule XI and learn of it only when they become the subject of disciplinary charges. Further, it is not at all apparent that financial institutions will think to turn to the rule that governs lawyer discipline to determine their IOLTA responsibilities. Consequently, attaching the IOLTA rules at the end of the disciplinary procedures set forth in Rule XI will likely make the IOLTA rules harder for lawyers to find and no more accessible to financial institutions than they are in the appendix to the disciplinary rules.

3. **Describing the Foundation's authority in a Court rule devoted to the disciplinary system is confusing and potentially mischievous.**

In addition, placing in Rule XI a description of the Foundation's authority to monitor lawyers' participation in IOLTA implies that the Foundation is part of the disciplinary system and that a failure to provide information in response to its inquiry may be grounds for discipline. The proposed language of Rule XI, § 20(h) authorizes the Foundation to monitor "lawyers' participation in the DC IOLTA program." This suggests that the Foundation is to play an active role in the disciplinary system by investigating possible non-compliance. The problem is compounded because the provision would delegate to the Foundation broad discretion over the form and substance of its monitoring. Though the proponents of this provision have assured us that they contemplate only voluntary participation and non-intrusive inquiries, nothing in proposed § 20(h) so limits the Foundation's authority, leaving open the possibility that a future Foundation might take a contrary position. Engrafting a voluntary procedure into the mandatory rules of the disciplinary system invites confusion.

The Board appreciates the assurance of Bar Counsel that he would not prosecute an attorney for failing to cooperate with voluntary monitoring and that refusal to cooperate would not constitute misconduct under Rule XI, § 2(b) (defining misconduct). We do not find the issue as clear as Bar Counsel suggests, and there is no guarantee that a future Bar Counsel will not take a different view. The Board has held that provisions of Rule XI governing recordkeeping are enforceable by Bar Counsel, and they have been charged as violations.

4. **Where should the Bar Foundation's authority appear?**

The Board submits that the Bar, the Court and the Foundation would be best served by creating a new District of Columbia Bar Rule, Rule XVI, to address the Bar Foundation and its

role in IOLTA.[2] The Board on Professional Responsibility, the Clients' Security Fund, and the Attorney/Client Arbitration Board each has its own separate rule, making it easy for a lawyer to find the relevant provisions. Making participation in IOLTA mandatory will elevate the role of the Bar Foundation, and it is fitting that the Court's rules recognize its importance. A separate rule dedicated to the Bar Foundation will make it more prominent to both lawyers and financial institutions than appending the provisions to Rule XI.

Our proposed Rule XVI should explain the role of the Foundation and its authority to monitor lawyers' participation in IOLTA. The Board believes that the Rule should describe with some specificity what actions the Foundation is authorized to take and make clear that a lawyer "should" (i.e., is strongly urged to) comply with those reasonable requests.

CONCLUSION

The Board appreciates the opportunity to submit its comments to the most recent proposed changes to the IOLTA rules. We hope they are of assistance to the Board of Governors.

Respectfully submitted,

THE BOARD ON PROFESSIONAL RESPONSIBILITY

By: Charles J. Willoughby
Charles J. Willoughby
Chair

Dated: July 30, 2009

[2] Alternatively, the proposed rule could be numbered as Rule XIV, thus grouping the rule dedicated to the Bar Foundation with the rules governing the Board, the Clients' Security Fund and the Attorney/Client Arbitration Board, and the successive rules renumbered accordingly.

Red-line Proposed Rule 1.15
September 2009

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). ~~shall be kept in a separate account maintained in a financial institution which is authorized by federal, District of Columbia, or state law to do business in the jurisdiction where the account is maintained and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies.~~ Other property shall be identified as such and appropriately safeguarded.~~; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer under an escrow or similar agreement in connection with a commercial transaction.~~ Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) ~~(b)~~ Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) ~~(c)~~ When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) ~~(d)~~ Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

~~(e) Nothing in this rule shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. The IOLTA program rules are set forth in Appendix to Rule X of the Court's Rules Governing the Bar of the District of Columbia, and are hereby incorporated into these rules.~~

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. ~~paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.~~ This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other

than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

~~[3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program.~~

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical

location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

~~[4]~~ [6] Paragraphs (c) and (d) recognize that ~~L~~lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

~~[5]~~ [7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

~~[2]~~ [8] Paragraph (e) ~~(d) of Rule 1.15~~ permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

~~[6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.~~

~~[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.~~

~~[8]~~ [9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Rule 1.15—Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[3] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law

firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[5] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[6] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[7] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law

to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[8] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[9] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

Proposed Rule XI § 20
Approved Depositories for Lawyers' Trust Accounts
and
District of Columbia Interest on Lawyers Trust Accounts Program

(a) To be listed as an approved depository for lawyers' trust accounts, a financial institution shall file an undertaking with the Board on Professional Responsibility (BPR), on a form to be provided by the board's office, agreeing (1) promptly to report to the Office of Bar Counsel each instance in which an instrument that would properly be payable if sufficient funds were available has been presented against a lawyer's or law firm's specially designated account at such institution at a time when such account contained insufficient funds to pay such instrument, whether or not the instrument was honored and irrespective of any overdraft privileges that may attach to such account; and (2) for financial institutions that elect to offer and maintain District of Columbia IOLTA (DC IOLTA) accounts, to fulfill the requirements of subsections (f) and (g) below. In addition to undertaking to make the above-specified reports and, for financial institutions that elect to offer and maintain DC IOLTA accounts, to fulfill the requirements of subsections (f) and (g) below, approved depositories, wherever they are located, shall also undertake to respond promptly and fully to subpoenas from the Office of Bar Counsel that seek a lawyer's or law firm's specially designated account records, notwithstanding any objections that might be raised based upon the territorial limits on the effectiveness of such subpoenas or upon the jurisdiction of the District of Columbia Court of Appeals to enforce them.

Such undertakings shall apply to all branches of the financial institution and shall not be canceled by the institution except upon thirty (30) days written notice to the Office of Bar Counsel. The failure of an approved depository to comply with any of its undertakings hereunder shall be grounds for immediate removal of such institution from the list of BPR-approved depositories.

(b) Reports to Bar Counsel by approved depositories pursuant to paragraph (a) above shall contain the following information:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the institution's other regular account holders.

(2) In the case of an instrument that was presented against insufficient funds but was honored, the report shall identify the depository, the lawyer or law firm maintaining the account, the account number, the date of presentation for payment and the payment date of the instrument, as well as the amount of overdraft created thereby.

The report to the Office of Bar Counsel shall be made simultaneously with, and within the time period, if any, provided by law for notice of dishonor. If an instrument presented against insufficient funds was honored, the institution's report shall be mailed to Bar Counsel within five (5) business days of payment of the instrument.

(c) The establishment of a specially designated account at an approved depository shall be conclusively deemed to be consent by the lawyer or law firm maintaining such account to that institution's furnishing to the Office of Bar Counsel all reports and information required hereunder. No approved depository shall incur any liability by virtue of its compliance with the requirements of this rule, except as might otherwise arise from bad faith, intentional misconduct, or any other acts by the approved depository or its employees which, unrelated to this rule, would create liability.

(d) The designation of a financial institution as an approved depository pursuant to this rule shall not be deemed to be a warranty, representation, or guaranty by the District of Columbia Court of Appeals, the District of Columbia Bar, the District of Columbia Board on Professional Responsibility, the Office of Bar Counsel, or the District of Columbia Bar Foundation as to the financial soundness, business practices, or other attributes of such institution. Approval of an institution under this rule means only that the institution has undertaken to meet the reporting and other requirements enumerated in paragraph (a) and (b) above.

(e) Nothing in this rule shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

(f) Participation by financial institutions in the DC IOLTA program is voluntary. A financial institution that elects to offer and maintain DC IOLTA accounts shall fulfill the following requirements:

(1) The institution shall pay no less on its DC IOLTA accounts than the interest rate or dividend rate in (A) or (B):

(A) The highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers when

the DC IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend rate generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the DC IOLTA account, factors customarily considered by the institution when setting interest rates or dividend rates for its non-IOLTA customers, provided that such factors do not discriminate between DC IOLTA. accounts and non-IOLTA accounts and that these factors do not include the fact that the account is a DC IOLTA account.

(i) An institution may offer, and the lawyer or law firm may request, an account that provides a mechanism for the overnight investment of balances in the DC IOLTA account in an interest- or dividend-bearing account that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund.

(ii) An institution may choose to pay the higher interest rate or dividend rate on a DC IOLTA account in lieu of establishing it as a higher rate product.

(B) A "benchmark" rate set periodically by the Foundation that reflects the Foundation's estimate of an overall comparability rate for accounts in the DC IOLTA program and that is net of allowable reasonable fees. When applicable, the Foundation will express the benchmark rate in relation to the Federal Funds Target Rate.

(2) Nothing in this Rule shall preclude a financial institution from paying a higher interest rate or dividend on a DC IOLTA account than described in subparagraph (f)(1) above.

(3) Allowable reasonable fees are the only fees and service charges that may be deducted by a financial institution from interest or dividends earned on a DC IOLTA account. Allowable reasonable fees may be deducted from interest or dividends on a DC IOLTA account only at the rates and in accordance with the customary practices of the financial institution for non-IOLTA customers. No fees or service charges other than allowable reasonable fees may be assessed against the accrued interest or dividends on a DC IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the

sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the DC IOLTA account. Allowable reasonable fees in excess of the interest or dividends earned on one DC IOLTA account for any period shall not be taken from interest or dividends earned on any other DC IOLTA account or accounts or from the principal of any DC IOLTA account. Nothing in this rule shall preclude a financial institution from electing to waive any fees and service charges on a DC IOLTA account.

(g) On forms approved by the Foundation, a financial institution that maintains DC IOLTA accounts shall:

(1) Remit all interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in each DC IOLTA account, or as otherwise computed in accordance with the institution's standard accounting practice, at least quarterly, to the Foundation. The institution may remit the interest or dividends on all of its DC IOLTA accounts in a lump sum; however, the institution shall provide, for each individual DC IOLTA account, to the Foundation the information described in subparagraph (g)(2), and to the lawyer or law firm the information in subparagraph (g)(3).

(2) Transmit with each remittance to the Foundation a report showing the following information for each DC IOLTA account: the name of the lawyer or law firm in whose name the account is registered, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any allowable reasonable fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the remittance period, and such other information as is reasonably required by the Foundation.

(3) Transmit to the lawyer or law firm in whose name the account is registered a periodic account statement in accordance with normal procedures for reporting to depositors.

(h) The Foundation shall maintain records of each remittance and statement received from a financial institution for a period of at least three years and shall, upon request, promptly make available to a lawyer or law firm the records or statements pertaining to that lawyer's or law firm's DC IOLTA accounts.

(i) All interest and dividends transmitted to the Foundation shall, after

deduction for the necessary and reasonable administrative expenses of the Foundation for operation of the DC IOLTA program, be distributed by the Foundation for the following purposes: (1) at least eighty-five percent for the support of legal assistance programs providing legal and related assistance to poor persons in the District of Columbia who would otherwise be unable to obtain legal assistance; and (2) up to fifteen percent for those programs to improve the administration of justice in the District of Columbia as are specifically approved from time to time by this court.

(j) Definitions. As used in this rule, the terms below shall have the following meanings:.

(1) "Allowable reasonable fees" for DC IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable DC IOLTA account administrative or maintenance fee.

(2) "Foundation" means the District of Columbia Bar Foundation, Inc.

(3) "Interest- or dividend-bearing account" means (i) an interest-bearing account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily (overnight) financial institution repurchase agreement must be fully collateralized by U.S. Government Securities and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least $250,000,000.

(4) "DC IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for IOLTA-eligible funds at a financial institution from which funds may be withdrawn upon request by the depositor as soon as permitted by law.

(5) "IOLTA-eligible funds" means those funds from a client or third-party that are nominal in amount or are expected to be held for a short period of time, and that cannot earn income for the client or third party in excess of the costs incurred to secure such income.

(6) "Law Firm" - Includes a partnership of lawyers, a professional or non-profit corporation of lawyers, and combination thereof engaged in the practice of law.

(7) "Financial Institution" - Includes banks, savings and loan associations, credit unions, savings banks and any other business that accepts for deposit funds held in trust by lawyers or law firms which is authorized by federal, District of Columbia, or state law to do business in the District of Columbia or the state in which the financial institution is situated and that maintains accounts which are insured by an agency or instrumentality of the United States.

RULE OF PROFESSIONAL CONDUCT 1.19 – TRUST ACCOUNT OVERDRAFT NOTIFICATION

[Delete in its entirety.]

APPENDIX B OF THE RULES GOVERNING THE DISTRICT OF COLUMBIA BAR-INTEREST ON LAWYERS' TRUST ACCOUNTS PROGRAM

[Delete in its entirety.]

APPENDIX

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[5 pages]

BOARD ON PROFESSIONAL RESPONSIBILITY

Charles J. Willoughby
Chair

Ray S. Bolze
Vice Chair

Ernestine Coghill-Howard
Deborah J. Jeffrey
Jean S. Kapp
James P. Mercurio
Russell F. Smith
Shirley M. Williams
Theodore D. Frank

Elizabeth J. Branda
Executive Attorney

Nancy C. Crisman
Assistant Executive Attorney

Erica S. Simpson
Assistant Executive Attorney

DC BAR

July 30, 2009

Kim Michele Keenan, Esquire
President, District of Columbia Bar
c/o Carla J. Freudenberg, Esquire
Regulation Counsel, District of Columbia Bar
1101 K Street, N.W.
Suite 200
Washington, D.C. 20005

Re: Proposed Changes to the District of Columbia Rules Governing IOLTA

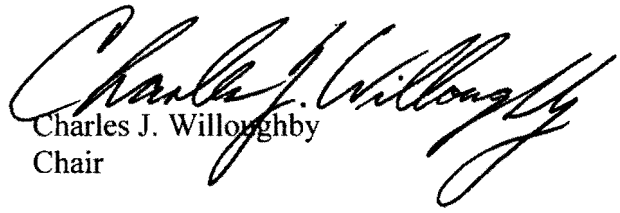
Dear Ms. Keenan:

On behalf of the Board on Professional Responsibility, I submit herewith comments on the most recent proposed changes to the District of Columbia rules governing the Interest on Lawyers' Trust Accounts (IOLTA).

The Board hopes that our comments are of assistance to the Board of Governors in making its recommendations to the D.C. Court of Appeals.

We would be pleased to respond to any questions concerning the Board's comments.

With best regards,



Charles J. Willoughby
Chair

cc: Wallace E. Shipp, Jr., Esquire
Bar Counsel

Ronald S. Flagg, Esquire
President-Elect
District of Columbia Bar

Katherine L. Garrett, Esquire
Executive Director
District of Columbia Bar Foundation

430 E Street, N.W., Suite 138, Washington, DC 20001 ▪ 202-638-4290, FAX 202-638-4704

SUPPLEMENTAL COMMENTS OF THE BOARD ON PROFESSIONAL RESPONSIBILITY ON PROPOSED CHANGES TO THE DISTRICT OF COLUMBIA RULES GOVERNING THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA)

INTRODUCTION

The Board has been asked to comment on proposed language authorizing the Bar Foundation to monitor compliance with IOLTA requirements. The new language provides, in relevant part: "The Foundation may monitor lawyers' participation in the DC IOLTA program." Proposed Comment 4 to Rule 1.15. Two classes of entities are subject to monitoring: (1) financial institutions that hold IOLTA accounts; and (2) lawyers, with respect to their participation in the IOLTA program.[1] The proposal will require changes to the Comments to Rule 1.15 (safekeeping of property) and a new section of D.C. Bar Rule XI ("Rule XI") to address trust accounts. The monitoring provision would appear as Rule XI, § 20(h).

The Board has been advised that, for many years, the Foundation has monitored the opening of IOLTA accounts at financial institutions. The institution notifies the Foundation, which can then reconcile the interest payments to ensure that the Foundation is receiving funds from that IOLTA account. We understand that the Foundation intends to continue this practice, in the expectation that new IOLTA accounts will be opened if participation in IOLTA becomes mandatory, as the Board of Governors will propose. We are told that this monitoring has been occurring for more than 20 years, and the Foundation has not previously considered express authorization necessary. Further, we are told that the Foundation from time to time makes inquiries to individual lawyers.

---

[1] Proposed Rule XI, § 20(h) provides that "[t]he Foundation may monitor 1) fulfillment of the requirements of paragraphs (f) and (g) of this Rule [setting forth dividend and interest rates and the remittance and reporting obligations of participating financial institutions] by institutions that elect to offer and maintain DC IOLTA accounts; and 2) lawyers' participation in the DC IOLTA program.

In the Board's view, these proposed amendments raise three issues:

1. Is additional authority necessary?

The rule seems superfluous in light of the fact that the Foundation currently monitors the opening of new accounts and may under its existing authority make inquiries of lawyers. If the rule is instead intended to increase the authority of the Foundation, it is important to identify the additional activities that the Foundation would be authorized to take.

2. Placing the IOLTA rules in Rule XI will make them less prominent.

Rule XI addresses the jurisdiction and operation of the disciplinary system. The IOLTA rules now appear as an appendix to the D.C. Rules of Professional Conduct. A violation of these provisions subjects a lawyer to discipline. As we understand, the Board of Governors approved the recommendation of the Rules of Professional Conduct Review Committee to move the IOLTA provisions from the appendix to a new section of Rule XI, which would separate them from the ethics rules governing lawyer conduct. Our understanding is that one objective of this change is to make the IOLTA rules more prominent.

We believe that the change will have the opposite effect. In the Board's experience, the vast majority of lawyers are not familiar with Rule XI and learn of it only when they become the subject of disciplinary charges. Further, it is not at all apparent that financial institutions will think to turn to the rule that governs lawyer discipline to determine their IOLTA responsibilities. Consequently, attaching the IOLTA rules at the end of the disciplinary procedures set forth in Rule XI will likely make the IOLTA rules harder for lawyers to find and no more accessible to financial institutions than they are in the appendix to the disciplinary rules.

3. **Describing the Foundation's authority in a Court rule devoted to the disciplinary system is confusing and potentially mischievous.**

In addition, placing in Rule XI a description of the Foundation's authority to monitor lawyers' participation in IOLTA implies that the Foundation is part of the disciplinary system and that a failure to provide information in response to its inquiry may be grounds for discipline. The proposed language of Rule XI, § 20(h) authorizes the Foundation to monitor "lawyers' participation in the DC IOLTA program." This suggests that the Foundation is to play an active role in the disciplinary system by investigating possible non-compliance. The problem is compounded because the provision would delegate to the Foundation broad discretion over the form and substance of its monitoring. Though the proponents of this provision have assured us that they contemplate only voluntary participation and non-intrusive inquiries, nothing in proposed § 20(h) so limits the Foundation's authority, leaving open the possibility that a future Foundation might take a contrary position. Engrafting a voluntary procedure into the mandatory rules of the disciplinary system invites confusion.

The Board appreciates the assurance of Bar Counsel that he would not prosecute an attorney for failing to cooperate with voluntary monitoring and that refusal to cooperate would not constitute misconduct under Rule XI, § 2(b) (defining misconduct). We do not find the issue as clear as Bar Counsel suggests, and there is no guarantee that a future Bar Counsel will not take a different view. The Board has held that provisions of Rule XI governing recordkeeping are enforceable by Bar Counsel, and they have been charged as violations.

4. **Where should the Bar Foundation's authority appear?**

The Board submits that the Bar, the Court and the Foundation would be best served by creating a new District of Columbia Bar Rule, Rule XVI, to address the Bar Foundation and its

role in IOLTA.[2] The Board on Professional Responsibility, the Clients' Security Fund, and the Attorney/Client Arbitration Board each has its own separate rule, making it easy for a lawyer to find the relevant provisions. Making participation in IOLTA mandatory will elevate the role of the Bar Foundation, and it is fitting that the Court's rules recognize its importance. A separate rule dedicated to the Bar Foundation will make it more prominent to both lawyers and financial institutions than appending the provisions to Rule XI.

Our proposed Rule XVI should explain the role of the Foundation and its authority to monitor lawyers' participation in IOLTA. The Board believes that the Rule should describe with some specificity what actions the Foundation is authorized to take and make clear that a lawyer "should" (i.e., is strongly urged to) comply with those reasonable requests.

CONCLUSION

The Board appreciates the opportunity to submit its comments to the most recent proposed changes to the IOLTA rules. We hope they are of assistance to the Board of Governors.

Respectfully submitted,

THE BOARD ON PROFESSIONAL RESPONSIBILITY

By: Charles J. Willoughby
Charles J. Willoughby
Chair

Dated: July 30, 2009

[2] Alternatively, the proposed rule could be numbered as Rule XIV, thus grouping the rule dedicated to the Bar Foundation with the rules governing the Board, the Clients' Security Fund and the Attorney/Client Arbitration Board, and the successive rules renumbered accordingly.

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[1 page]

IOLTA Monitoring Provisions

Rule 1.15, Comment 4:

> The D.C. Bar Foundation (Foundation) administers the DC IOLTA program. The Foundation may monitor lawyers' participation in the DC IOLTA program. Additional elements of the IOLTA program are found in Section 20 of Rule XI of the Rules Governing the District of Columbia Bar. More information is available on the Foundation's website www.dcbarfoundation.org.

Rule XI, Section 20(h):

> The Foundation may monitor 1) fulfillment of the requirements of paragraphs (f) and (g) of this Rule by institutions that elect to offer and maintain DC IOLTA accounts; and 2) lawyers' participation in the DC IOLTA program.

Approved in principle by consensus
Board of Governors meeting 7/21/2009

APPENDIX

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[1 page]

QUESTIONS FOR TEXAS ACCESS TO JUSTICE FOUNDATION
AND FLORIDA BAR FOUNDATION

1. Does your Bar require certification by lawyers that they are in compliance with the requirement of having an IOLTA account?

2. How is the certification process implemented? Dues statement, letter, other? What is the cost of the process? (staff time, postage, paper, new software, other)?

3. Which staff (Bar, Court, Foundation or other entity that receives the funds raised from IOLTA accounts) handles the certification process?

4. Of the certifications received by your bar, what percentage represented members who were required to participate in IOLTA versus members who claimed exemptions from the mandatory IOLTA program?

5. Do you collect bank account information? If so, through what means/media? Is it received by the Foundation or by the Bar or by some other body? How is the information secured?

6. Is there a penalty or sanction for failure to certify, or for certifying incorrectly? If so, what is it, who administers it and how many attorneys have been penalized or sanctioned?

7. Have you measured the impact of mandatory IOLTA accounts and/or mandatory certification (in whatever form your program uses, e.g., on your dues statement or in a separate mailing from the dues mailing) on your IOLTA revenue? If so, what did you find?

8. We understand that different states have adopted different methods in implementing certification programs. However, are you aware of any statistics or is there any written documentation from any bar's mandatory IOLTA program that shows a change in participation after certification is required?

9. What kind of educational program did you have when the mandatory IOLTA rule was put in place? What method(s) were the most effective for educating members about the new requirements?

10. Did you contact the administrators at the large firms to encourage compliance with the mandatory rules?

11. Are the Bar Foundation employees also employees of the Bar or are they employees of a separate entity? What is the Bar Foundation relationship to the state's highest Court?

APPENDIX

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[3 pages]

QUESTIONS FOR STATE BAR OF TEXAS

1. What does the Bar Foundation do? What entity formed it? What is its relationship to the Bar? (e.g., is it a separate organization, such as a 501(c)(3)? Who appoints its Board?)

The Texas Bar Foundation was created by the State Bar of Texas in 1965. It is a philanthropic 501 (c)(3) organization made up of Texas lawyers. One-third of one percent of the State Bar membership is invited to membership each year. Following the Foundation Board's vote, an attorney elected to the Fellows agrees to make a gift of $2,500 to the Foundation. Fellows may take as many as ten years to complete the gift, so long as the Fellow makes a gift each year. The State Bar President appoints and the Board of Directors approves lawyers and public members to the Texas Bar Foundation Board of Trustees. Prior to applying for Texas Bar Foundation grants, State Bar entities must be approved by the Board Grant Review Committee in an effort to assist the Bar Foundation in prioritizing State Bar grant requests.

2. What does the IOLTA Foundation do? What entity formed? What is its relationship to the Bar? (e.g., is it a separate organization, such as a 501(c)(3)?)

The IOLTA program, established in 1984 by the Supreme Court of Texas, allows attorneys to pool short-term or nominal deposits made on behalf of clients or third parties into one account. Interest generated by these accounts is dedicated to helping nonprofit organizations that provide free civil legal services. As of July 1, 1989, all Texas attorneys handling qualifying client funds must establish an IOLTA account, unless a low balance account exempts them.

The Texas Access to Justice Foundation administers the following funds: IOLTA, BCLS (Basic Civil Legal Services - The Texas Legislature enacted the BCLS program in 1997, when federal funding for legal services decreased significantly. People who file lawsuits must pay a small additional fee to the court, ranging from $2 in the lower courts to $25 for suits taken to the Supreme Court of Texas. These fees are designated to assist nonprofit organizations in providing free civil legal services to low-income Texans), CVCLS (Crime Victims Civil Legal Services - In 2001, the Texas Office of the Attorney General and the Supreme Court of Texas entered into an agreement to administer a $5 million Crime Victims Civil Legal Services fund over the biennium. The monies granted must be used to provide free civil legal services to low-income victims of crime) and Voluntary Access to Justice Contributions (Each year, Texas attorneys have the option of donating $100 or more when paying their State Bar of Texas dues. A significant portion of these donations is administered by the Texas Access to Justice Foundation and granted to legal aid organizations statewide.)

The Texas Access to Justice Foundation is separate from the State Bar of Texas but a partner with the State Bar of Texas as well as the Texas Access to Justice Commission, Legal Aid, and pro bono providers in working to ensure that all Texans have access to civil legal assistance regardless of ability to pay.

Texas lawyers certify their compliance with the IOLTA requirement as part of their annual dues statement.

The Board of Directors of the Texas Access to Justice Foundation consists of thirteen directors, including the Chairman, all of whom must be residents of the State of Texas. The chairman and six directors are appointed by the Supreme Court of Texas (the "Court Appointed Directors") and the remaining six directors are appointed by the president of the State Bar of Texas with the approval of the board of directors of the State Bar of Texas (the "Bar Appointed Directors"). At least two of each group of appointees to the Board of Directors, other than the chairman, shall be persons who are not attorneys and do not have, other than as consumers, a financial interest in the practice of law.

3. What is the relationship of the IOLTA Foundation to the Bar Foundation? Do they have any overlapping functions? Overlapping or shared resources? Do they share the same Board?

They are separate entities, and they do not have overlapping functions, shared resources or share the same Board.

4. Is either of the foundations or its activities funded or subsidized by mandatory bar dues?

Neither foundation is subsidized by mandatory bar dues but in 2003, the Texas Legislature added to the State Bar Act a provision requiring the Supreme Court to set legal services fee in the amount of $65 to be paid annually by each non-exempt active member of the State Bar. Through its grant application process, the Texas Equal Access to Justice Foundation will administer the 50 percent of the funds dedicated to civil legal services to the poor. The Task Force on Indigent Defense will administer the other half of the funds for indigent criminal defense projects.

5. Does the bar dues statement ask the members for any certification, information or assistance to either foundation? If so, how?

Texas lawyers are provided an opportunity to make a voluntary contribution to access to justice in addition to paying the legal services fee. Last year, about $650,000 was collected through voluntary donations. The funds are divided with the majority of the funds disbursed by the Access to Justice Foundation and the Texas Bar Foundation granting the remaining funds.

6. What is the “ask” on the dues statement about IOLTA? Is it IOLTA certification specifically or is it something else? Has it changed over time, and why (or why not, if it hasn’t changed)?

Here is what is listed on our dues statement:

This year the dues statement is being used to confirm your compliance with IOLTA (Interest on Lawyers’ Trust Accounts.) An IOLTA compliance statement will not be mailed to you. By paying your bar dues, you certify that you are in compliance with IOLTA and no further action is required. If you are not currently in compliance (or have changes to your IOLTA

status), check the box on the remittance coupon below certifying that you will update your IOLTA compliance information online at www.teajf.org. Please read the enclosed flyer for more information.

Voluntary Access to Justice Contribution: $150.00

(This tax-deductible donation will support civil legal services to the poor through local programs funded by the Texas Equal Access to Justice Foundation and the Texas Bar Foundation.)

7. Is a response required of all members or only a subset of members? If not all members, which category/group of members is required to respond? What kind of response?

All members.

8. For what purposes other than mandatory bar functions can dues money be used/and or staff support be provided? Do you have a pro bono program? Does Bar staff or Bar dues support it? How else is it funded? Sections?

The State Bar of Texas does not provide direct pro bono assistance. The Texas Lawyers Care Department assists with training and activation of pro bono programs. The State Bar of Texas provides legal malpractice insurance coverage for all Texas lawyers who do pro bono work through an organized program as well as providing access to Lexis for all legal aid attorneys. The State Bar of Texas also provides scholarships to Legal Aid attorneys to Continuing Legal Education programs. Most State Bar sections support pro bono legal services either through direct service, scholarships, or free CLE.

9. What is the Bar staff involvement with any IOLTA processes, including certification?

Texas lawyers certify their compliance with the IOLTA requirement as part of their annual State Bar dues statement.

10. Does the Bar maintain any bank account information about members' IOLTA accounts?

The Texas Access to Justice Foundation maintains that information. The State Bar of Texas does not.

APPENDIX

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[11 pages]

DUES STATEMENT

The State Bar of Texas
2009-2010 Membership Statement

Read The Important Message at Right

STATE BAR OF TEXAS

P.O. BOX 12487
AUSTIN, TX 78711-2487

!! ATTENTION !!

Changes to IOLTA Compliance Reporting

This year the dues statement is being used to confirm your compliance with IOLTA (Interest On Lawyers' Trust Accounts). *An IOLTA compliance statement will NOT be mailed to you.* By paying your Bar dues, you certify that you are in compliance with IOLTA and no further action is required. If you are not currently in compliance (or have changes to your IOLTA status), check the box on the remittance coupon below certifying that you will update your IOLTA compliance information online at www.teaif.org. Please read the enclosed IOLTA flyer for more information.

QUESTIONS?

DUES: 800-204-2222, Ext. 1383 | IOLTA: 800-252-3401

Directions For Completing Your 2009-2010 Membership Form

STEP 1: Verify Membership Statement Information!

Please review your section membership(s) and demographic information on the reverse side of this form.

STEP 2: Keeping Last Year's Options?

If you DO NOT need to make changes to your section membership(s), verify the dollar amounts reflected on line ❷ below. Read item ❸ below regarding the Access To Justice (ATJ) contribution. Check the appropriate box on line ❹ to reflect your payment amount. Detach the original coupon below and remit with your payment in the return envelope provided. **DO NOT COPY – SEND ORIGINAL. DO NOT STAPLE OR TAPE.** ⇒ SKIP TO STEP 4 ⇐

STEP 3: Changing Your Options?

If you need to make changes to your section membership(s), complete SIDE 2 of the enclosed Change Form. You must specify all sections to which you wish to subscribe **(including those you may already have and wish to keep)**. Next, bubble in your Access to Justice (ATJ) contribution in the box provided. Total your new charges at the bottom of the Change Form and remit with payment in the envelope provided. DO NOT SEND BACK ANY PORTION OF THIS FORM UNLESS YOU HAVE UPDATES TO YOUR MEMBERSHIP INFORMATION ON THE REVERSE SIDE OF THIS FORM – SEND ONLY THE CHANGE FORM AND YOUR PAYMENT.

STEP 4: Updating Your Demographic Information?

If you need to make changes to your demographic information, complete SIDE 1 of the enclosed Change Form and RETURN IT IN THE ENCLOSED ENVELOPE ALONG WITH THE APPROPRIATE PAYMENT FORM COMPLETED FOR EITHER STEP 2 OR 3.

Detach Here

ALL PAYMENTS ARE DUE JUNE 1, 2009. (Penalty of 50% applies to membership dues postmarked after Aug. 31, 2009 or 100% after Nov. 30, 2009.)

Totals for Mr. (2009-2010)

DUE BY JUNE 1, 2009

❶ Required State Bar Dues for Fiscal 2009-2010 [redacted]

❷ Optional Section Membership Renewals $0.00

TOTAL RENEWAL FEES [redacted] $150.00

❸ Voluntary Access To Justice Contribution:
(This tax-deductible donation will support civil legal services to the poor through local programs funded by the Texas Equal Access to Justice Foundation and the Texas Bar Foundation. See enclosed letter from the Texas Supreme Court.)

❹ Select Total State Bar Payment:
(Check the appropriate box to confirm your payment)

Total Renewal Fees with ATJ contribution..... ☐ $150.00

Total Renewal Fees without ATJ contribution..... ☐ $0.00

☐ I certify that if I am not in IOLTA compliance, I will update my status at www.teaif.org.

Please do not write below this line.

Remit payment in the envelope provided.
See reverse for mailing address.
Make your check payable to:
Clerk, Supreme Court

OR to pay by credit card fill out the information below:

☐ Visa ☐ MasterCard

____/____/____/____

Credit Card Number

Expiration Date __/__

Signature

$ _____
Amount Authorized

0049427 066303 0 015000 000000 35621 03/09

BarCard:

Change of Address for MR.

Bar-related mail is currently sent to: Office

Check here if you wish to change the preferred address that your mail is currently sent to: ☐

Office Mailing Address	Home Mailing Address
STATE BAR OF TEXAS P.O. BOX 12487 AUSTIN, TX 78711-2487	

Company _____ ☐ Check box only if you wish to disclose home information to the public *

Address 1 _____

Address 2 _____

City/St/Zip _____

Work Phone: (512) _____ Ext. _____

Fax: _____

Email Address: _____

If you prefer to provide the above information on-line via our website, go to the Bar's homepage at www.texasbar.com. Select MyBarPage and login using your Bar Number and PIN or password. Select Update My Profile to edit your Contact Information.

Demographic Information for MR.

1. Your primary occupation: None Specified
2. Number of Attorneys in your law firm: Never Provided
3. Areas of Practice used to notify you regarding upcoming TexasBarCLE activites:

Payments sent by Aug 31 mail to: State Bar of Texas, PO Box 149335, Austin, TX 78714-9335. Payments sent after Aug 31 mail to: State Bar of Texas, Membership Dept., PO Box 12487, Austin, TX 78711-2487.

Membership Options for MR.

4. Current State Bar section memberships that you may wish to renew:

Section Name	Annual Dues	Section Name	Annual Dues
Administrative and Public Law	$0.00	Entertainment & Sports Law	$0.00
African American Lawyers Section	$0.00	Environmental & Natural Resource	$0.00
Alternative Dispute Resolution	$0.00	Family Law	$0.00
American Indian Law	$0.00	General Practice, Solo & Small Fir	$0.00
Animal Law	$0.00	Government Lawyers	$0.00
Antitrust & Business Litigation	$0.00	Health Law	$0.00
Appellate Section	$0.00	Hispanic Issues	$0.00
Asian Pacific Interest Section	$0.00	Immigration and Nationality Law	$0.00
Aviation Law	$0.00	Individual Rights & Responsibilitie	$0.00
Bankruptcy Law	$0.00	Insurance Law	$0.00
Business Law	$0.00	International Law	$0.00
Computer and Technology Section	$0.00	Intellectual Property Law	$0.00
Consumer and Commercial Law	$0.00	James C. Watson Inn	$0.00
Construction Law	$0.00	Judicial Law	$0.00
Corporate Counsel	$0.00	Justice of the Peace	$0.00
Criminal Justice	$0.00	Juvenile Law	$0.00

$6.00 of your membership dues funds the Bar Journal.

**NOTE: The State Bar will not disclose home information to the public unless you have given authorization to do so. This selection will apply universally to all State Bar and Section use of your information, including but not limited to, membership directories and lists of attendees of State Bar and/or Section sponsored CLE courses.*

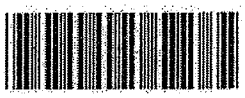
Change Form Only

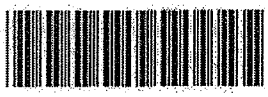
SIDE 1 - This side for Demographic Changes only.

Darken completely the circle next to each of your selections using a blue or black ball point pen or pencil.

STATE BAR OF TEXAS

P.O. BOX 12487
AUSTIN, TX 78711-2487





AMSID Number: BarCard Number: Seq #: * AMS ID: *

Primary Occupation
(Select one)

- ◯ Private Law Practice
- ◯ Government Lawyer
- ◯ Full-Time Judge
- ◯ Law Faculty
- ◯ In-House/Corporate Counsel
- ◯ Other Law-Related Employment
- ◯ Non-Law-Related Employment
- ◯ Public Interest Lawyer
- ◯ Retired/Not Working
- ◯ Unemployed: Currently looking for work
- ◯ Unemployed: Not currently looking for work

Number of Attorneys in Law Firm
(Include attorneys at all office locations)

- ◯ 1 (Solo)
- ◯ 2 - 5
- ◯ 6 - 10
- ◯ 11 - 24
- ◯ 25 - 40
- ◯ 41 - 60
- ◯ 61-100
- ◯ 101-200
- ◯ Over 200

Areas of Practice

This information will only be used to notify you regarding upcoming TexasBarCLE activities in your areas of practice while also avoiding unnecessary mailings to you.

- ◯ ADR
- ◯ Agricultural
- ◯ Appellate
- ◯ Bankruptcy
- ◯ Business
- ◯ Consumer
- ◯ Corporate Counsel
- ◯ Creditor/Debtor
- ◯ Criminal
- ◯ Elder Law
- ◯ Employment
- ◯ Entertainment
- ◯ Environmental
- ◯ Ethics/Legal Malpractice
- ◯ Family
- ◯ Federal
- ◯ General Practice
- ◯ Government/Administrative
- ◯ Health Care
- ◯ Immigration
- ◯ Insurance
- ◯ Intellectual Property
- ◯ International
- ◯ Juvenile
- ◯ Law Office Management
- ◯ Litigation: Commercial
- ◯ Litigation: Personal Injury
- ◯ Nonprofit Organizations
- ◯ Oil & Gas
- ◯ Poverty Law
- ◯ Real Estate
- ◯ Taxation
- ◯ Technology
- ◯ Water Law
- ◯ Wills/Trusts/Probate
- ◯ Workers Compensation

DO NOT DETACH – RETURN THIS ENTIRE PAGE

Use the reverse side ONLY if you are making changes to your Section Memberships or voluntary ATJ Contributions.

STATE BAR OF TEXAS

P.O. BOX 12487
AUSTIN, TX 78711-2487

AMSID Number:

BarCard Number:

State Bar Section Memberships

Section Name	Annual Dues
○ Administrative & Public Law	$25.00
○ African-American Lawyers	$25.00
○ Alternative Dispute Resolution	$25.00
○ American Indian Law	$15.00
○ Animal Law	$20.00
○ Antitrust & Business Litigation	$15.00
○ Appellate	$25.00
○ Asian-Pacific Interest	$10.00
○ Aviation Law	$15.00
○ Bankruptcy Law	$25.00
○ Business Law	$30.00
○ Computer & Technology	$25.00
○ Construction Law	$30.00
○ Consumer & Commercial Law	$30.00
○ Corporate Counsel	$25.00
○ Criminal Justice	$10.00
○ Entertainment & Sports Law	$30.00
○ Environmental & Natural Resources Law	$20.00
○ Family Law	$40.00
○ General Practice, Solo & Small Firm	$20.00
○ Government Lawyers	$10.00
○ Health Law	$20.00
○ Hispanic Issues	$20.00

Section Name	Annual Dues
○ Immigration and Nationality Law	$20.00
○ Individual Rights & Responsibilities	$15.00
○ Insurance Law	$30.00
○ Intellectual Property Law	$30.00
○ International Law	$30.00
○ James C. Watson Inn of Former Officers & Directors	$15.00
○ Justice of the Peace	$20.00
○ Juvenile Law	$25.00
○ Labor & Employment Law	$30.00
○ Litigation - Sustaining	$100.00
○ Litigation - Regular	$30.00
○ Military Law	$15.00
○ Municipal Judges	$15.00
○ Oil, Gas & Energy Resources Law	$35.00
○ Poverty Law	$15.00
○ Public Utility Law	$10.00
○ Real Estate, Probate & Trust Law	$30.00
○ School Law	$25.00
○ Sexual Orientation and Gender Identification Issues	$20.00
○ Taxation	$35.00
○ Women and the Law	$20.00
○ Workers' Compensation Section	$25.00

Voluntary Access to Justice Contribution

Tax-Deductible Donation

(See enclosed letter from the Texas Supreme Court)

$ ____ .00

0 1 2 3 4 5 6 7 8 9

(Please use this box to change the Voluntary Access to Justice Contribution by either bubbling in another amount or zero.)

Required State Bar Membership Dues

○ $68.00 ○ $148.00 ○ $235.00

○ Age Exempt ○ Inactive ($50.00)

You must contact the Membership Dept. at memmail@texasbar.com if you are making a change to your membership status.

$6.00 of your membership dues funds the Bar Journal.

SCANTRON Mark Reflex® EM-226027-11:654321

SIDE 2 - For changes to Membership Sections and voluntary ATJ Contributions.

DO NOT DETACH – RETURN THIS ENTIRE PAGE

Mr.

Required State Bar Dues for Fiscal 2009-2010 $ $0.00

Optional Section Memberships $ _____

Voluntary Access to Justice Contribution $ 150.00

(This tax-deductible donation will support civil legal services to the poor through local programs funded by the Texas Equal Access to Justice Foundation and the Texas Bar Foundation. See enclosed letter from the Texas Supreme Court.) Or $ _____

Total State Bar Payment $ _____

☐ I certify that if I am not in IOLTA compliance, I will update my status at www.teajf.org.

Due June 1, 2009

Please do not write below this line.

Remit payment in the envelope provided. See reverse of Dues Statement for Address.

Make your check payable to: **Clerk, Supreme Court**

OR to pay by credit card fill out the information below:

☐ VISA ☐ MasterCard

____ / ____ / ____ / ____ ___ / ___

Credit Card Number Exp. Date

_____ $ _____

Signature Amount Authorized

ALL PAYMENTS ARE DUE JUNE 1, 2009. (Penalty of 50% applies to membership dues postmarked after Aug. 31, 2009 or 100% after Nov. 30, 2009)

0049427 066303 0 015000 000000

IOLTA INSERT DRAFT

Texas Access to Justice Foundation

Annual Attorney IOLTA Compliance

NOTICE OF CHANGE

The Texas Access to Justice Foundation is a 501(c)(3) nonprofit organization created by the Supreme Court of Texas in 1984 to administer the Interest on Lawyers' Trust Accounts (IOLTA) Program. These funds provide civil legal aid for poor Texans. The Foundation is committed to the vision that all Texans have equal access to justice, regardless of their income.

The Rules Governing the Operation of the Texas Access to Justice Foundation states in Section 23 "Compliance" that each year all attorneys licensed by the Supreme Court of Texas shall report IOLTA compliance in a manner to be prescribed by the Texas Access to Justice Foundation and the State Bar of Texas. The complete rules can be found at http://www.teajf.org.

For 2009 the annual attorney IOLTA compliance process has changed. The membership dues statement is being used to confirm your compliance with IOLTA. By paying your Bar dues, you certify that you are in compliance with IOLTA and no further action is required. If you are not currently in compliance (or have changes to your IOLTA status), check the box on the enclosed dues remittance coupon certifying that you will update your IOLTA compliance information online. This year you will NOT receive a paper compliance form or email from the Foundation. If you need to verify or change your IOLTA account information, go to http://www.teajf.org, click on "**Attorneys**" then click on account information/changes.

For questions or more information, visit our website www.teajf.org, email compliance @teajf.org, or call 800-252-3401 ext. 107.

The Supreme Court of Texas

CHIEF JUSTICE
WALLACE B. JEFFERSON

JUSTICES
NATHAN L. HECHT
HARRIET O'NEILL
DALE WAINWRIGHT
SCOTT BRISTER
DAVID M. MEDINA
PAUL W. GREEN
PHIL JOHNSON
DON R. WILLETT

Post Office Box 12248 Austin TX 78711

Telephone: 512/463-1312

Facsimile: 512/463-1365

CLERK
BLAKE A. HAWTHORNE

ADMINISTRATIVE ASSISTANT
NADINE SCHNEIDER

PUBLIC INFORMATION OFFICER
OSLER MCCARTHY

Dear Texas Attorney:

Last year, Texas attorneys voluntarily gave more than $540,000 through the Access to Justice contribution on the State Bar of Texas dues statement to provide civil legal services to the poor (those with an annual income of less than $13,000 for an individual or $26,500 for a family of four). Thanks to your generosity, Texans in critical need received basic legal help to free themselves and their children from domestic violence, to secure subsistence benefits when age or disabilities prevented them from working, and to secure protections for the elderly.

We are proud that Texas attorneys contributed so much to those who desperately need legal aid. We encourage you to be even more generous this year to help meet the increased demand for civil legal services as a result of Hurricane Ike. While many of you have already contributed to help meet the needs of the survivors immediately following Ike, pressing legal needs still continue even months later. Legal services programs already working with limited resources have been overwhelmed. Further, the continued economic downturn has dramatically reduced funding sources for legal services to the poor. As a result, programs providing basic civil legal services to the poor are struggling to meet an increased demand with fewer resources. Please help by taking the opportunity to contribute through your dues statement.

In addition to generous financial contributions, Texas attorneys are also generous with their time. A recent State Bar survey shows that 58 percent of Texas lawyers performed pro bono work in 2007, with an average of 48.5 hours. The Supreme Court commends your contributions of time and talent. We recognize, however, that only a fraction of the legal needs of the poor are being addressed. Therefore, we challenge every Texas attorney to contribute 50 hours of pro bono service this year.

So that the State Bar may demonstrate the value of lawyers' service to the poor, we also encourage you to report your pro bono hours and financial contributions online at www.texasbar.com/reporting. If you do not have internet access, please contact Texas Lawyers Care at the State Bar at 800-204-2222, ext. 1855.

It is important for our profession to lead the way in bringing attention to this societal need and to assist in every way we can. We urge each of you to participate by contributing the suggested amount on the dues statement and by completing the online voluntary reporting so that access to justice for all can become a reality.

Sincerely,

Chief Justice Wallace B. Jefferson | Justice Nathan L. Hecht | Justice Harriet O'Neill

Justice J. Dale Wainwright | Justice Scott Brister | Justice David M. Medina

Justice Paul W. Green | Justice Phil Johnson | Justice Don R. Willett

TEXAS | ACCESS to JUSTICE FOUNDATION

TEXAS ACCESS TO JUSTICE FOUNDATION
ANNUAL ATTORNEY IOLTA COMPLIANCE

NOTICE OF CHANGE

The Texas Access to Justice Foundation is a 501(c)(3) nonprofit organization created by the Supreme Court of Texas in 1984 to administer the Interest on Lawyers' Trust Accounts (IOLTA) Program. These funds provide civil legal aid for poor Texans. The Foundation is committed to the vision that all Texans have equal access to justice, regardless of their income.

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For questions or more information, visit our website www.teajf.org, email compliance @teajf.org, or call 800-252-3401 ext. 107.

Regarding Your Membership Statement

Membership Dues

Active Status

Earliest date to be licensed in any State	Dues
On or after June 1, 2006	$68.00
On or after June 1, 2004, but before June 1, 2006	$148.00
Before June 1, 2004 and under the age of 70	$235.00

Inactive Status

On Inactive Status prior to June 1, 2009 or members requesting inactive status effective June 1, 2009	$50.00

Inactive Status

Information on eligibility and the forms required for inactive status can be found online at www.texasbar.com/membership.

If a State Bar member does not practice law in Texas during any given fiscal year, inactive status may be requested. To clarify if a member is eligibile for inactive status with the State Bar of Texas, the State Bar Board of Directors adopted the following policy:

The following list includes those members who are deemed to be engaged in the "practice of law," and therefore not eligible to be granted "inactive" membership status. This list is not intended to be exhaustive, but provides common examples:

- Members engaged in providing private legal services in any state whether such services are compensated or uncompensated. Such services shall include any actions or advice rendered to any person or entity in all matters connected with the law. Such services shall not include those rendered solely on behalf of a member's own personal interests;
- Members of the judiciary, including state, county, municipal, and all other governmental entities. This shall include those considered to be administrative judges or judicial officers;
- Members who are law clerks, briefing attorneys, law librarians, or others engaged in an activity that requires researching or briefing the law;
- Members whose job or position requires the person holding it to be an attorney or possess a law degree;
- Members who are full-time or part-time faculty members of any law school and who are either compensated or uncompensated;
- Members who are elected officials in positions that require the person holding them to be an attorney or possess a law degree.

Note: The above examples apply only to attorneys using their Texas law license to practice and do not hold an active license in another state.

However, members may still be eligible for exemptions from the Minimum Continuing Legal Education (MCLE) requirements. Any correspondence concerning MCLE requirements should be directed to Nancy Smith, MCLE Department, P.O. Box 13007, Austin, Texas 78711.

On Inactive Status, Members cannot practice law in Texas, but will receive the Texas Bar Journal and annual dues statements, but no other mailings from the State Bar of Texas. Members may be eligible for health insurance through the State Bar Insurance Trust (eligibility is determined by the management of the Trust, not the State Bar of Texas). In addition, members may be exempt from compliance with the Minimum Continuing Legal Education (MCLE) requirements provided the member was not on the active roll at anytime during the member's MCLE compliance year. Further members cannot vote in State Bar elections and referenda (State Bar Act, 81.051).

To Change Your Status to Inactive, see information provided below: Members requesting inactive status between June 1 and August 31 that have not practiced on or after June 1 of the current year, and have not already paid bar dues, must complete and return the following items:

1. A written statement that you have not practiced law in Texas since June 1 of the current year;
2. Your active Texas bar card, or a written statement that it cannot be located;
3. A $50 payment made payable to the Clerk of the Supreme Court of Texas.

**Important Note: In addition to the correspondence as stated above, members requesting inactive status in Texas that reside in another state, and whose job requires you to hold an active law license, will need to provide a copy of your out of state bar card or a letter of good standing from your out of state bar association.*

Members requesting inactive status that have practiced since June 1 of the current year, please call the Membership Department at 1-800-204-2222, ext. 1383.

Any request for a change in status should be made to the State Bar of Texas, Membership Department at P.O. Box 12487, Austin, TX 78711-2487. When all inactive requirements have been met, members will receive written confirmation along with an inactive Bar card.

Reinstatement to Active Membership Roll following inactive status: Inactive members may be reinstated to the active roll of the State Bar of Texas at any time. To be reinstated, the member must:

- Provide a statement certifying that they have not practiced law in Texas during the fiscal period(s) they were on the inactive rolls;
- Return inactive bar card, or a written statement that it cannot be located;
- Pay the membership dues, legal services fee, and prorated occupation tax due for the current fiscal period. (This does not apply to members joining the State Bar for the first time).

Important Note: If a member assumes inactive status for the current fiscal year and decides to reinstate to the active roll before the end of fiscal year, the member will be penalized 50% of the active bar dues if reinstatement is on or after September 1.

Age Exemption

If you are 70 years of age or older or will become 70 on or before December 31, 2009, **then you are exempt from membership dues** regardless of your status. However, **you must return this membership statement to retain your current status and you must pay any other fees required** for section memberships or other choices you have made.

Attorney Profile

Pursuant to § 81.115 of the State Bar Act, information contained in an attorney's profile must be updated annually. To update your attorney profile, go to the Bar's homepage at www.texasbar.com. Select MyBarPage and login using your Bar Number and PIN or password. Select Update My Profile.

Other Items Listed on the Statement

Primary Occupation
Number of Attorneys in Law Firm
Areas of Practice

To serve you better, we would like to know what you do and your areas of practice. This information will help avoid inconveniencing you with unnecessary mailings about upcoming TexasBarCLE seminars and products. If you elect not to update this information, the result may be that you do not receive notices related to your areas of practice.

State Bar Section Memberships

Participation in sections is voluntary and can be one of the most rewarding aspects of the organized Bar. You are encouraged to join sections in any area of law which interests you. Section memberships are renewable each June 1st. The membership statement shows your section memberships from last year. To make changes to these selections, please use the Change Form.

Voluntary Access to Justice Contribution (Tax-deductible donation)

Your voluntary tax-deductible* donation will be used to support legal services provided to the poor through local programs funded by the Texas Equal Access to Justice Foundation and the Texas Bar Foundation. For additional information, please see the enclosed Supreme Court letter.
*to the full extent allowed by law

Emeritus Attorney Program

Inactive attorneys may be eligible to provide pro bono legal services to the poor through the emeritus attorney program. For information, call Texas Lawyers Care at the State Bar of Texas, 800/204-2222, ext. 1855 or, in Austin, 427-1855.

The College of the State Bar of Texas is an honorary society for Texas lawyers, chartered by the Supreme Court of Texas in 1981. It recognizes and represents lawyers in good standing who attend at least 30 hours of CLE in the calendar year. College dues are $60 per year, and a dues notice will be sent the first week of November. For details, call 800-204-2222 ext, 1819 or, in Austin, 427-1819.

Most lawyers feel that working with better-educated colleagues significantly enhances the quality of professional life. If you would like to contribute to making our profession better, we invite you to make a tax-deductible gift to the College. It will be used to help fund worthwhile CLE projects throughout the state that might otherwise cost too much or never get off the ground. Please make checks payable to "College of the State Bar of Texas."

For more information. . .

- **Membership Dues Questions**
  800 / 204-2222, ext. 1383
  In Austin 427-1383

  www.texasbar.com/membership

- **Voluntary Access to Justice Contribution Questions**
  www.texasbar.com/atj

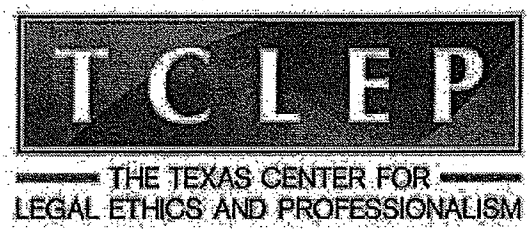
  Texas Bar Foundation
  P.O. Box 12487
  Austin, Tx 78711

  State Bar of Texas
  Texas Lawyers Care Department
  800/204-2222, ext. 1855
  In Austin 427-1855

  Texas Equal Access to Justice Foundation
  800/252-3401, ext. 107
  In Austin 320-0099, ext. 107
  www.txiolta.org

  Texas Access to Justice Commission
  www.texasatj.org

36796 3/09



The Texas Center for Legal Ethics and Professionalism is a public 501(c)(3) non-profit foundation that promotes professionalism and civility among Texas lawyers. It accomplishes these endeavors primarily through its outstanding ethics programs.

Education

Live Courses include:

- *A Guide to the Basics of Law Practice (Supreme Court Mandated course)*
- *The Ethics Course*
- Specialized Ethics Seminars

Online Courses:

- *A Guide to the Basics of Law Practice*
- *Other Ethics Programs*

More information about the Center can be found at http://www.tclep.org

Member Benefits

The Center offers its members an array of benefits that include three hours of ethics MCLE credit. This ethics MCLE credit can be obtained by viewing videos at TCLEP's online education center http://www.tclep.org.

Please join today!

Commitment to Professionalism

I support the purposes, principles and goals of The Texas Center for Legal Ethics and Professionalism, and agree to use my best efforts to adhere to these purposes and principles. I understand that my contribution does not evidence any special expertise in the area of legal ethics or in the profession. I will not use my association with the Center in any public advertising or direct solicitation of legal business.

Printed Name: _____

Address: _____

City: _____

State/Zip: _____

Business Phone: _____

Fax: _____

e-mail: _____

Bar Card Number: _____

You may join and make your contribution online by going to the website at http://www.tclep.org.

Check appropriate contribution* type:

❑ Original Contribution ❑ Renewal

Level	Amount
Benefactor	$1000.00
Charter	$500.00
Professional	$100.00

❑ Check ❑ Visa ❑ MasterCard ❑ Amex

Account # _____

Exp. Date _____

Signature _____

Texas Center for Legal Ethics and Professionalism
1414 Colorado, 4th Floor
Austin, TX 78701-1627
P.O. Box 12487
Austin, TX 78711-2487
1.800.204.2222 ext. 1477
512.427.1477
Fax: 512.427.4125
www.tclep.org / e-mail: info@tclep.org

**Tax-deductible to the extent allowed by law.*

APPENDIX

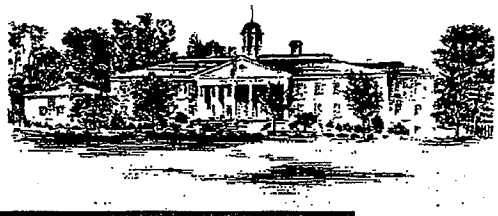
17

[6 pages]

2008-2009

THE FLORIDA BAR

ANNUAL MEMBERSHIP FEES
651 EAST JEFFERSON STREET
TALLAHASSEE, FLORIDA 32399-2300
1-850-561-5832 (MEMBERSHIP RECORDS ONLY)
1-800-342-8060 • Ext. 5832



PLEASE READ INSTRUCTION SHEET BEFORE COMPLETING FORM

FEES ARE DUE AND PAYABLE JULY 1, 2008

SECTION AND DIVISION DUES

Sections to which you currently hold membership(s) are indicated.
For sections you are joining, please darken circles completely using a blue or black ball point pen or pencil.

- O $25 Administrative Law **(11)**
- O $40 Appellate Practice **(21)**
- O $45 Business Law **(04)**
- O $25 City, County & Local Government Law **(07)**
- O $25 Criminal Law **(09)**
- O $50 Elder Law **(19)**
- O $35 Entertainment, Arts & Sports Law **(15)**
- O $35 Environmental & Land Use Law **(10)**
- O $30 Equal Opportunities Law **(22)**
- O $55 Family Law **(06)**
- O $35 General Practice, Solo & Small Firm **(05)**
- O $30 Government Lawyer* **(18)**
- O $30 Health Law **(16)**
- O $40 International Law **(14)**
- O $40 Labor & Employment Law **(13)**
- O $30 Out-of-State Division **(20)**
- O $35 Public Interest Law **(17)**
- O $50 Real Property, Probate & Trust Law **(02)**
- O $50 Tax Law **(01)**
- O $50 Trial Lawyers **(03)**
- O $50 Workers' Compensation **(08)**

* Joint membership with either Criminal or Administrative Law = $45
* Joint membership of Gov't Lawyer/Criminal/Administrative Law = $70

TOTAL SECTION DUES $ *Please fill in*

VOLUNTARY CONTRIBUTIONS

Attorney's Charitable Trust ..... (suggested contribution $25.00)

Lawyers' Challenge for Children ..... [see www.flabarfndn.org] ..... (suggested contribution $45.00)

Supreme Court Historical Society ..... (Please see back of letter for contribution options.)

MEMBERSHIP FEES

DESCRIPTION	PRIOR YEAR BALANCE	CURRENT YEAR FEES**	LATE FEES	OTHER COSTS (1)
MEMBERSHIP				
				TOTAL PAID

** THIS ANNUAL FEE INCLUDES $20 FOR CLIENT SECURITY FUND
(1) THIS COST AMOUNT IS VALID IF PAID BY AUGUST 15, 2008

☐ **I am qualified to pay by installments (see instructions)**
☐ **I am a full time government employee**

CHECK #

To pay by credit card, please go to our website: www.FLORIDABAR.org

FEES ARE DUE AND PAYABLE JULY 1, 2008

Fees received after 8-15-08 are assessed a $50.00 late fee. Fees received after 10-1-08 are considered delinquent. A delinquent attorney is prohibited from the practice of law in Florida and from rendering advice on matters of Florida law until all fees, a $50.00 late fee, a $150.00 reinstatement fee and a petition for reinstatement are received and the reinstatement petition is approved by the Executive Director.

I HEREBY ELECT INACTIVE STATUS ☐ **please check box (see instructions) $175 Inactive Annual Fee Enclosed**
Deadline August 15, 2008

COMPLETE FRONT AND BACK AND RETURN ENTIRE FORM TO MAINTAIN MEMBERSHIP STATUS

2008-2009

THE FLORIDA BAR

ANNUAL MEMBERSHIP FEES

TRUST ACCOUNT COMPLIANCE CERTIFICATE FOR JULY 1, 2007 - JUNE 30, 2008 YEAR.

I hereby represent that I have read the rules applicable to lawyer trust accounts (rule 4-1.5 and chapter 5) and that I or my law firm have complied with all applicable parts of the Rules Regulating The Florida Bar with respect to trust account records, if any, including required participation in the IOTA program, and maintenance of trust account records.

○ YES
○ NO

ANNUAL PRO BONO REPORTING FORM (REQUIRED)

Be sure to completely blacken the circle where applicable.

PRO BONO REPORTING FOR JULY 1, 2007 - JUNE 30, 2008 YEAR.

Please enter the number of whole hours

Pursuant to the reporting requirement of Rule 4-6.1(d), Rules Regulating The Florida Bar

1 I have personally provided pro bono legal services: (a) ○ "on my own." (b) ○ "through an organized legal aid program;" ____ hours

2 My firm provided pro bono services collectively under a plan with the following Florida Circuit Pro Bono Committee: ____ (circuit #) **and I was allocated:** ____ hours

3 I have contributed to a legal aid organization. Please enter amount. whole dollars $ ____

4 I have not provided pro bono legal services to the poor this year or made a contribution to a legal aid organization. ○

5 During the reporting period, I did not provide pro bono legal services to the poor because I am: (choose one)
○ a member of the judiciary (a) ○ a governmental lawyer prohibited by statute, rule or regulation from providing services (c) ○ retired (d)
○ judicial staff (b) ○ INACTIVE (e)

6. None of the above applies to me, but I have provided legal services to the poor in the following special manner: (see instructions)

COMMUNITY SERVICE (OPTIONAL) FOR JULY 1, 2007 - JUNE 30, 2008 YEAR

VOLUNTARY SURVEY
for the purpose of showing the involvement of lawyers in community service.

Be sure to completely blacken the circle corresponding to your entry.

I have contributed community and public services in the following areas:

○ Service to the legal community ____ hours
○ Service to religious organizations ____ hours
○ Service to civic organizations ____ hours
○ Service to other charities/schools ____ hours

Answering this question does not constitute compliance with required pro bono response.

Please enter the number of whole hours

MEMBER DATA CHANGES

Membership data can be changed any time at www.floridabar.org.

CHANGE OF ADDRESS: Members shall promptly notify the Bar of changes pursuant to Rule 1-3.3, Rules Regulating The Florida Bar. All such data contained in your membership record is public information. **CURRENT E-MAIL:**

Firm (optional)

Mailing Address

City/State/Zip

Physical Address

(Street address of your office must be provided if different from mailing address.)

City/State/Zip

Business Telephone – – **Extension** **Fax # (optional)** – –

E-mail (optional)

COMPLETE FRONT AND BACK AND RETURN ENTIRE FORM TO MAINTAIN MEMBERSHIP STATUS

2009-2010

THE FLORIDA BAR

ANNUAL MEMBERSHIP FEES
651 EAST JEFFERSON STREET
TALLAHASSEE, FLORIDA 32399-2300
1-850-561-5832 (MEMBERSHIP RECORDS ONLY)
1-800-342-8060 • Ext. 5832

PLEASE READ INSTRUCTION SHEET BEFORE COMPLETING FORM

FEES ARE DUE AND PAYABLE JULY 1, 2009

SECTION AND DIVISION DUES

Sections to which you currently hold membership(s) are indicated.
For sections you are joining, please darken circles completely using a blue or black ball point pen or pencil.

- O $25 Administrative Law **(11)**
- O $40 Appellate Practice **(21)**
- O $45 Business Law **(04)**
- O $35 City, County & Local Government Law **(07)**
- O $25 Criminal Law **(09)**
- O $50 Elder Law **(19)**
- O $35 Entertainment, Arts & Sports Law **(15)**
- O $35 Environmental & Land Use Law **(10)**
- O $30 Equal Opportunities Law **(22)**
- O $55 Family Law **(06)**
- O $35 General Practice, Solo & Small Firm **(05)**
- O $30 Government Lawyer* **(18)**
- O $30 Health Law **(16)**
- O $40 International Law **(14)**
- O $40 Labor & Employment Law **(13)**
- O $30 Out-of-State Division **(20)**
- O $35 Public Interest Law **(17)**
- O $50 Real Property, Probate & Trust Law **(02)**
- O $50 Tax Law **(01)**
- O $50 Trial Lawyers **(03)**
- O $50 Workers' Compensation **(08)**

* Joint membership with either Criminal or Administrative Law = $45
* Joint membership of Gov't Lawyer/Criminal/Administrative Law = $70

PLEASE ADD FOR TOTAL SECTION DUES $ *Please fill in*

VOLUNTARY CONTRIBUTIONS

Attorneys Charitable Trust ..... (suggested contribution $25.00)

Lawyers' Challenge for Children ..... [see www.flabarfndn.org] ..... (suggested contribution $45.00)

Supreme Court Historical Society ..... (Please see back of letter for contribution options.)

MEMBERSHIP FEES

DESCRIPTION	PRIOR YEAR BALANCE	CURRENT YEAR FEES**	LATE FEES	OTHER COSTS (1)
MEMBERSHIP				
				TOTAL PAID

** THIS ANNUAL FEE INCLUDES $25 FOR CLIENTS SECURITY FUND
(1) THIS COST AMOUNT IS VALID IF PAID BY AUGUST 15, 2009

☐ **I am qualified to pay by installments (see instructions)**

☐ **I am a full time government employee**

CHECK #

To pay by credit card, please go to our website: www.FLORIDABAR.org

FEES ARE DUE AND PAYABLE JULY 1, 2009

Fees received after 8-15-09 are assessed a $50.00 late fee. Fees received after 10-1-09 are considered delinquent. A delinquent attorney is prohibited from the practice of law in Florida and from rendering advice on matters of Florida law until all fees, a $50.00 late fee, a $150.00 reinstatement fee and a petition for reinstatement are received and the reinstatement petition is approved by the Executive Director.

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Deadline August 15, 2009

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2009-2010

THE FLORIDA BAR

ANNUAL MEMBERSHIP FEES

TRUST ACCOUNT COMPLIANCE CERTIFICATE FOR JULY 1, 2008 - JUNE 30, 2009 YEAR.

I hereby represent that I have read the rules applicable to lawyer trust accounts (rule 4-1.5 and chapter 5) and that I or my law firm have complied with all applicable parts of the Rules Regulating The Florida Bar with respect to trust account records, if any, including required participation in the IOTA program, and maintenance of trust account records.

○ YES
○ NO

ANNUAL PRO BONO REPORTING FORM (REQUIRED)

Be sure to completely blacken the circle where applicable.

PRO BONO REPORTING FOR JULY 1, 2008 - JUNE 30, 2009 YEAR.

Pursuant to the reporting requirement of Rule 4-6.1(d), Rules Regulating The Florida Bar

Please enter the number of whole hours

1 I have personally provided pro bono legal services: (a) ○ "on my own." (b) ○ "through an organized legal aid program;" ____ hours

2 My firm provided pro bono services collectively under a plan with the following Florida Circuit Pro Bono Committee: ____ (circuit #) **and I was allocated:** ____ hours

3 I have contributed to a legal aid organization. Please enter amount. whole dollars $ ____

4 I have not provided pro bono legal services to the poor this year or made a contribution to a legal aid organization. ○

5 During the reporting period, I did not provide pro bono legal services to the poor because I am: (choose one)
○ a member of the judiciary (a) ○ a governmental lawyer prohibited by statute, rule or regulation from providing services (c) ○ retired (d)
○ judicial staff (b) ○ INACTIVE (e)

6. None of the above applies to me, but I have provided legal services to the poor in the following special manner: (see instructions)

COMMUNITY SERVICE (OPTIONAL) FOR JULY 1, 2008 - JUNE 30, 2009 YEAR

VOLUNTARY SURVEY
for the purpose of showing the involvement of lawyers in community service.

Be sure to completely blacken the circle corresponding to your entry.

I have contributed community and public services in the following areas:

○ Service to the legal community ____ hours
○ Service to religious organizations ____ hours
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○ Service to other charities/schools ____ hours

Answering this question does not constitute compliance with required pro bono response.

Please enter the number of whole hours

MEMBER DATA CHANGES

Membership data can be changed any time at www.floridabar.org.

CHANGE OF ADDRESS: Members shall promptly notify the Bar of changes pursuant to Rule 1-3.3, Rules Regulating The Florida Bar. All such data contained in your membership record is public information. **CURRENT E-MAIL:**

Firm (optional)

Mailing Address

City/State/Zip

Physical Address

(Street address of your office must be provided if different from mailing address.)

City/State/Zip

Business Telephone **Extension** **Fax #** (optional)

E-mail (optional)

COMPLETE FRONT AND BACK AND RETURN ENTIRE FORM TO MAINTAIN MEMBERSHIP STATUS

2010-2011

THE FLORIDA BAR

ANNUAL MEMBERSHIP FEES
651 EAST JEFFERSON STREET
TALLAHASSEE, FLORIDA 32399-2300
1-850-561-5832 (MEMBERSHIP RECORDS ONLY)
1-800-342-8060 • Ext. 5832

PLEASE READ INSTRUCTION SHEET BEFORE COMPLETING FORM

FEES ARE DUE AND PAYABLE JULY 1, 2010

SECTION AND DIVISION DUES

Sections to which you currently hold membership(s) are indicated.
For sections you are joining, please darken circles completely using a blue or black ball point pen or pencil.

- ○ $25 Administrative Law **(11)**
- ○ $40 Appellate Practice **(21)**
- ○ $45 Business Law **(04)**
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- ○ $25 Criminal Law **(09)**
- ○ $50 Elder Law **(19)**
- ○ $35 Entertainment, Arts & Sports Law **(15)**
- ○ $40 Environmental & Land Use Law **(10)**
- ○ $30 Equal Opportunities Law **(22)**
- ○ $55 Family Law **(06)**
- ○ $35 General Practice, Solo & Small Firm **(05)**
- ○ $30 Government Lawyer* **(18)**
- ○ $30 Health Law **(16)**
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- ○ $50 Tax **(01)**
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- ○ $50 Workers' Compensation **(08)**

* Joint membership with either Criminal or Administrative Law = $45
* Joint membership of Gov't Lawyer/Criminal/Administrative Law = $70

PLEASE ADD FOR TOTAL SECTION DUES $ *Please fill in*

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Attorneys Charitable Trust ..... (suggested contribution $25.00)

Lawyers' Challenge for Children ..... [see www.flabarfndn.org] ..... (suggested contribution $45.00)

Supreme Court Historical Society ..... (Please see back of letter for contribution options.)

FLAME (Florida Lawyers Association for the Maintenance of Excellence, Inc.) ..... (suggested contribution $45.00)

Notice Regarding Deductibility of **FLAME** Voluntary Contributions – Since 100% of FLAME, Inc. (Florida Lawyers Association for the Maintenance of Excellence, Inc.) contributions may be allocated to lobbying expenses, they would therefore not be tax deductible.

MEMBERSHIP FEES

DESCRIPTION	PRIOR YEAR BALANCE	CURRENT YEAR FEES**	LATE FEES	OTHER COSTS (1)
MEMBERSHIP				
				TOTAL PAID

** THIS ANNUAL FEE INCLUDES $25 FOR CLIENTS' SECURITY FUND
(1) THIS COST AMOUNT IS VALID IF PAID BY AUGUST 16, 2010

☐ **I am qualified to pay by installments (see instructions)**

☐ **I am a full time government employee**

CHECK #

To pay by credit card, please go to our website: www.FLORIDABAR.org

FEES ARE DUE AND PAYABLE JULY 1, 2010

Fees postmarked after 8-16-10 are assessed a $50.00 late fee. Fees received after 9-30-10 are considered delinquent. A delinquent attorney is prohibited from the practice of law in Florida and from rendering advice on matters of Florida law until all fees, a $50.00 late fee, a $150.00 reinstatement fee and a petition for reinstatement are received and the reinstatement petition is approved by the Executive Director.

I HEREBY ELECT INACTIVE STATUS ☐ **Please check box (see instructions) $175 Inactive Annual Fee Enclosed**

Deadline August 16, 2010

COMPLETE FRONT AND BACK AND RETURN ENTIRE FORM TO MAINTAIN MEMBERSHIP STATUS

2010-2011

THE FLORIDA BAR

ANNUAL MEMBERSHIP FEES

TRUST ACCOUNT COMPLIANCE CERTIFICATE FOR JULY 1, 2009 - JUNE 30, 2010 YEAR. (REQUIRED)

I certify that I have read the rules applicable to lawyer trust accounts and safekeeping property in chapter 5 of the Rules Regulating The Florida Bar [www.floridabar.org/rules/chapter5] and that:

- ○ I am required to maintain a trust account and I am in compliance with the trust account and safekeeping property rules. (1)
- ○ I am not required to maintain a trust account because I do not receive or hold funds or property from clients or third parties in connection with legal representation. (2)
- ○ I am **not** in compliance with the trust account and safekeeping property rules. Attached is an explanation of the way in which I did not comply with the trust account and safekeeping property rules. (3)

ANNUAL PRO BONO REPORTING FOR JULY 1, 2009 - JUNE 30, 2010 YEAR. (REQUIRED)

Be sure to completely blacken the circle where applicable.

Please enter the number of whole hours

Pursuant to the reporting requirement of Rule 4-6.1(d), Rules Regulating The Florida Bar

1. I have personally provided pro bono legal services: (a) ○ "on my own." (b) ○ "through an organized legal aid program;" ____ hours
2. My firm provided pro bono services collectively under a plan with the following Florida Circuit Pro Bono Committee: ____ (circuit #) **and I was allocated:** ____ hours
3. I have contributed to a legal aid organization. Please enter amount. whole dollars $ ____
4. I have not provided pro bono legal services to the poor this year or made a contribution to a legal aid organization. ○
5. During the reporting period, I was deferred from the provision of reporting pro bono legal services to the poor because I am: (choose one)
   - ○ a member of the judiciary (a)
   - ○ judicial staff (b)
   - ○ a governmental lawyer prohibited by statute, rule or regulation from providing services (c)
   - ○ retired (d)
   - ○ inactive (e)
6. None of the above applies to me, but I have provided legal services to the poor in the following special manner: (see instructions)

COMMUNITY SERVICE FOR JULY 1, 2009 - JUNE 30, 2010 YEAR (OPTIONAL)

VOLUNTARY SURVEY

for the purpose of showing the involvement of lawyers in community service.

Be sure to completely blacken the circle corresponding to your entry.

- ○ Service to the legal community ____ hours
- ○ Service to religious organizations ____ hours
- ○ Service to civic organizations ____ hours
- ○ Service to other charities/schools ____ hours

Answering this question does not constitute compliance with required pro bono response.

Please enter the number of whole hours

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Firm (optional)

Mailing Address

City/State/Zip

Physical Address

(Street address of your office must be provided if different from mailing address.)

City/State/Zip

Business Telephone ___ - ___ - ____ **Extension** ____ **Fax #** (optional) ___ - ___ - ____

E-mail (optional)

COMPLETE FRONT AND BACK AND RETURN ENTIRE FORM TO MAINTAIN MEMBERSHIP STATUS

APPENDIX

18

[13 pages]

May 14, 2010

Member IOLTA Rules Education Campaign

The revised IOLTA Rules go into effect on August 1, 2010.

***Washington Lawyer*:**
(Mailed to over 90,000 Bar members)

Accomplished:

•May, 2010, issue- "Legal Beat" included story about new IOLTA rules.

Upcoming:

•June issue- publication of IOLTA "primer." Includes the Court of Appeals order promulgating the revised IOLTA rules; text of the revised IOLTA rules; abbreviated version of previously published web story about the revised IOLTA rules; information about upcoming June 16 CLE class about IOLTA; and Bar Counsel column about the revised IOLTA rules. A "corner cut" on cover will direct readers to the new rules inside.

•July/August issue: Bar president's page will include information about IOLTA.
•Early/mid 2011 "Speaking of Ethics" column could focus on IOLTA rules
•Early/mid 2011: possible feature article about IOLTA rules.

Continuing Legal Education:

Accomplished:

•April 28, 2010: "Ethics and Lawyer Trust Accounts" CLE class. This class may be offered again in the late fall of 2010.

Upcoming:

•June 16, 2010, a special class focusing on IOLTA is scheduled. This course could also be available on a CD and online (if this latter method of delivery becomes available.)

Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice: The topic is now included in the ethics, disciplinary system and regulation counsel segments of all sessions of the Mandatory Course. This course is offered 12 times a year and reaches about 3,500 members annually.

Accomplished:

•Courses were held on April 14 and May 8, 2010

Sessions of the course for the remainder of 2010 are scheduled as follows:

•June 8, 2010
•July 10, 2010
•August 10, 2010
•September 11, 2010
•October 5, 2010
•November 6, 2010
•December 7, 2010

Sections:

•Educational events sponsored by the solo and small firm committee of the Law Practice Management Section.

D.C. Bar Website:

Accomplished:

•March 24, 2010: A lead story about changes to the IOLTA rules was published on the Bar's home page. Links to clean and red-lined versions of the revised rules are included in the story. The web story is periodically circulating to the home page for the next 90 days.

***E-brief*:**

Accomplished:

•April 5: Notification to Bar members about the IOLTA revisions was published in the April 5 edition of the *E-brief*. A link back to the web story described above was included.

Regulation Counsel Staff:

•Questions from members will be handled in the following way:

•Specific fact-based questions that arise under Rule of Professional Conduct 1.15 about whether or not a member is obligated to open an IOLTA account in the District of Columbia are handled by legal ethics counsel.

•The mechanics of how to open and operate an IOLTA account are provided by the manager of the Practice Management Advisory Service (PMAS).

•Information about IOLTA-compliant banks is provided by the D.C. Bar Foundation.

"Basic Training" seminar:

Sponsored by the Practice Management Service Committee, this intensive seminar for new and current solo practitioners is held once or twice a month by the PMAS manager. During sessions of this seminar, the manager is educating members about the new IOLTA rules.

Accomplished:

Recent seminars were held on:

•March 31, 2010
•April 14, 2010
•May 5, 2010

Upcoming seminars are scheduled for the following dates in 2010:

•May 26, 2010
•June 9, 2010
•June 30, 2010
•July 12, 2010
•July 27, 2010
•August 9, 2010
•September 13, 2010
•September 28, 2010
•October 13, 2010
•October 27, 2010
•November 8, 2010
•November 23, 2010
•December 7, 2010
•December 20, 2010

Additional seminars are added on an ongoing basis.

Online Surveys

•To selected groups of members (particularly to solo practitioners and to attorneys in small, medium and large firms) to learn what educational methods members are using to learn about the revised IOLTA rules. Surveys can be conducted before and after the implementation date of the revised rules.

Chief Judge Letter:

Upcoming:

• Chief Judge Washington has agreed to author a letter to Bar members about the new IOLTA rules. The letter can be sent to members via *E-brief* and *Washington Lawyer.* The letter is currently being drafted.

Firm administrators:

•The Bar can provide to the Bar Foundation contact information on the firm administrators for the law firms located within the District of Columbia, which participate in the law firm billing program. This would enable the Bar Foundation to reach approximately 9,000 lawyers.

Bar demographic information:

•To assist the Bar Foundation in the administration of its IOLTA program, the Bar will provide the Bar Foundation with aggregate data from certain demographic segments of the Bar's membership.

Bar Leadership (Voluntary Bar Associations) meetings:

Upcoming:

• Brief presentation and overview about the new IOLTA rules at the meeting of the leadership of the voluntary bar associations in the fall of 2010 after implementation of the new IOLTA rules, and when new leadership will be in place at many of the voluntary bars.

•Detailed presentations to specific voluntary bars can be made in the future.

June 7, 2010

Member IOLTA Rules Education Campaign

The revised IOLTA Rules go into effect on August 1, 2010.

***Washington Lawyer*:**
(Mailed to over 90,000 Bar members)

Accomplished:

•May, 2010, issue- "Legal Beat" included story about new IOLTA rules.

•June issue- publication of IOLTA "primer." A "corner cut" on cover directs readers to the new rules inside.

Includes:

- The Court of Appeals order promulgating the revised IOLTA rules;
- Text of the revised IOLTA rules;
- Abbreviated version of previously published web story about the revised IOLTA rules;
- Information about upcoming June 16 CLE class about IOLTA; nd
- Bar Counsel column about the revised IOLTA rules.

Upcoming

•July/August issue: Bar president's page will include information about IOLTA.
•Early/mid 2011 "Speaking of Ethics" column could focus on IOLTA rules
•Early/mid 2011: possible feature article about IOLTA rules.

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•April 28, 2010: "Ethics and Lawyer Trust Accounts" CLE class. This class may be offered again in the late fall of 2010.

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•June 16, 2010, a special class focusing on IOLTA is scheduled. This course could also be available on a CD and online (if this latter method of delivery becomes available.)

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•October 5, 2010
•November 6, 2010
•December 7, 2010

Sections:

•Educational events sponsored by the solo and small firm committee of the Law Practice Management Section.

D.C. Bar Website:

Accomplished:

•March 24, 2010: A lead story about changes to the IOLTA rules was published on the Bar's home page. Links to clean and red-lined versions of the revised rules are included in the story. The web story is periodically circulating to the home page for the next 90 days.

***E-brief*:**

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Additional seminars are added on an ongoing basis.

Online Surveys

•To selected groups of members (particularly to solo practitioners and to attorneys in small, medium and large firms) to learn what educational methods members are using to learn about the revised IOLTA rules. Surveys can be conducted before and after the implementation date of the revised rules.

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***Washington Lawyer*:**
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Accomplished:

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•June issue- publication of IOLTA "primer." A "corner cut" on cover directs readers to the new rules inside.

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- Information about upcoming June 16 CLE class about IOLTA; and
- Bar Counsel column about the revised IOLTA rules.

Upcoming

•July/August issue: Bar president's page will include information about IOLTA and letter from Chief Judge Eric Washington to Bar members about the IOLTA rules.
•Early/mid 2011 "Speaking of Ethics" column could focus on IOLTA rules
•Early/mid 2011: possible feature article about IOLTA rules.

Continuing Legal Education:

Accomplished:

•April 28, 2010: *Ethics and Lawyer Trust Accounts* CLE class. This class may be offered again in the late fall of 2010.

•June 16, 2010: *How to Comply with the New D.C. Mandatory IOLTA Rules (aka OMG! IOLTA's Going Mandatory*, a special CLE class focusing on IOLTA. This course could also be available on a CD and online (if this latter method of delivery becomes available.)

Upcoming:

•August 5, 2010, repeat of: *How to Comply with the New D.C. Mandatory IOLTA Rules (aka OMG! IOLTA's Going Mandatory*, a two-hour version of the June 16th CLE class.

Mandatory Course on the D.C. Rules of Professional Conduct and D.C. Practice: The topic is now included in the ethics, disciplinary system and regulation counsel segments of all sessions of the Mandatory Course. This course is offered 12 times a year and reaches about 3,500 members annually.

Accomplished:

•Courses were held on April 14, May 8, June 8, and July 10, 2010

Sessions of the course for the remainder of 2010 are scheduled as follows:

•August 10, 2010
•September 11, 2010
•October 5, 2010
•November 6, 2010
•December 7, 2010

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•Educational events sponsored by the solo and small firm committee of the Law Practice Management Section.

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***E-brief*:**

Accomplished:

•April 5: Notification to Bar members about the IOLTA revisions was published in the April 5 edition of the *E-brief*. A link back to the web story described above was included.

•July 7: A reminder to Bar members about the IOLTA revisions, effective August 1, was published in the July 7 edition of the E-brief. A link back to the web story described above was included. The web story was modified to include a link to a letter by Chief Judge Eric T. Washington to Bar members about the upcoming IOLTA revisions.

Regulation Counsel Staff:

•Questions from members will be handled in the following way:

•Specific fact-based questions that arise under Rule of Professional Conduct 1.15 about whether or not a member is obligated to open an IOLTA account in the District of Columbia are handled by legal ethics counsel.

•The mechanics of how to open and operate an IOLTA account are provided by the manager of the Practice Management Advisory Service (PMAS).

•Information about IOLTA-compliant banks is provided by the D.C. Bar Foundation.

"Basic Training" seminar:

Sponsored by the Practice Management Service Committee, this intensive seminar for new and current solo practitioners is held once or twice a month by the PMAS manager. During sessions of this seminar, the manager is educating members about the new IOLTA rules.

Accomplished:

Recent seminars were held on:

•March 31, 2010
•April 14, 2010
•May 5, 2010
•May 26, 2010
•June 9, 2010
•June 30, 2010
•July 12, 2010

Upcoming seminars are scheduled for the following dates in 2010:

- July 27, 2010
- August 9, 2010
- September 13, 2010
- September 28, 2010
- October 13, 2010
- October 27, 2010
- November 8, 2010
- November 23, 2010
- December 7, 2010
- December 20, 2010

Additional seminars are added on an ongoing basis.

Online Surveys

- To selected groups of members (particularly to solo practitioners and to attorneys in small, medium and large firms) to learn what educational methods members are using to learn about the revised IOLTA rules. Surveys can be conducted before and after the implementation date of the revised rules.

Chief Judge Letter:

Accomplished:

- Chief Judge Eric T. Washington authored a letter to Bar members about the new IOLTA rules. The letter was sent to members in the July 7 edition of E-*brief* and will be published in the July/August 2010 *Washington Lawyer.*

Firm administrators:

- The Bar can provide to the Bar Foundation contact information on the firm administrators for the law firms located within the District of Columbia, which participate in the law firm billing program. This would enable the Bar Foundation to reach approximately 9,000 lawyers.

Bar demographic information:

- To assist the Bar Foundation in the administration of its IOLTA program, the Bar will provide the Bar Foundation with aggregate data from certain demographic segments of the Bar's membership.

Bar Leadership (Voluntary Bar Associations) meetings:

Upcoming:

- Brief presentation and overview about the new IOLTA rules at the meeting of the leadership of the voluntary bar associations in the fall of 2010 after implementation of the new IOLTA rules, and when new leadership will be in place at many of the voluntary bars.

- Detailed presentations to specific voluntary bars can be made in the future.

APPENDIX

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[1 page]

OCTOBER 2010 MEMBERSHIP DISTRIBUTION REPORT

CLASS DISTRIBUTION			
CLASS DISTRIBUTION	TOTAL	METRO	NON METRO
ACTIVE	68860	49513	19347
INACTIVE	21266	6190	15076
JUDICIAL	952	499	453
RETIRED INACTIVE	2814	1458	1356
SPECIAL LEGAL CONSULTANT	77	54	23
SUBTOTAL:	**93969**	**57714**	**36255**

CLASS DISTRIBUTION			
CLASS DISTRIBUTION	TOTAL	METRO	NON METRO
NON-MEMBER	22016	18297	3719
SUBTOTAL:	**22016**	**18297**	**3719**

METRO AREA MEMBER TYPES BY PRACTICE			
INDUSTRY	ACTIVE	INACTIVE	JUDICIAL
SOLE PRACTICE	4905	665	9
FIRM PRACTICE	23058	639	8
GOVERNMENT	10272	1544	417
OTHER*	4732	2358	61
UNKNOWN**	78	20	0
CORPORATE	3448	407	1
ACADEMIA	541	163	1
NOT-FOR_PROFIT ORGANIZATION	2046	346	1
NOT-FOR_PROFIT PRACTICE	433	48	1
SUBTOTAL:	**49513**	**6190**	**499**

*Other: employment in a non-law-related occupation or law-related occupation not included in the other practice types
**Unknown: information not provided by member

APPENDIX

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[3 pages]

	A	B	C
2	FIRM NAME	# DC METRO LAWYERS	SOURCE OF INFO
3	Akin Gump Strauss Hauer & Feld LLP	251	firm website
4	Alston & Bird LLP	122	firm website
5	Arent Fox LLP	239	firm billing program
6	Arnold & Porter LLP	468	firm billing program
7	Ashcraft & Gerel LLP	30	firm billing program
8	Baker & Hostetler	80	firm billing program
9	Baker & McKenzie LLP	97	firm website
10	Baker Botts LLP	113	firm billing program
11	Ballard Spahr LLP	50	firm website
12	Beveridge & Diamond, P.C.	81	firm billing program
13	Bingham McCutchen LLP	182	firm website
14	Blank Rome LLP	79	firm website
15	Boies, Schiller & Flexner LLP	32	firm website
16	Bryan Cave LLP	70	firm website
17	Buchanan Ingersoll & Rooney, P.C.	102	firm website
18	Cadwalader, Wickersham & Taft	84	firm website
19	Caplin & Drysdale	65	firm website
20	Chadbourne & Parke LLP	57	firm website
21	Cleary Gottlieb Steen & Hamilton LLP	109	firm website
22	Clifford Chance US LLP	192	firm website
23	Cooley Godward Kronish	125	firm website
24	Covington & Burling LLP	491	firm billing program
25	Crowell & Moring	159	firm website
26	Dechert LLP	76	firm website
27	Dewey & LeBoeuf LLP	101	firm website
28	Dickstein Shapiro LLP	254	firm billing program
29	DLA Piper LLP	149	firm website
30	Dow Lohnes PLLC	107	firm billing program
31	Drinker, Biddle & Reath LLP	114	firm website
32	Duane Morris LLP	49	firm website
33	EpsteinBeckerGreen	60	firm website
34	Finnegan, Henderson, Farabow, Garrett & Dunner L.L.P.	283	firm website
35	Fish & Richardson	62	firm website
36	Foley & Lardner LLP	162	firm website
37	Fried, Frank, Harris, Shriver & Jacobson LLP	109	firm website
38	Fulbright & Jaworski L.L.P.	107	firm billing program
39	Gibson, Dunn & Crutcher LLP	150	firm website
40	Goodwin Procter LLP	106	firm website
41	Greenberg Traurig	140	firm website
42	Groom Law Group	53	firm website
43	Hogan Lovells US LLP	559	firm billing program
44	Holland & Knight	210	firm website
45	Hollingsworth LLP	71	firm website
46	Howrey LLP	228	firm website
47	Hughes, Hubbard & Reed LLP	51	firm website
48	Hunton & Williams	221	firm billing program
49	Jackson & Campbell, P.C.	49	firm billing program
50	Jenner & Block LLP	81	firm website
51	Jones Day	187	firm billing program
52	K&L Gates LLP	85	firm website
53	Katten Muchin Rosenman LLP	66	firm website
54	Keller and Heckman LLP	80	firm website
55	Kelley Drye & Warren	125	firm website
56	Kellogg, Huber, Hansen, Todd, Evans & Figel	70	firm website
57	Kilpatrick Stockton LLP	650	firm website
58	King & Spalding LLP	178	firm website
59	Kirkland & Ellis LLP	231	firm billing program
60	Latham & Watkins LLP	313	firm billing program
61	Mayer Brown LLP	146	firm website

	A	B	C
62	McDermott Will & Emery	198	firm billing program
63	McGuireWoods LLP	111	firm website
64	McKenna, Long & Aldridge LLP	134	firm website
65	Miller & Chevalier	90	firm billing program
66	Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.	64	firm billing program
67	Morgan, Lewis & Bockius LLP	315	firm billing program
68	Morrison & Foerster Foundation	112	firm website
69	Nixon Peabody LLP	106	firm website
70	Oblon, Spival, McClelland, Maier & Neustadt	99	firm website
71	O'Melveny & Myers LLP	160	firm billing program
72	Orrick, Herrington & Sutcliffe LLP	89	firm website
73	Patton Boggs	241	firm billing program
74	Paul Hastings	97	firm billing program
75	Pepper Hamilton LLP	37	firm website
76	Perkins Coie LLP	81	firm website
77	Pillsbury Winthrop Shaw Pittman LLP	206	firm billing program
78	Public Defender Service for the District Of Columbia	87	firm billing program
79	Reed Smith LLP	103	firm website
80	Ropes & Gray LLP	92	firm website
81	Rothwell, Figg, Ernst & Manbeck P.C.	40	firm billing program
82	Shook Hardy & Bacon LLP	34	firm website
83	Sidley Austin LLP	249	firm billing program
84	Skadden, Arps, Slate, Meagher & Flom LLP	328	firm billing program
85	Sonnenschein Nath & Rosenthal LLP	108	firm website
86	Squire, Sanders & Dempsey L.L.P.	136	firm website
87	Steptoe & Johnson LLP	318	firm billing program
88	Sterne Kessler Goldstein & Fox LLP	40	firm website
89	Sughrue Mion	80	firm website
90	Sullivan & Cromwell LLP	42	firm website
91	Sutherland	164	firm billing program
92	Troutman Sanders	110	firm website
93	Van Ness Feldman, P.C.	68	firm website
94	Venable LLP	295	firm billing program
95	Vinson & Elkins	89	firm billing program
96	Weil Gotshal & Manges LLP	73	firm website
97	White & Case LLP	150	firm website
98	Wiley Rein LLP	235	firm billing program
99	Williams & Connolly LLP	308	firm billing program
100	Willkie Farr & Gallagher LLP	104	firm billing program
101	WilmerHale	399	firm billing program
102	Wilson Sonsini Goodrich & Rosati Foundation	52	firm website
103	Winston & Strawn LLP	128	firm website
104	Wombel Carlyle Sandridge & Rice	91	firm website
105	Zuckerman Spaeder LLP	54	firm website
106	Zuckert, Scoutt & Rasenberger, LLP	19	firm billing program
107	**TOTAL LARGEST FIRMS and BILLING PROGRAM**	**15,097**	
108			
109	10.2010 all bar members	93,969	
110	10.2010 metro all	57,714	
111	10.2010 metro active	49,513	
112	10.2010 solo practice	4,905	
113	10.2010 firm practice	23,088	
114			
115	DC metro members in big firms	7,399	
116	members in DC Bar firm billing program	7,698	
117	IOLTA-eligible who are in big firms (7399) + members in billing program (7698) = **15,097**	15,097	
118	IOLTA-eligible who are not solos or in big firm or /billing program (23,088 minus 15,097) = **7991**	7,991	
119			
120			

	A	B	C
121			
122	23,088 (firm practice) *minus* big firm members and lawyers covered by billing program (15,097) = **7991** remaining firm members who are possibly IOLTA-eligible		
123			
124	7991 (remaining) + 4905 (solo) = **12,896** possibly IOLTA-eligible		
125			
126	12896/93969 = **13.7%** of total membership		
127			
128	12896/49513 (metro active) = **26.0%** of metro active		
129			
130	12896/57714 (all metro) = **22.3%** of all metro members		
131			

APPENDIX

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[6 pages]

MEMORANDUM

TO: Regulations/Rules/Board Procedures Committee

FROM: Carla J. Freudenburg

RE: Chart: Unified Bars with Mandatory IOLTA Programs

DATE: October 16, 2009

The attached staff chart – "Unified Bars with Mandatory IOLTA Programs"-- provides IOLTA information about 28 jurisdictions. Twenty-five of the jurisdictions are unified bars with mandatory IOLTA programs. Three additional jurisdictions are included for comparison purposes. Maryland, a voluntary bar with a mandatory IOLTA program, is included because it is a neighboring jurisdiction. New York, a voluntary bar with a mandatory IOLTA program, is included because like the D.C. Bar, it is one of the country's largest bars. Virginia, a mandatory bar with an opt-out IOLTA program, is included because it is a neighboring jurisdiction.

Of the 27 jurisdictions with a mandatory IOLTA program, 25 have a requirement in which lawyers are required to report their compliance with or exemption from the IOLTA rules or statutes. Detailed materials about the IOLTA certification requirements are provided for nine jurisdictions: Arizona, California, Florida, Maryland, Missouri, New York, North Carolina, Texas, and Wisconsin.

The source of the majority of the data included in this chart is from a chart entitled: "IOLTA Compliance Reporting Information 2006." The source of data for the 2006 IOLTA chart is the IOLTA Clearinghouse Database- Self Reporting by Programs; the 2006 chart is the most recent update provided by the IOLTA Clearinghouse. The 2006 chart was included in the Bar Foundation's 2007 IOLTA Report to the Bar.

Except for data about the nine jurisdictions noted above, the data included in the staff chart has not been updated from that provided by the IOLTA Clearinghouse in 2006. However, changes or discrepancies that were discovered during the course of research by Bar staff have been reflected in the staff chart.

Unified Bars with Mandatory IOLTA Programs
October 16, 2009

Jurisdiction / Applicable IOLTA Rule	Are lawyers required to report their compliance with or exemption from the IOLTA rule or status / Applicable Rule	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific Penalties / Applicable Rule	Does IOLTA program obtain information
Arizona / ER 1.15 & Supreme Court Rule 43(c)	Yes / Supreme Court Rule 43(c)*	The State Bar of Arizona	Dues Statement	Annually	Yes	Administrative suspension / Supreme CourtRule 43(h)	Yes
California / Business and Professions Code Section 6211	Yes / Rules of the State Bar 2.114	The State Bar of California Legal Services Trust Fund Program	California IOLTA update form	Annually	Appears that it is not being enforced	Appears that it is not being enforced	Unclear
Florida/ Rules Regulating the Florida Bar 5.1.1 & RPC 4-1.15	Yes / Rules Regulating the Florida Bar 5.1.1	The Florida Bar	Annual Bar Fee Statement	Annually	Yes	Same as for any violation of The Rules Regulating the Florida Bar / Rule 5-1.2	Yes
Georgia / RPC 1.15 (II)	No	N/A	N/A	N/A	N/A	N/A	N/A
Hawaii / Hawaii Supreme Court Rule 11	Yes	The Hawaii Justice Foundation	Part IV, IOLTA Certification Form	Annually	Yes	If the form is not completed, they are administratively suspended. If they misrepresent, the Office of Disciplinary Counsel may take action when this is discovered	Yes
Idaho / RPC 1.15(e)	Yes	Idaho State Bar	Idaho State Bar Trust Account Certification	Annually	Yes	Cannot be Licensed (but loosely enforced)	Yes
Indiana / RPC 1.15	Yes	Clerk of the Indiana Supreme Court	Attorney Annual Registration Fee Form	Annually	Yes	May be subject to administrative suspension	Yes

Unified Bars with Mandatory IOLTA Programs
October 16, 2009

Jurisdiction / Applicable IOLTA Rule	Are lawyers required to report their compliance with or exemption from the IOLTA rule or status / Applicable Rule	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific Penalties / Applicable Rule	Does IOLTA program obtain information
Louisiana / RPC 1.15(g)	Yes	Office of Disciplinary Counsel	State bar registration statement	Annually	Yes	Not reported by state	Yes
Maryland** / RPC 1.15	Yes / MD Rule 16-608	Maryland Court of Appeals	Annual IOLTA Compliance Report	Annually	N	None are specified in the Rule	Yes
Michigan / RPC 1.15(3)	Yes	State Bar of Michigan	Bar Dues Statement	Annually	Yes	Delay of licensing	Yes
Mississippi / RPC 1.15(d)	Yes	Not reported by state	Not reported by state	Not reported by state	Not reported by state	Not reported by state	Yes
Missouri / Rules Governing the Missouri Bar and the Judiciary Rule 4-1.15(h)	Yes / Rule 4-1.15(i)	Clerk of the Supreme Court	Annual Attorney Enrollment Form	Annually	No	N/A	Yes
Montana/ RPC 1.18	Yes	State Bar of Montana	Compliance form provided by State Bar	Annually	Not reported by state	Not reported by state	No
Nevada / Supreme Court Rule 217	Yes	Supreme Court of Nevada	Form provided by the court	Annually	No	Not reported by state	Yes
New Mexico / Rules Governing New Mexico Bar Rule 24-109	Yes	Clerk of New Mexico Supreme Court	Annual certification on State Bar dues	Yearly	No	Not reported by state	Yes

Unified Bars with Mandatory IOLTA Programs
October 16, 2009

Jurisdiction / Applicable IOLTA Rule	Are lawyers required to report their compliance with or exemption from the IOLTA rule or status / Applicable Rule	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific Penalties / Applicable Rule	Does IOLTA program obtain information
New York*** / NYCRR 7000.8	Not a state requirement.The first and second departments require attorneys certify on their registration statements that they are in compliance with with the RPC governing safekeeping of client property and reporting requirements / Rule1.15	Departments	Registration Statement	Bi-annually	No	N/A	Unclear
North Carolina / RPC 1.15-2 & 27NCCAC 01D.1316	Yes / 27 NCAC 01D.1316(c) & 27 NCAC01D.1318	NC State Bar	Annual Dues notice	Annually	Yes	Administrative suspension	Yes
North Dakota / RPC 1.15(f)	Not reported by state	Not reported by state	Not reported by state	Not reported by state	Not reported by state	Not reported by state	Not reported by state
Oklahoma / RPC 1.15	Yes	Oklahoma Bar Association	Annual dues statement	Annually	Yes	Members are faced with possible disciplinary action through the association	Yes
Oregon / RPC 1.15-2	Yes	Oregon State Bar	Annual Certification of Complinace	Annually	Not reported by state	As of 2006, under review	Yes
Rhode Island / RPC 1.15(d)	Yes	Send compliance form to Bar Foundation	IOLTA notice and certification of compliance form	Annually	No	N/A	Bar Foundation keeps compliance form on file

Unified Bars with Mandatory IOLTA Programs
October 16, 2009

Jurisdiction / Applicable IOLTA Rule	Are lawyers required to report their compliance with or exemption from the IOLTA rule or status / Applicable Rule	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific Penalties / Applicable Rule	Does IOLTA program obtain information
South Carolina / Court Rule 412	Yes	South Carolina Bar	License Fee statement	Annually	No	N/A	Yes
Texas / State Bar of Texas Rules: Article XI, Section 5	Yes / Rules Governing the Operation of the Texas Access to Justice Foundation: Rule 23	Texas Equal Access to Justice Foundation	Paper forms mailed-in; 2006 can report online	Annually	Yes	A list of non-compliance is sent to the Supreme Court and attorneys are subject to suspension (not always enforced) / Rules Governing the Operation of the Texas Access to Justice Foundation: Rule 23	Yes
Utah / Utah Code of Judicial Administration: Supreme Court Rules of Professional Practice - Rule 14-1001	Yes	Utah Bar Foundation / Utah Supreme Court	IOLTA Trust Account Certification	Annually	Yes	A list of non-compliance is sent to the Supreme Court and attorneys are subject to suspension / Supreme Court Rules of Professional Practice, Chapter 14: Rules Governing the Utah State Bar, Article 10: Rule 14-1001. IOLTA	Yes
Virginia**** / RPC 1.15	No	N/A	N/A	N/A	N/A	N/A	Opt-out
Washington / RPC 1.15A	Yes	Washington State Bar Association	Trust account attestation	Annually	Not reported by state	Not reported by state	Yes

Unified Bars with Mandatory IOLTA Programs
October 16, 2009

Jurisdiction / Applicable IOLTA Rule	Are lawyers required to report their compliance with or exemption from the IOLTA rule or status / Applicable Rule	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific Penalties / Applicable Rule	Does IOLTA program obtain information
West Virginia / RPC 1.15	Yes	West Virginia Bar Foundation	Bar Foundation Form	Annually	Yes	Violation of Rules of Professional Conduct	Yes
Wisconsin / Supreme Court Rule 20:1.15(c)	Yes / SCR 20:1.15(i)	Wisconsin Office of Lawyer Regulation (OLR)	Wisconsin State Bar dues statement; OLR forms	Annually	Yes	Administrative suspension / SCR 20:1.15(i)(4)	No

*Arizona - Must report compliance with client trust account rules.
**Maryland is a voluntary bar with a mandatory IOLTA. As a neighboring jurisdiction it is being included for comparison.
***New York is a voluntary bar with a mandatory IOLTA. As one of the country's largest bars, it is being included for comparison.
****Virginia is a mandatory bar with an opt-out IOLTA program. As a neighboring jurisdiction it is included for comparison.

APPENDIX

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[4 pages]

IOLTA Random Monitoring Concept

I. Purpose

The Bar Foundation may choose periodically to conduct random monitoring of D.C. Bar members to collect information about their IOLTA accounts. It is anticipated that random monitoring would assist the Bar Foundation in managing the interest income of D.C. IOLTA accounts. The form and manner of the monitoring shall be agreed to by the Foundation and the D.C. Bar and would comply with criteria set out in a memorandum of understanding between the two entities.

It is not contemplated that random monitoring would be enforced through the disciplinary process.

II. Time frame

Random monitoring would begin in the third year after a comprehensive IOLTA rule becomes effective and would be conducted annually. After three random monitoring cycles, the monitoring would be assessed by the D.C. Bar and the Bar Foundation to determine its effectiveness in meeting the Bar Foundation's goal of increasing IOLTA interest revenue. The assessment would also include a cost-benefit analysis. Criteria to measure effectiveness would be agreed to by the D.C. Bar and the Bar Foundation.

III. Composition of the random monitoring pool

It is recommended that random monitoring be conducted with a selected group of members. It is not recommended that the entire membership be monitored. Limiting monitoring to members who may be most likely to maintain IOLTA accounts, and excluding categories of members who most likely are not engaged in practices that would require them to maintain IOLTA accounts would minimize the cost of monitoring to the Bar Foundation and the administrative burden on members in responding to the monitoring.

A. Selection criteria for the random monitoring pool

Before random monitoring is conducted, it is recommended that a consultation with a survey expert and/or a statistician be performed to ensure that monitoring achieves meaningful results. The following questions should be asked:

1) How many members should be included in the random monitoring pool;
2) What percentage of responses from the random monitoring is needed before a statistically meaningful sample is achieved;
3) Should follow-up to non-responders to the monitoring be performed? If so, how often, and by what method? (e.g., postal mail, e-mail, telephone)

4) Should the selection criteria be consistent for each monitoring cycle (e.g., solo practitioners, small and mid-size firm members who practice in the District of Columbia, Maryland and Virginia) or should different selection criteria be used?

B. Inclusions and exclusions in a random monitoring

1. Potential categories of members to include in a random monitoring cycle:

All active members;
All active members in the Washington, D.C. metro area;[1]
Active members in other selected jurisdictions;
Active members in selected zip codes;
Active members by size of practice (e.g. solo/small, medium, large firm).

Any combination of the above criteria could be used.

2. Potential categories of members to exclude from the random monitoring pool:

Because some groups of members and members in certain practice settings are unlikely to maintain IOLTA accounts, it is recommended that the following groups be excluded from random monitoring:

Judicial members;
Inactive members;
Retired members;
Members who practice in the following settings:
- Government;
- In-house counsel;
- Non-profit organization;
- Academia.

C. Other selection methods

Other methods of conducting a random monitoring that could be considered are a selection of every nth member or an alpha selection by last name (e.g., the first monitoring cycle could include members whose last names begin with "A" to "F", the subsequent cycle could be "G" to "M", etc.). This selection criterion could also be applied to defined categories of members to create a random monitoring pool (e.g., every 10th member in a group of active, metro area members would be monitored.)

D. Method and content of inquiry by the Bar Foundation

[1] As of June 2009, the Bar reported 48,795 active metro-area members.

It is recommended that the request for information by the Bar Foundation would be sent by postal mail to members and would consist of a paper form and a return envelope addressed to the Bar Foundation.

The request for information from the member would include: the member's name, or the name of the law firm completing the form on behalf of members associated with the law firm; whether the member maintains an IOLTA account(s); and if not, whether the member is exempt from the requirements of Rule 1.15 and what category of exemption the member meets.

If the member maintains an IOLTA account(s), the following information would be requested: the IOLTA account number(s) and the name and location of the depository where the account(s) is located; whether the member has opened or closed any IOLTA account(s); and if so, the IOLTA account number(s) and the name and location of the depository where the account(s) has been opened and/or closed.

IV. Data sharing by the D.C. Bar with the Bar Foundation/Data collection and maintenance by the Bar Foundation

A. Mailing labels

The primary point of contact by the Bar Foundation to Bar members to conduct the random monitoring would be by first class mail to the members' preferred address. The D.C. Bar may provide the Bar Foundation with the address labels of members who comprise the random monitoring pool.

B. Other member contact information

Other contact information provided by the D.C. Bar to the Bar Foundation would depend on whether the Bar Foundation engages in follow-up inquiries to members who do not return the monitoring form or who return incomplete or unclear information, or if a monitoring form is returned to the Bar Foundation because of an incorrect or outdated address. It may also depend on the terms about member contact by the Bar Foundation that are set out in the memorandum of understanding between the Bar and the Bar Foundation.[2]

C. IT best practices

It is recommended that any IT data collection and maintenance plan proposed by the Bar Foundation to collect and store data about their IOLTA accounts provided to the Foundation by Bar members comply with Bar-wide policies and best practices on IT security, staff training, etc. An assessment of the Bar Foundation's IT plan and IT resources should be conducted by D.C. Bar IT senior staff before the D.C. Bar provides membership data to the Bar Foundation.

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[2] Some member contact information is publicly available at www.dcbar/org.

V. Outreach to Bar members

When the Bar Foundation prepares to conduct a random monitoring, Bar members could be notified and educated about the process, and encouraged to respond via notices on the Bar's website, in *E-Brief* and in the *Washington Lawyer*. Members of the Bar's sections and the local voluntary bars could also be notified by the Bar.

This notification of Bar members about the monitoring process could also present an opportunity to remind members to not send address changes or changes of membership status to the Bar Foundation. It could also be used to remind and educate members generally about the work of the Bar Foundation.

APPENDIX

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[12 pages]

SEPARATE STATEMENT

OF COMMITTEE MEMBER

FRANCIS D. CARTER

SEPARATE STATEMENT
FRANCIS D. CARTER, MEMBER
D.C. Bar Committee on Rules, Regulations and Board Procedures
February 23, 2011

I write separately because I have a fundamental disagreement with the majority of our Committee on the need for each D.C. Bar ("Bar") member to annually certify their compliance with the newly implemented Interest on Lawyers' Trust Accounts ("IOLTA") rules. I believe that an annual certification by each Bar member is warranted; and failure to do so will not, under my proposal, implicate a disciplinary violation. This certification will be accomplished simultaneously with the submission of annual dues by each Bar member. Certification is a foundational component to our mandatory IOLTA, in my opinion, and it should be implemented promptly.

I also do not agree with the recommendation of the Committee majority with regard to the language of their proposed rule concerning monitoring of our attorneys by the D.C. Bar Foundation ("Bar Foundation") under IOLTA. As an initial matter, the proposed language from the Committee majority requires the development of and subsequent approval of a process for monitoring IOLTA compliance but is silent on the substance of any monitoring program. This is so because the Bar and the Bar Foundation are still in the process of determining the form, reach and particulars of any modifications of the existing monitoring process currently used by the Bar Foundation. The charge of this Committee from the Bar Board of Governors on October 6, 2009, was to proposed modification(s) "to D.C. Rule of Professional Conduct 1.15 and Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar." See, *Committee Report*, p. 1. Amendments to either or both will require approval of the District of Columbia Court of Appeals and thus, in my opinion, we should not approach the D.C. Court of Appeals without a substantive monitoring process recommendation for amendment of the Rules indicated, some other Rules or for the establishment of a new rule. A process for the development of some, as of yet undetermined, modifications to the present monitoring program is not, in my opinion, what a proposed rule change should entail. Because the Committee, the Bar and the Bar Foundation are not yet where we want to be, despite our review of a large volume of material and discussions with numerous people, I would stay our hand in this regard until such time as we have a substantive recommendation on monitoring for consideration.

Let me explain.

I. MY PROPOSAL

a. CERTIFICATION

Our jurisdiction is not undertaking some new-fangled mandatory IOLTA experiment. As of November 2010, there are forty-three jurisdictions in this country who have mandatory IOLTA programs.[1] There is ample operational history upon which we can draw for effective

[1] *See*, Status of IOLTA Programs, American Bar Association Commission, Interest on Lawyers' Trust Accounts.

implementation procedures. Despite the uniqueness of the District of Columbia in relation to the 50 states, there is information available for our consideration. For example, the Committee was given *IOLTA Compliance Reporting Information 2006. See*, attached. I do not have access to more current information but this document shows that of the fifty-two jurisdictions listed, forty-two require lawyers to report their compliance with, or exemption from, the IOLTA rule or statute. In general, this reporting is done on the particular jurisdiction's annual dues statement or a separate form provided by the jurisdiction. My suggested certification of compliance occurs by the payment of Bar dues.

I propose a modification to D.C. Bar Rule II (perhaps Section 2), which explains the payment of annual dues. My proposal would include a provision which states that each Bar member, by the payment of her/his dues, certifies that they have read and are in compliance with Rule 1.15 of the D.C. Rules of Professional Conduct and D.C. Bar Rule XI, Section 20 covering mandatory IOLTA. Both the Rules of Professional Conduct and the Bar Rules were modified by the District of Columbia Court of Appeals, effective August 1, 2010, to convert our voluntary IOLTA into a mandatory program.

In addition to a modification of the language in Bar Rule II, implementation of my suggestion can be accomplished by inserting language (in red ink) above the signature section of each annual dues statement. This language would advise that each member certifies, by the payment of their dues, that she/he has read Rule of Professional Conduct 1.15 and Bar Rule XI, Section 20, and is in compliance with the requirements of mandatory IOLTA.[2] I trust that the scribes assigned to this task can make the language understandable and not overly verbose. (If necessary, I can supplement this Separate Statement with proposed language for consideration.) Certification by payment, rather than signature, obviates any difficulties faced by those members willing to file their statements and pay their Bar dues electronically. The Committee has been advised by Bar staff that insertion of such suggested wording to the dues statement will have a nominal economic impact upon the Bar. Additionally, the language can refer the member to the website of the Bar Foundation for the actual documents required to be filed in order to comply with the IOLTA rules. http://www.dcbarfoundation.org/iolta.html. If compliance is required of a particular attorney because of her/his access to eligible funds, a Bar member will send her/his bank information directly to the D.C. Bar Foundation.[3] I presume that the Bar Foundation will offer encryption on its website so that members can, if they so desire, file this information on-line. Whether each lawyer is required to submit this bank information, or their ineligibility for

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http://www.abanet.org/abanet/common/print/newprintview.cfm?ref=http%3A//www.abanet.org/legalservices/iolta/ioltus.html

[2] The Bar's website lists the Rules Governing the D.C. Bar. http://www.dcbar.org/inside_the_bar/structure/bar_rules/index.cfm . This particular web site can be referenced on the actual dues statement near the certification wording. Further, the D.C. Rules of Professional Conduct appear in Appendix A of the D.C. Bar Rules. http://www.dcbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/index.cfm .

[3] The Committee has also been advised by the Bar staff that the collection, storage and transmission of financial information by the Bar will implicate D.C. legislation. Noncompliance with the law and/or potential security related breaches could result in the imposition of significant damages. Thus, bank account information will be sent by each member directly to the D.C. Bar Foundation for collection and storage, eliminating the need for the D.C. Bar to be involved in the bank information collection process.

filing such, to the Bar Foundation on a one-time-only basis, annually or on a periodic basis, is a detail which is best left to the operational good sense of the Bar Foundation.

Under my proposal, the Bar will transmit to the Bar Foundation the certification information received with the dues statement or by payment of dues, as requested by the Bar Foundation. The Bar Foundation can decide if it will receive this information when they episodically request data for an individual lawyer, for designated attorneys on a rolling basis or it can ask for comprehensive annual information for the approximately 92,000 D.C. Bar Members for each dues cycle. Whether the data request is done in increments or for the Bar at-large and whether the Bar Foundation receives this information in hard copy or electronically would be left to the operational needs and programmatic decision of the Bar Foundation. Since the cost of the collection and transmission of this data from the Bar would be borne by the Bar Foundation, the financial factor may drive the manner and form of this implementation.

I understand that the Bar does not require any member to certify that they are providing competent legal services nor to ratify their compliance with any other provision of the Rules which govern membership. My proposal, however, will offer a modicum of leverage for compliance purposes to the Foundation even though I are not suggesting that failure to comply with the IOLTA requirements could result in a disciplinary violation. In the end, there is something about the specter of having agreed to compliance in writing, which can spur a tardy lawyer into registering their trust account as required by the Rules.

The Committee heard a concern that any certification process is likely to cause members to delay payment of their annual Bar dues, to insure they have followed the IOLTA requirements. Such an effect, of course, cannot be accurately measured at this time. The Bar within the last two years employed procedures to facilitate prompt payment of members' dues. Those efforts have reduced the number of lawyers who wait until the last minute to pay their dues. This, in turn, has helped the Bar with its continual efforts to monitor its revenues in the face of the demands of its mission. Certainly, there is some merit to this concern --- at least for the first two to three years of the implementation of my proposal. Any new rule or requirement is likely to give every member pause to avoid unnecessary complications. I would certainly hope our membership, who necessarily have advanced degrees, can adjust without major disruption to the dues process. But, the Bar has undertaken a comprehensive education campaign in both their publications and through its CLE programs to better inform our membership of these IOLTA changes. The Bar Foundation also has a prerecorded instruction option on its voice mail, in addition to a drop-down tab on its website (Banking on Justice: IOLTA Program) with helpful hints and instructions for both lawyers and banks. Following the first two to three years of implementation every existing Bar member will have a clear grasp on what they have already done, or will need to do, for compliance. New members will receive comprehensive instructions on their IOLTA requirements during the mandatory D.C. Bar course for all incoming attorneys.

The Bar staff has assured the Committee that the cost of inserting language as I have suggested on the dues statement will be nominal. I also readily concede there are legitimate cost and operational complications which will occur if we implement a certification process, as I suggest, now <u>after</u> the Bar has concluded the first wave of its education process. Yet, this is not a valid reason to avoid going forward with my suggestion. In truth, we continue to be in the

formative stages of mandatory IOLTA (instituted in August 2010) and I would argue that our membership is sufficiently facile to withstand this change. Moreover, I presume that both the Bar and the Bar Foundation will not cease its educational efforts but will insure there are annual reminders and updates for the Bar.

The IOLTA rules apply to every D.C. Bar member and, thus, certification should be required of every member, regardless of whether they control eligible funds at the time of their dues payment. Just as every member of our Bar is required to submit current annual information of their address, etc., they should also be required to certify every year to their compliance with the IOLTA rules and regulations. Yet, only those members who have a trust account with qualifying funds need to take affirmative steps for compliance, beyond the payment of their dues. I also think that certification will not impact upon the voluntary contributions to the D.C. Bar *Pro Bono Programs*. This impact, again, cannot be accurately quantified at this time. In the end, the District of Columbia Court of Appeals has determined that mandatory IOLTA is good and proper for our community. Implementation of a rather nonintrusive and reasonably efficient certification program for IOLTA is a must. A certification provision of compliance with mandatory IOLTA on the annual dues statement will not remove funds from the pockets of our membership; IOLTA will merely use eligible trust funds to earn interest which can be applied to assist legal services for the needy of our community.

And more fundamentally, costs associated with the implementation and the on-going operation of mandatory IOLTA will be borne by the Bar Foundation.

b. <u>MONITORING PROGRAM</u>

A monitoring format, and the authority to implement one, seems to logically flow from the establishment of mandatory IOLTA. Under the former voluntary IOLTA program, as the Committee Report sets forth, the Bar Foundation, authorized by the District of Columbia Court of Appeals in 1985 to administer IOLTA, implicitly had authority, and did, monitor compliance as a fundamental axiom of its administrative responsibilities. This was done through a reconciliation process after receipt of information from counsel as well as from financial institutions. Moreover, the Bar Foundation made contact with selectedattorneys, and several financial institutions during this process, as issues with particular accounts arose. The language of the Committee's proposed Rule XIV seems to call into question this organizational principle.[4] There is no reason to believe monitoring by the Bar Foundation, perhaps to a greater extent, will not continue. Whether a mandatory IOLTA program requires more review and oversight is yet to be decided.

Through the discussion process leading up to the request for the D.C. Court of Appeals to authorize mandatory IOLTA, the configuration of a monitoring program was vetted but never decided upon. Today, we do not have a firm grasp on the shape, breath or requirements of a

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[4] "Consistent with its fundamental function of maximizing and collecting the interest revenue generated by D.C. IOLTA accounts, the Bar Foundation *may periodically monitor* a lawyer's or law firms' participation in the D.C. IOLTA program.

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If the Bar Foundation *decides to monitor* lawyers' and law forms' participation….(emphasis added).

monitoring program. Logically, the monitoring program must come from the Bar Foundation, since they have been authorized by the District of Columbia Court of Appeals to be the administrators of mandatory IOLTA. Perhaps the Bar Foundation continues to ponder the operational details of a monitoring program required for efficiency and effectiveness. Perhaps they want to experience the increased responsibilities which flow from a mandatory rather than an "opt-out" program. Perhaps the full parameters of the operational needs, at this stage of implementation, are not so clear. In all events, what a monitoring program should substantively accomplish, what actual steps it should entail, what its objectives are and how effective it must be, should be determined, in the first instance, by the Bar Foundation, since it has a better grasp of its operational needs. Would it be better to have the monitoring system in operation as we commence mandatory IOLTA? Of course. Nevertheless, the reconciliation process from the optional IOLTA program will presumably continue while the Bar Foundation has real-time exposure to the needs of our new system. Further, additional time may sharpen our understanding of the actual needs of a monitoring system. We have not experienced a full dues cycle, much less a complete twelve months since the mandatory IOLTA became effective in August 2010. It would be imprudent to move the D.C. Court of Appeals for a rule change merely for the sake of haste. Whatever monitoring system we eventually implement may logically require some amendments to the Rules. The Committee instead proposes a rule to make a subsequent rule. Ultimately, whether we should recommend a modification of D.C. Rule of Professional Conduct 1.15, Section 20 of Rule XI of the D.C. Court of Appeals Rules Governing the Bar, amendments to some other Rule or develop a new rule which will underwrite the requirements of a monitoring program for mandatory IOLTA, should be decided after due deliberation and sufficient operational information. But, our zeal to put "something" in place should not require action on the "appearance" of a proposal which subsequently requires amending. This, unfortunately, is what I believe the Committee majority is recommending.

In the end, the Bar Foundation remains an unrelated independent 501(c)(3) organization and the operational aspects should be formulated and proposed to this Committee by that organization.

II. CONCLUSION

I recommend that a certification process be promptly implemented, as I have previously described with a modification of D.C. Bar Rule II and that we provide the Bar Foundation with additional time to develop and present to this Committee a special report on the details and requirements of their proposed monitoring program. The timetable for such should be discussed between the Bar and Bar Foundation. This special report should contain sufficient details to allow this Committee to determine which, if any, Rules will need to be modified. Also, beginning with the 2010 Annual Report, the Bar Foundation shall provide details of the operation of mandatory IOLTA, to include details of the current monitoring program. This will allow the Bar, as well as the other recipients, of the Annual Report to have a current and comprehensive understanding of the operation of our IOLTA program.

IOLTA Compliance Reporting Information 2006

Source: IOLTA Clearinghouse Database - Self Reporting by Programs

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Alabama	N						
Alaska	Y	Alaska Bar Association	Dues Notice	Each Year	Y	Administrative suspension	Y
Arizona	Y	The State Bar of Arizona	Their dues statement	Annually	Y	Disciplinary action by the State Bar	Noncompliance information
Arkansas	Y	to the Clerk of the Arkansas Supreme Court	IOLTA Compliance Statement	Annually	Y	They are reported to the Office of Professional Conduct	Y
California	N						
Colorado	Y	Colorado Supreme Court	Certification form	Annually	N		Y
Connecticut	Y	Statewide Grievance Committee	Attorney Registration Form	Annually	Y	Under certain circumstances	Y
Delaware	Y	Supreme Court of Delaware	Yearly registration	Annually	Y	Without registration lawyers may not practice law, failure to report IOLTA at the courts discretion	Y
District of Columbia	N						
Florida	Y	The Florida Bar	Annual Bar Fee Statement	Annually	Y	Same as for any violation of The Rules Regulating The Florida Bar	Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Georgia	N						
Hawaii	Y	To the Hawaii Justice Foundation	Part IV, IOLTA Certification Form	Annually	Y	If the form is not completed, they are administratively suspended. If they misrepresent, the Office of Disciplinary Counsel may take action when this is discovered	Y
Idaho	Y	Idaho State Bar	Idaho State Bar Trust Account Certification	Annually	Y	Cannot be Licensed (but loosely enforced)	Y
Illinois	Y	To the Supreme Court via ARDC	Annual Registration	Annually	Y	Suspension of license	N
Indiana	Y	Clerk of the Indiana Supreme Court	Attorney Annual Registration Fee Form	Annually	Y	May be subject to administrative suspension	Y
Iowa							
Kansas	Y	Kansas Clerk of the Supreme Court					Y
Kentucky	Y	Kentucky IOLTA Fund Board of Trustees	Kentucky IOLTA Fund Compliance Certification Form	Every Other Year	N		Y
Louisiana	Y	Office of Disciplinary Counsel	State bar registration statement	Annually	Y		Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Maine	Y	Board of Overseers of the Bar	Annual Trust Account Report and IOLTA Election	Yearly	N		Y
Maryland	Y	Maryland Court of Appeals	Annual IOLTA Compliance Report	Annually	N	None are specified in the Rule	Y
Massachusetts	Y	Massachusetts Board of Bar	Registration statement	Annually	Y	Administrative suspension	Y
Michigan	Y	State Bar of Michigan	Bar Dues Statement	Annually	Y	Delay of licensing	Y
Minnesota	Y	Minnesota Supreme Court	Attorney Registration Statement	Annually	Y	Suspension for failure to pay annual fee, Failure to maintain account may result in professional discipline	Y
Mississippi	Y						
Missouri	Y	Clerk of the Supreme Court	Annual Attorney Enrollment Form	Annually	N		Y
Montana	Y	State Bar On Montana	Compliance form provided by State Bar	Annually			N
Nebraska	Y	Bar Association	Trust Account Affidavit	Annually	N		The NLTAF receives a copy of the affidavit

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Nevada	Y	Supreme Court of Nevada	Form provided by the court	Annually	N		Y
New Hampshire	Y	New Hampshire Foundation	IOLTA Verification Form	Annually	N		Y
New Jersey	Y	The IOLTA Fund of the Bar of New Jersey	IOLTA Registration Form	Annually	Y	Declared administratively ineligible to practice law by court order	Y
New Mexico	Y	Clerk of New Mexico Supreme Court	Annual certification on State Bar dues	Yearly	N		Y
New York	N				N		
North Carolina	Y	NC State Bar	Annual Dues notice	Annually	N		Y
North Dakota							
Ohio	Y	Supreme Court	Biennial registration form	Every 2 years	Y	Handled by Supreme Court of Ohio's Disciplinary Council	Y
Oklahoma	Y	Oklahoma Bar Association	Annual dues statement	Annually	Y	Members are faced with possible disciplinary action through the association	Y
Oregon	Y	Oregon State Bar	Annual Certification of Compliance	Annually		Under review	Y
Pennsylvania	Y	Disciplinary Board of The Supreme Court of PA	PA Attorney's Annual Fee Form	Annually		The form will not be processed without the certification	Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Rhode Island	Y	Send compliance form to Bar Foundation	IOLTA notice and certification of compliance form	Annually	N		Bar Foundation keeps compliance form on file
South Carolina	Y	South Carolina Bar	License fee statement	Annually	N		Y
South Dakota							
Tennessee	Y	Board of Professional Responsibility	Registration statement	Annually	N		Y
Texas	Y	Texas Equal Access to Justice Foundation	Paper forms mailed in 2006 can report on line	Annually	Y	A list of non-compliance is sent to the Supreme Court and attorneys are subject to suspension.	Y
Utah	Y	Utah Bar Foundation/Utah Supreme Court	IOLTA Trust Account Certification	Annually		That will be determined by Supreme Court this October.	Y
Vermont	Y	Attorney Licensing	License Renewal	Every two years	Y	Attorney License will not be renewed	Y
Virgin Islands	N						
Virginia	N						
Washington	Y	WSBA	Trust account attestation	Annually			Y
West Virginia	Y	West Virginia Bar Foundation	Bar Foundation Form	Annually	Y	Violation of Rules of Professional Conduct	Y

Jurisdiction	Are lawyers required to report their compliance with or exemption from the IOLTA rule or statute	Reporting Body	Form Used	How often	Are there penalties for not reporting	Specific penalties	Does program obtain information
Wisconsin	Y	Wisconsin Office of Lawyer Regulation (OLR)	Wisconsin State Bar dues statement, OLR forms	Annually	Y	Suspension	N
Wyoming	Y	Wyoming State Bar	Annual license fee statement	Annually	Y		Y