

**NOTICE OF REQUEST FOR COMMENTS
REGARDING PROPOSED AMENDMENTS TO
RULE 1.15 OF THE MISSISSIPPI RULES OF PROFESSIONAL CONDUCT
OFFERED FOR CONSIDERATION BY
THE SUPREME COURT RULES COMMITTEE**

The Supreme Court is considering joining thirty-one other states in adopting mandatory IOLTA (interest on lawyer's trust accounts). Mississippi currently is one of eighteen states which require lawyers to participate in the IOLTA program unless they "opt-out." The interest earned on IOLTA trust accounts would continue to provide a portion of the funding for Legal Services and the Volunteer Lawyer's Project, both of which provide legal services to the poor in Mississippi. If adopted, the change would come in the form of an amendment to Rule 1.15 of the Mississippi Rules of Professional Conduct.

Pursuant to Rule 27(f) of the Mississippi Rules of Appellate Procedure, the Supreme Court now seeks comments from the bench, the bar, and the public on this proposal.

Comments should be filed with the Clerk of the Supreme Court, Gartin Justice Building, P.O. Box 117, Jackson, Mississippi 39205, no later than Thursday, April 13, 2006.

RULE 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold clients' and third persons' property separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such trust account funds and other property shall be kept and preserved by the lawyer for a period of seven 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 the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When a lawyer is in possession of property in which both the lawyer and another person claim an interest, the property shall be kept separate by the lawyer until completion of an accounting and

severance of their respective interests. If a dispute arises concerning their respective interests, the lawyer shall disburse the portion not in dispute, and keep separate the portion in dispute until the dispute is resolved.

(d) Except as provided in paragraph (f) of this rule, a lawyer or law firm shall create and maintain an interest- or dividend-bearing trust account (IOLTA Account) for all funds which are nominal or short term funds that cannot earn income for the client or third party in excess of the costs incurred to secure such income (IOLTA eligible Funds), pursuant to the following:

(1) All trust Funds shall be deposited in a lawyer's or law firm's IOLTA Account unless— in the lawyer's judgment — the funds can earn income for the client or third party in excess of the costs incurred to secure such income.

(2) No earnings from such an IOLTA Account shall be made available to a lawyer or law firm.

(3) IOLTA Accounts shall be established only with financial institutions:

- i. authorized by federal or state law to do business in Mississippi;
- ii. the deposits of which are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation or any successors thereof;
- iii. which pay a rate of interest or dividend on IOLTA Accounts that is no less than the highest rate generally available to its own non-IOLTA Account depositors when the IOLTA Account meets the same minimum balance or other eligibility requirements, provided however that: (a) IOLTA Accounts may be maintained in an interest-bearing checking account or an interest or dividend-bearing account with check-writing and with a sweep feature which is tied to either a money market account insured by an agency of the federal government or a money market fund or daily overnight repurchase agreement invested solely in or fully collateralized by U.S. Government securities (defined as U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof) so long as there is no impairment of the right to immediately withdraw and transfer principal as soon as permitted by law; (b) institutions may choose to pay these rates on a qualifying IOLTA checking account instead of establishing the higher rate product; and (c) institutions may also elect to pay a higher interest or dividend rate and may waive any fees on IOLTA Accounts;

(4) Financial institutions are prohibited from using interest from one IOLTA Account to pay fees or charges in excess of the interest earned on another IOLTA Account. If not waived by the financial institution, such fees, if any, are the responsibility of the lawyer or the law firm.

(5) Lawyers or law firms depositing funds in an IOLTA Account established pursuant to this rule shall direct the depository institution:

i. to remit all interest, net of reasonable service charges or 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 Mississippi Bar Foundation, Inc. For the purposes of this paragraph, reasonable services charges or fees shall not include fees for wire transfers, insufficient funds, bad checks, stop payments, account reconciliation, negative collected balances and check printing;

ii. 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, the amount of interest or dividends earned, the rate and type of interest or dividend applied, the amount of any services charges or fees assessed during the remittance period, the net amount of interest or dividends remitted for the period, the average account balance for the period for which the interest was earned and such other information as is reasonably required by the Foundation;

iii. to transmit to the depositing lawyer or law firm a periodic account statement in accordance with normal procedures for reporting to depositors.; and

(e) Any IOLTA Account which has or may have the net effect of costing the IOLTA program more in fees than earned in interest over a period of time may, at the discretion of the Foundation, be exempted from and removed from the IOLTA program. Exemption of an IOLTA Account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. Exemption of such account from the IOLTA program shall not relieve the lawyer and/or law firm from the obligation to maintain the nominal or short term funds of clients and third persons separately, as required above, in a non-interest bearing account.

(f) Every lawyer admitted to practice in this State shall annually certify to this Court that all IOLTA eligible Funds are held in an IOLTA Account, or that the lawyer is exempt because the lawyer:

- (1) is not engaged in the private practice of law;
- (2) does not have an office within the State of Mississippi;
- (3) is a judge, attorney general, public defender, U.S. attorney, district attorney, on duty with the armed services or employed by a local, state or federal government, and is not otherwise engaged in the private practice of law;
- (4) is a corporate counsel or teacher of law and is not otherwise engaged in the private

practice of law;

- (5) has been exempted pursuant to Section (e) above; or
- (6) has been exempted by an order of general or special application of this Court which is cited in the certification.

(g) In the exercise of a lawyer's good faith judgment in determining whether funds can earn income in excess of costs, a lawyer 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 institutions where the funds are to be deposited;
- (4) the cost of establishing and administering the account, including 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; and
- (6) any other circumstances that affect the ability of the funds to earn a net return for the client.

(h) A lawyer shall review the IOLTA Account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client.

(i) The determination of whether funds are nominal or short-term so that they can not earn income in excess of costs shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(j) A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in paragraph A below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account.

- (1) Certain categories of trust account deposits are considered to carry a limited and

acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Provided the lawyer has other sources of funds available at the time of disbursement (other than client or third party funds) sufficient to replace any uncollected funds, notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances:

- (i) when the deposit is made by certified check or cashier's check;
- (ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;
- (iii) when the deposit is made by a check issued by the United States, the State of Mississippi, or any agency or political subdivision of the State of Mississippi; or
- (iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the State of Mississippi.

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered guilty of professional misconduct based upon the disbursement of uncollected funds.

(2) A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct.

[Amended effective _____, 2006, to provide for mandatory IOLTA participation.]

Comment

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 which 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. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is a risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. 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 shall be promptly distributed.

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.

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.

Interest on Lawyer's Trust Accounts. Each lawyer or law firm, unless specifically excluded in paragraph (f), is required to establish an IOLTA Account. Only IOLTA eligible funds - those nominal or short term funds that cannot earn income for the client or third party in excess of the costs incurred to secure such income - may be placed in the IOLTA Account. This definition of IOLTA eligible funds is in compliance with the decision in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), which upheld the constitutionality of the IOLTA concept.

No earnings on the IOLTA Accounts may be made available to or utilized by the lawyer or law firm. Upon the request of the client, earnings may be made available to the client whenever possible upon deposited funds which are neither nominal in amount nor to be held for a short period of time; however, traditional attorney client relationships do not compel lawyers either to invest clients' funds or to advise clients to make their funds productive.

IOLTA eligible funds shall be retained in an interest - or dividend - bearing trust account with the interest (net of any reasonable service charge or fees) made payable to the Mississippi Bar Foundation, Inc., said payments to be made by the financial institution at least quarterly. The determination of whether client or third party funds are nominal in amount or to be held for a short period of time so that they cannot earn net income over costs rests in the sound judgment of each lawyer or law firm and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's exercise of judgment in that regard.

Annual certification required in (f) above shall be through a form that is made a part of the members's

annual membership fees statement.

The decision to deposit client or third party funds in an IOLTA Account rests with the lawyers, so notification of such a deposit to clients whose funds are nominal in amount or to be held for a short period of time is unnecessary. This is not to suggest that many lawyers will not want to notify their clients of their participation in the program in some fashion. There is no impropriety in a lawyer or law firm advising all clients of how their participation advances the administration of justice in Mississippi.

Unclaimed Property. Any lawyer holding property or monies belonging to clients with whom he has lost contact must retain and account for said funds, subject to the Mississippi Uniform Disposition of Unclaimed Property Act.

Code Comparison

With regard to Rule 1.15(a), DR 9-102(A) provides that "funds of clients" are to be kept in a trust account in the state in which the lawyer's office is situated. DR 9-102(B)(2) provides that a lawyer shall "identify and label securities and properties of a client ... and place them in ... safekeeping" DR 9-102(B)(3) requires that a lawyer "maintain complete records of all funds, securities and other properties of a client" Rule 1.15(a) extends these requirements to property of a third person that is in the lawyer's possession in connection with the representation.

Rule 1.15(b) is substantially similar to DR 9-102(B)(1) and (4).

Rule 1.15(c) is substantially similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

Rule 1.15(d) is identical to DR 9-102(C).

See MSB Ethics Opinions Nos. 98 and 104.