

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on September 29, 2014, the following order was made and entered:

RE: APPROVAL OF STATE BAR ADMINISTRATIVE RULE 10

By order of April 14, 2014, the Court approved a sixty-day period of public comment on proposed State Bar Administrative Rule 10, which will form part of a new set of rules that will replace the existing West Virginia State Bar Rules and Regulations. The public comment period closed on June 13, 2014, and the Court expresses its gratitude to the members of the bar who provided comments.

Upon consideration whereof, the Court of is the opinion to and does hereby approve State Bar Administrative Rule 10, **effective immediately**, to read as follows:

WEST VIRGINIA STATE BAR ADMINISTRATIVE RULES

Rule 10 — Client Trust Accounts; IOLTA Program

Rule 10.01 Obligation to Maintain Client Trust Account

In accordance with Rule 1.15 of the Rules of Professional Conduct, a lawyer or law firm that receives client funds must keep those funds in a separate account. Client trust accounts must conform with the requirements in R.P.C. 1.15 and be maintained at an eligible financial institution as set forth in Rule 10.04.

Rule 10.02 Obligation To Maintain Separate IOLTA Trust Account, Reporting

In accordance with Rule 1.15(f) of the Rules of Professional Conduct, a lawyer or law firm that receives client funds that are nominal in amount or are expected to be held for a brief period shall establish and maintain a pooled, interest or dividend-bearing account for the deposit of such funds, at an eligible financial institution. The separate IOLTA trust account must comply with this rule and participate in the Interest on Lawyers Trust Accounts (IOLTA) Program administered by the West Virginia State Bar. On a yearly basis, each lawyer must provide an IOLTA report to the West Virginia State Bar, disclosing: (1) whether the lawyer is exempt under Rule 10.07; (2) whether the lawyer is a member of a law firm that maintains an IOLTA trust account; and, if applicable (3) the name of the financial institution, the routing number and the account number of the IOLTA trust account. The West Virginia State Bar is authorized to assess an administrative penalty of two hundred dollars (\$200) to any lawyer who does not comply with the yearly reporting requirement.

Rule 10.03 Determining What Funds to Deposit in an IOLTA Trust Account

The IOLTA trust account shall include only such client funds that are so nominal in amount or are expected to be held for such a brief period of time such that the funds cannot earn income for the client in excess of the costs of securing that income. The lawyer shall review the account at reasonable intervals to determine whether circumstances warrant further action with respect to the funds of any client. In determining whether a client's funds can earn income in excess of costs, the lawyer or law firm shall consider the following factors:

- (a) the amount of the funds to be deposited;
- (b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
- (c) the rates of interest or yield at financial institutions where the funds are to be deposited;
- (d) the cost of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;
- (e) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients;
- (f) Any other circumstances that affect the ability of the client's funds to earn a net return for the client.

A lawyer may not be charged with any breach of the Rules of Professional Conduct or other ethical violation with regard to a good faith determination of whether client funds are nominal in amount, are expected to be held for a brief period, or in applying the factors (a) through (f) in this rule.

Rule 10.04 Eligible Financial Institutions

Lawyers may only establish and maintain a Client Trust Account or an IOLTA Trust Account at an eligible financial institution. To qualify as eligible, the financial institution must:

- (a) be certified by the West Virginia State Bar to be in compliance with this Rule; and
- (b) be a federally-insured and state or federally-regulated financial institution authorized by federal or state law to do business in West Virginia, or an open-end investment company registered with the federal Securities and Exchange Commission and authorized by federal or state law to do business in West Virginia.; and
- (c) agree to provide overdraft notification as provided in Rule 10.08; and
- (d) with respect to IOLTA accounts, offers such accounts within the requirements of Rule 10.04.

Rule 10.05 IOLTA Account Requirements

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

(a) The eligible financial institution shall pay no less on its IOLTA accounts than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts. Interest and dividends shall be calculated in accordance with the eligible institution's standard practices for non-IOLTA customers. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an eligible institution may consider, in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is an IOLTA account. Nothing in this rule shall preclude an eligible institution from paying a higher interest rate or dividend than described above or electing to waive any fees and services charges on an IOLTA account.

(b) An eligible institution may choose to pay the highest interest or dividend rate in Rule 10.05(a), less allowable reasonable fees as set forth in Rule 10.05(d), if any, on an IOLTA account in lieu of establishing it as a higher rate product.

(c) The IOLTA Trust Account shall be an interest or dividend-bearing account. Interest- or dividend-bearing account means: (1) an interest-bearing checking account; (2) a checking account paying preferred interest rates, such as money market or indexed rates; (3) a government interest-bearing checking account such as accounts used for municipal deposits; (4) a business checking account with an automated investment sweep feature which is a daily (overnight) financial institution repurchase agreement or an open-end money market fund; or (5) any other suitable interest or dividend-bearing account offered by the institution to its non-IOLTA customers. A daily financial institution repurchase agreement must be fully collateralized by or invested in Securities and may be established only with an eligible institution that is well-capitalized or adequately capitalized as those terms are defined by applicable federal statutes and regulations. An open-end money market fund must be invested in U.S. Government Securities and must hold itself out as a money-market fund as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and, at the time of the investment, must have total assets of at least \$250,000,000. United States Government Securities are defined to include debt securities of Government Sponsored Enterprises, such as, but not limited to, debt securities of, or backed by, the Federal National Mortgage Association, the Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation.

(d) Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest or dividends earned on an IOLTA account. Allowable reasonable fees are defined as per check charges, per deposit charges, a fee in lieu of minimum balances, sweep fees, FDIC insurance fees, and a reasonable IOLTA account administrative fee. Allowable reasonable fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges shall be collected from the principal balance deposited in an IOLTA account. Any fees and service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm

maintaining the IOLTA account, including bank overdraft fees and fees for check returns for insufficient funds. Fees and service charges in excess of the interest or dividends earned on one IOLTA account for any period shall not be taken from interest or dividends earned on any other IOLTA account or accounts or from the principal of any IOLTA account.

(e) As an alternative to the rates required under Rule 10.05(a), an eligible institution may choose to pay on IOLTA accounts an amount equal to 65% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first calendar day of the month. The amount is net of all allowable reasonable fees under Rule 10.05(d). This initial benchmark rate of 65% of the Federal Funds Target Rate may be adjusted once a year by the West Virginia State Bar, upon 90 days' written notice to financial institutions participating in the IOLTA program at which time financial institutions may elect to pay the new benchmark amount or may choose among the other options at Rule 10.05(a).

(f) The name of the IOLTA trust account shall be in the following format: “(*Attorney or Firm Name*), IOLTA Trust Account”.

Rule 10.06 Lawyer Instructions to IOLTA Account Institution

The lawyer shall direct the eligible financial institution as follows with regard to an IOLTA account:

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

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

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

Rule 10.07 Exemptions from the IOLTA Program

An attorney or the law firm with which the attorney is associated may be exempt from the requirement to maintain an IOLTA Trust Account in accordance with this Rule if:

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

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

(c) the West Virginia State Bar's Board of Governors, having received a petition requesting an exemption, may exempt the attorney or law firm from participation in the program for a period of no more than two years when service charges on the attorney's or law firm's Trust Account

equal or exceed any interest generated or when compliance with the Rule would create an undue hardship on the lawyer and would be extremely impractical.

Rule 10.08 Overdraft Notification

(a) In the event any properly payable instrument is presented against a Client Trust Account or an IOLTA Trust Account containing insufficient funds, irrespective of whether or not the instrument is honored, the eligible financial institution must provide a report to the West Virginia State Bar. Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(b) The eligible financial institution shall file an overdraft notification agreement with the State Bar. The agreement shall apply to all branches of the financial institution and cannot be canceled except upon 30-day notice in writing to the West Virginia State Bar. The West Virginia State Bar shall annually publish a list of financial institutions that have agreed to comply with this Rule and may establish operational guidelines governing amendments to the list of eligible financial institutions.

(c) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and

(2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

(d) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule. Fees charged for the reasonable cost of producing the reports and records required by this Rule are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as defined in Rule 10.05(d).

Rule 10.09 Disposition of IOLTA Funds Whose Owners Cannot Be Located or Cannot Be Identified

(a) When an executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or a lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure holds funds in an IOLTA account for a client or third party, and cannot locate that client or third party after four or more months of reasonable efforts to do so, it shall pay the funds to the West Virginia State Bar, while at the same time notifying the Executive Director, under oath, of the efforts made to locate the owner, whether client or third party.

(b) When an executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or a lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure cannot identify the owner or owners of funds in an IOLTA account, whether client or third party, after four or more months of reasonable efforts to do so, the lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure shall petition the Supreme Court of Appeals for leave to pay the funds to the West Virginia State Bar, together with a statement, under oath, of the efforts made to identify and locate the owner or owners.

(c) The executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or lawyer, law firm, or trustee appointed under the Rules of Lawyer Disciplinary Procedure shall have a continuing responsibility for returning the funds to the owner or owners. If the owner of such funds remitted to the West Virginia State Bar is identified and located within two years after the funds have been remitted to the West Virginia State Bar, then the lawyer, law firm, or trustee shall notify the West Virginia State Bar IOLTA Advisory Committee; and request, pursuant to procedures adopted by the West Virginia State Bar IOLTA Advisory Committee for that purpose, a refund of the amounts paid. The lawyer, law firm, or trustee shall be responsible for proper distribution of any funds that are refunded.

(d) The procedures in Rule 10.09(a) and (b) shall apply in cases where the amount of the funds is \$500 or more. In cases where the amount of the funds is \$500 or less, the executor, administrator, personal representative, administrator c.t.a, curator of the estate, administrator de bonis, or ancillary administrator, or the lawyer, law firm or trustee appointed under the Rules of Lawyer Disciplinary Procedure, shall remit the funds directly to the West Virginia State Bar.

Rule 10.10 Distribution of IOLTA Funds by the West Virginia State Bar

All IOLTA funds remitted to the West Virginia State Bar shall be distributed by that entity as follows:

(a) an annual fee not to exceed thirty thousand dollars shall be retained by the West Virginia State Bar, for administration of the fund, with a detailed annual accounting of services performed in consideration for such fee to be filed for public inspection with the Supreme Court of Appeals;

(b) special grants not to exceed fifteen percent of the fund's annual receipts to WV CASA Network, coordinating agency for court-appointed special advocate programs, in the amount of 43.5 percent of special grant funds available; to the West Virginia Fund for Law in the Public Interest, Inc., in the amount of 19.3 percent of special grant funds available; to the Appalachian Center for Law and Public Service, in the amount of 7.72 percent of special grant funds available; to West Virginia Senior Legal Aid, Inc., in the amount of 24.125 percent of special grant funds available; and to ChildLaw Services of Mercer County 5.355 percent of special grant funds available; and

(c) Seventy-five percent (75%) of the remaining funds to Legal Aid of West Virginia and twenty-five percent (25%) of the remaining funds to Mountain State Justice or such other method of distribution as may hereinafter be adopted by order of the Supreme Court of Appeals. Any

funds distributed by the West Virginia State Bar pursuant to this subdivision shall not be used by the recipient organization to support any lobbying activities.

Rule 10.11 IOLTA Advisory Committee

(a) The State Bar Board of Governors shall appoint an IOLTA Advisory Committee (“Committee”) to assist in the administration of the IOLTA Program.

(b) The Committee shall meet at least quarterly and shall advise the Board of Governors, the Executive Director, and the Supreme Court on issues related to the administration of the IOLTA Program, including, but not limited to: providing proposed distributions of IOLTA funds to the Board of Governors for approval; the amount of the annual administrative fee; the procedures related to the annual audit; receipts and requests for refunds under Rule 10.09; and other matters as requested by the Board, the Executive Director, or the Supreme Court.

(c) The Committee shall provide an annual summary of its activities to the Board of Governors.

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Cross references to Rule 1.15 of the Rules of Professional Conduct should be read as references to the language of the amendments to that rule approved by order of September 29, 2014. The remaining State Bar Administrative Rules are under development and will be addressed in due course by a separate order.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

