

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd day of June 2010, the following order was made and entered:

IN RE: Amendments to the Rules of Professional Conduct, Rule 1.15. Safekeeping property.

On a former day, to wit, May 17, 2010, the Court published for comment proposed amendments to the Rules of Professional Conduct, Rule 1.15. Safekeeping property. Comments were received from The Honorable Mary Ellen Griffith, Thomas V. Flaherty, Esq., Tracey A. Rohrbaugh, President, West Virginia Bar Foundation, and Cathy McConnell, Esq., Executive Director, West Virginia Senior Legal Aid, Inc.

On this day came the Court, pursuant to the inherent rule-making power declared by W.Va. Code §51-1-4a, on its own motion, after careful review and consideration of the comments filed, and proceeded to consider adoption of the proposed amendments to Rule 1.15 of the Rules of Professional Conduct. Upon consideration whereof, pursuant to the provisions of W.Va. Code §51-1-4a, setting forth The West Virginia State Bar as an administrative agency of the Supreme Court of Appeals of West Virginia, as a part of the judicial department of the state government, the Court is of opinion to and does hereby adopt the following rule with said amendments, effective July 1, 2010. Deletions indicated by strikethrough and insertions indicated by underscoring:

“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. Funds shall be kept in a separate account designated as a “client's trust account” in an institution whose accounts are federally insured and maintained in the state where the lawyer's office is situated, or in a separate account 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) 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.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) IOLTA (Interest on Lawyers Trust Accounts). A lawyer who receives client funds that are nominal in amount or are expected to be held for a brief period shall establish and maintain a pooled, interest or dividend-bearing, account for the deposit of such funds, at an eligible financial institution which carries federal deposit insurance, in compliance with the following provisions: (1) The account shall include only such client funds that are nominal in amount or are expected to be held for a brief period of time, such that the funds cannot earn income for the client in excess of the costs of securing that income. In determining whether a client's funds can earn income in excess of costs, the lawyer or law firm shall consider the following factors: (i) The amount of the funds to be deposited;

(ii) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

(iii) The rates of interest or yield at financial institutions where the funds are to be deposited;

(iv) The cost of establishing and administering non-IOLTA accounts for the client'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 benefit;

(v) The capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients;

(vi) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

(2) The lawyer shall review the account at reasonable intervals to determine whether circumstances warrant further action with respect to the funds of any client.

(3) Lawyers may only establish and maintain an IOLTA Trust Account at an eligible financial institution. To qualify as eligible, the financial institution must:

(i) be certified by the West Virginia ~~State Bar Foundation~~ to be in compliance with this Rule; and

(ii) be a federally-insured and state or federally-regulated financial institution authorized by federal or state law to do business in West Virginia, or an open-end investment company registered with the federal Securities and Exchange Commission and authorized by federal or state law to do business in West Virginia.

(4) Participation by banks, savings and loan associations, and investment companies in the IOLTA program is voluntary. An eligible financial institution that elects to offer and maintain IOLTA accounts shall meet the following requirements:

(i) The eligible financial institution shall pay no less on its IOLTA accounts than the highest interest rate or dividend 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. Interest and dividends shall be calculated in accordance with the eligible institution's standard practices for non-IOLTA customers. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an eligible institution may consider, in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends 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. Nothing in this rule shall

preclude an eligible institution from paying a higher interest rate or dividend than described above or electing to waive any fees and service charges on an IOLTA account.

(ii) An eligible institution may choose to pay the highest interest or dividend rate in (d)(4)(i), less allowable reasonable fees as set forth in (d)(4)(iv), if any, on an IOLTA account in lieu of establishing it as a higher rate product.

(iii) The IOLTA Trust Account shall be an interest or dividend-bearing account. Interest- or dividend-bearing account means: (a) an interest-bearing checking account; (b) a checking account paying preferred interest rates, such as money market or indexed rates; (c) a government interest-bearing checking account such as accounts used for municipal deposits; (d) a business checking account with an automated investment sweep feature which is a daily (overnight) financial institution repurchase agreement or an open-end money market fund; or (e) any other suitable interest or dividend-bearing account offered by the institution to its non-IOLTA customers. A daily financial institution repurchase agreement must be fully collateralized by or invested in 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 in U.S. Government Securities or repurchase agreements fully collateralized by or invested in U.S. Government Securities and 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. United States Government Securities are defined to include debt securities of Government Sponsored Enterprises, such as, but not limited to, debt securities of, or backed by, the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation.

(iv) 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 are defined as per check charges, per deposit charges, a fee in lieu of minimum balances, sweep fees, FDIC insurance fees, and a reasonable IOLTA account administrative fee. 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. No fees or service charges shall be collected from the principal balance deposited in 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, including bank overdraft fees and fees for check returns for insufficient funds. Fees and service charges 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.

(v) As an alternative to the rates required under (d)(4)(i), an eligible institution may choose to pay on IOLTA accounts an amount equal to 65% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first calendar day of the month. The amount is net of all allowable reasonable fees under (d)(4)(iv). This initial benchmark rate of 65% of the Federal Funds Target Rate may be adjusted once a year by the West Virginia State Bar, Foundation upon 90 days' written notice to financial institutions participating in the IOLTA program at which time financial institutions may elect to pay the new benchmark amount or may choose among the other options at (d)(4)(i).

(5) The lawyer shall direct the depository institution:

(i) To remit interest or dividends, on at least a quarterly basis, net of allowable reasonable service charges or fees, if any, to the West Virginia State Bar Foundation, Inc; and

(ii) To transmit with each remittance to the West Virginia State Bar Foundation, Inc., a statement in any form and through any manner of transmission approved by the Foundation State Bar showing the name of the lawyer or law firm on whose account the remittance is sent and the amount of the remittance attributable to each, the account number for each account, the rate and type of interest or dividend, the amount and type of allowable reasonable service charges or fees, and the average account balance for the reporting period; and

(iii) To transmit to the depositing lawyer or law firm a report in accordance with the institution's normal procedures for reporting to depositors.

(6) An attorney or the law firm with which the attorney is associated may be exempt from the requirements of this Rule if:

(i) the nature of the attorney's or law firm's practice is such that the attorney or law firm never receives client funds that would require a Trust Account;

(ii) the attorney is a full-time judge, government attorney, military attorney, or inactive attorney; or

(iii) The West Virginia State Bar Foundation's Board of ~~Directors~~ Governors, having received a petition requesting an exemption, may exempt the attorney or law firm from participation in the program for a period of no more than 2 years when service charges on the attorney's or law firm's Trust Account equal or exceed any interest generated or when compliance with this Rule would create an undue hardship on the lawyer and would be extremely impractical.

(e) A lawyer may not be charged with any breach of the Rules of Professional Conduct or other ethical violation with regard to either the good faith determination of whether client funds are nominal in amount or are expected to be held for a brief period or the failure to establish and maintain a pooled, interest or dividend-bearing, federally-insured depository account for the deposit of such funds in accordance with Rule 1.15(d).

(f) All interest transmitted to the West Virginia State Bar Foundation, Inc., shall be distributed by that entity as follows: (1) an annual fee not to exceed ~~fifty~~ thirty thousand dollars shall be retained by the West Virginia State Bar Foundation, Inc., for administration of the fund, with a detailed annual accounting of services performed in consideration for such fee to be filed for public inspection with the Supreme Court of Appeals; (2) special grants not to exceed fifteen percent of the fund's annual receipts to WV CASA Network, coordinating agency for court-appointed special advocate programs, in the amount of 43.5 percent of special grant funds available; to the West Virginia Fund for Law in the Public Interest, Inc., in the amount of 19.3 percent of special grant funds available; to the Appalachian Center for Law and Public Service, in the amount of 7.72 percent of special grant funds available; to ~~the Elder Law Program of the North Central West Virginia Legal Aid Society, Inc.~~ West Virginia Senior Legal Aid, Inc., in the amount of 24.125 percent of special grant funds available; and to ChildLaw Services of Mercer County 5.355 percent of special grant funds available; and (3) Seventy-five percent (75%) of the remaining funds to Legal Aid of West Virginia and twenty-five percent (25%) of the remaining funds to Mountain State Justice or such other method of distribution as may hereinafter be adopted by order of the Supreme Court of Appeals. Any funds distributed by the West Virginia State Bar Foundation, Inc., pursuant to this subdivision shall not be used by the recipient organization to support any lobbying activities.”

A True Copy

Attest: //s// Edythe Nash Gaiser, Deputy Clerk