

**INVITATION TO COMMENT ON SUGGESTED
CHANGES TO RULE 1.15 OF THE RULES OF
PROFESSIONAL CONDUCT, AND THE IOLTA RULES, THAT
HAVE BEEN PROPOSED BY THE LOUISIANA BAR FOUNDATION**

The Louisiana Bar Foundation has presented a proposal to the Court for amending Rule 1.15 of the Rules of Professional Conduct and the IOLTA rules. A principal change sought by the rules is the requirement that “rate comparability” be incorporated with regard to IOLTA accounts. Rate comparability rules seek to insure that there is a statewide banking practice whereby IOLTA accounts earn the same interest rates as non-IOLTA accounts with similar criteria. The Bar Foundation has informed the Court that 12 states have incorporated rate comparability into their rules/regulations/laws.

The Court has considered the Bar Foundation proposal and has decided to allow interested persons to comment on the suggested rule changes. The Bar Foundation proposal follows. Suggested language changes are depicted through the use of underlining and ~~strikethrough~~.

Persons interested in commenting upon the Bar Foundation’s proposed rule changes should forward their comments to Deputy Judicial Administrator/ General Counsel Tim Averill no later than Monday, August 6, 2007. Mr. Averill’s mailing address is:

Supreme Court of Louisiana
Judicial Administrator’s Office
400 Royal Street, Suite 1190
New Orleans, LA 70130-8101

Comments may also be forwarded via e-mail to: tfa@lajao.org.

Please be advised that any comments which are forwarded constitute matters of public record and are subject to public inspection.

DRAFT

Rev.6/27/07

RULE 1.15. SAFEKEEPING PROPERTY

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Except as provided in (g) below, funds shall be kept in an interest or dividend-bearing account in one or more separate accounts maintained in a bank or similar institution in the state where the lawyer's office is situated, a bank or savings and loan association authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government, or elsewhere with the consent of the client or third person. 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) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account or obtaining a waiver of those charges, but only in an amount necessary for that purpose.
- (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. The lawyer shall deposit legal fees and expenses into the client trust account consistent with Rule 1.5(f).
- (d) 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. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. 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. **(Amended 05/24/01)**
- (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.
- (f) Every check, draft, electronic transfer, or other withdrawal instrument or authorization shall be personally signed or, in the case of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm.
- (g)(f) A lawyer shall create and maintain an "IOLTA Account," which is a pooled interest- or dividend- bearing trust account for clients' or third persons funds which are nominal in amount or to be held for a short period of time and cannot earn income for the client or third person in excess of the costs incurred to secure such income in compliance with the following provisions:

(1) IOLTA accounts shall be established at a bank or savings and loan association authorized by federal or state law to do business in Louisiana, the deposits of which are insured by an agency of the federal government or at an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Louisiana and shall comply with the following provisions:

~~(1)(A)~~ No earnings from such an account shall be made available to a lawyer or law firm.

~~(2)(B)~~ Such ~~The~~ account shall include **all** clients' or third persons' funds which are nominal in amount or to be held for a short period of time and cannot earn income for the client or third person in excess of the costs incurred to secure such income. ~~except as described in (6) below.~~

~~(3)(C)~~ Such ~~An interest-bearing trust accounts~~ shall be established only with any bank or savings and loan association or credit union authorized by federal or state law to do business in Louisiana and insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration an eligible financial institution as described in section (g) that is authorized by

federal or state law to do business in Louisiana. Funds in each interest- or dividend- bearing trust account shall be subject to withdrawal upon request and without delay except as permitted by law.

~~(4)~~(2) The rate of interest payable on any interest bearing trust account shall not be less than the rate paid by the depository institution to regular, non-lawyer depositors. Eligible financial institutions shall maintain IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance of other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non-IOLTA customers, but the eligible institution may elect to pay a higher interest or dividend rate on IOLTA accounts.

(3) The eligible institution may achieve comparability required in (g)(2) by:

(A) Establishing the IOLTA account as:

(1) an interest-bearing checking account; (2) a money market account with or tied to checking; (3) a sweep account which is a money market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or (4) an open-end money market fund solely invested in or fully collateralized by U.S. Government Securities. A daily financial institution repurchase agreement 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. “U.S. Government Securities” refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

(B) Paying the comparable rate on the IOLTA checking account in lieu of establishing the IOLTA account as the higher rate product; or

(C) Paying a “benchmark” amount of qualifying funds equal to 60% of the Federal Fund Target Rate as of the first business day of the quarter or other IOLTA remitting period; no fees may be deducted from this amount which is deemed already to be net of “allowable reasonable fees.”

~~(4)~~(5) Lawyers or law firms depositing client funds in an IOLTA trust savings-account shall direct the depository institution:

A. to remit interest or dividend, net of any ~~service charges or fees~~, allowable reasonable fees on the average monthly balance in the account, or as otherwise computed in accordance with an eligible institution’s standard accounting practice, at least quarterly, to the Louisiana Bar Foundation, Inc.;

B. to transmit with each remittance to the Foundation, a statement, on a form approved by the LBF, showing the name of the lawyer or law firm for whom the remittance is sent and for each account the rate of interest or dividend applied, the amount of interest or dividends earned, the types of fees deducted, if any, and the average account balance for each account for each month of the period in which the report is made; and

C. to transmit to the depositing lawyer or law firm ~~at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made:~~ a report in accordance with normal procedures for reporting to its depositors.

~~(5)~~(6) Any account enrolled in the program which has or may have the net effect of costing the IOLTA program more in bank fees than earned in interest over a period of time may, at the

discretion of the program's administrator, be exempted from and removed from the IOLTA program. Exemption of an account from the IOLTA program revokes the permission to use the administrator's tax identification number for that bank account. Exemption of a pooled clients' trust account from the IOLTA program does not relieve an attorney or law firm from the obligation to maintain the property of clients and third persons separately, as required above, in a non-interest-bearing account.

"Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of minimum balance, sweep fees and a reasonable IOLTA account administrative fee. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. Fees or service charges that are not "allowable reasonable fees" include, but are not limited to, the cost of check printing, deposit stamps, NSF charges, collection charges, wire transfers, and fees for cash management. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA accounts.

(6) IOLTA accounts shall be maintained only in eligible financial institutions. The Louisiana Disciplinary Counsel Board with the Louisiana Bar Foundation shall establish rules, subject to approval by the Louisiana Supreme Court, governing the determination that a financial institution is eligible to hold IOLTA accounts and shall at least annually publish a list of eligible financial institutions. Participation in the IOLTA program is voluntary for banks, savings and loans associations, and investment companies.

IOLTA RULES

Effective January 1, 1991

- (1) The IOLTA program shall be a mandatory program requiring the participation by attorneys and law firms, whether proprietorships, partnerships or professional corporations.
- (2) The program shall apply to all clients of the participating attorneys or law firms or third persons whose funds on deposit are either nominal in amount or to be held for a short period of time.
- (3) The following principles shall apply to clients' or third persons' funds which are held by attorneys and law firms.
 - (a) No earnings on the IOLTA accounts may be made available to or utilized by an attorney or law firm.
 - (b) Upon the request of the client, earnings may be made available to the client or third person whenever possible upon deposited funds which are not nominal in amount or to be held for a short period of time so that they can earn income for the client in excess of the costs incurred to secure such income; however, traditional attorney-client relationships do not compel attorneys either to invest clients' such funds or to advise clients or third persons to make their funds productive.
 - (c) Clients' or third persons' funds which are nominal in amount or to be held for a short period of time so that cannot earn income for the client in excess of the costs incurred to secure such income shall be retained in an interest-bearing checking or savings trust account with the interest an eligible financial institution as outlined above in section (g), with the interest or dividend (net of any service charge or allowable reasonable fees) made payable to the Louisiana Bar Foundation, Inc., said payments to be made at least quarterly.
 - (d) ~~In determining whether a client's funds are nominal in amount, the lawyer or law firm shall take into consideration the following factors:~~
 - (i) ~~The amount of interest which the funds would reasonably be expected to earn during the period they are to be deposited;~~
 - (ii) ~~The lawyer's cost to establish and administer the account, including the cost of preparing any required tax reports for interest accruing to a client's benefit; and~~
 - (iii) ~~The capability of financial institutions to calculate and pay interest to individual clients.~~

In determining whether a client's or third person's funds can earn income in excess of costs, the lawyers or law firm shall consider the following factors:

- (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 financial institutions where the funds are to be deposited;
- (4) The cost of establishing and administering non-IOLTA accounts for the client's or third person's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's or third person's benefit;
- (5) The capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients or third persons;
- (6) Any other circumstances that affect the ability of the client's or third person's funds to earn a net return for the client or third person.

The determination of whether funds to be invested could be utilized to provide a positive net return to the client or third person rests in the sound judgment of each attorney or law firm. ~~In making the determination, the attorney or law firm may assume that \$50.00 is a reasonable estimate of the minimum amount of interest that a segregated trust account for an individual client must generate to be practical in light of the costs involved in earning or accounting for any such income.~~ The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether changed circumstances requires further action with respect to the funds of any client or third person.

(e) Although notification to clients or third persons whose funds are nominal in amount or to be held for a short period of time so that cannot earn income for the client or third person in excess of the costs incurred to secure such income is not required, many attorneys may want to notify their clients or third persons of their participation in the program in some fashion. There is no impropriety in an attorney for the firm advising all clients or third persons of the members of the firm's advancing the administration of justice in Louisiana beyond their individual abilities in conjunction with other public-spirited members of their profession. The placement of a client's or third person's funds in an IOLTA account is in the sole discretion of the lawyers in the exercise of his/her independent judgement; notice to the client or third person is for informational purposes only. ~~In fact, it is recommended that this be done.~~ Participation in the program will require communication to an authorized financial institution.

(4) The Louisiana Bar Foundation shall hold the entire beneficial interest in the interest or dividend income derived from trust accounts in the IOLTA program. Interest or dividend earned by the program will be paid to the Louisiana Bar Foundation, Inc. to be used solely for the following purposes:

- (a) to provide legal services to the indigent and to the mentally disabled;
- (b) to provide law-related educational programs for the public;
- (c) to study and support improvements to the administration of justice, and
- (d) for such other programs for the benefit of the public and the legal system of the state as are specifically approved from time to time by the Supreme Court of Louisiana.

(5) The Louisiana Bar Foundation shall prepare an annual report to the Supreme Court of Louisiana that summarizes IOLTA income, grants, operating expenses and any other problems arising out of administration of the IOLTA program. In addition, the Louisiana Bar Foundation shall also prepare an annual report to the Supreme Court of Louisiana that summarizes all other Foundation income, grants, operating expenses and activities, as well as any other problems which arise out of the Foundation's implementation of its corporate purposes. The Supreme Court of Louisiana shall review, study and analyze such reports and shall make recommendations to the Foundation with respect thereto.

Adopted effective _____