


MEMORANDUM

TO: Melvin White, President, District of Columbia Bar
FROM: Robert N. Weiner, President, DC Bar Foundation 
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.

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

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

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";

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;

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;

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;

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 miscommunications 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;

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

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”;

Appendix B/Rule 1.20, subsection (f)(1)(B) – provides for setting of a “benchmark” rate; and

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 as depositories for IOLTA-eligible funds

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.

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;

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;

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

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

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,

A handwritten signature in black ink, appearing to read "Stephen J. Pollak". The signature is written in a cursive style with a large initial "S".

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	Disc 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	Chief of the Indiana Supreme Court	Attorney Annual Registration Fee Form	Annually	Y	May be subject to administrative suspension	Y
Iowa							
Kansas	Y	Kansas Chief of the Supreme Court					
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 Of Montana	Compliance form provided by State Bar	Annually			N
Nebraska	Y	Bar Association	Trust Account Affidavit	Annually	N		The NE IAF 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	Chief 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 file	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	WSSBA	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 OLTJA 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 does 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.

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(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 (2) 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.