

**THE RULES OF PROFESSIONAL CONDUCT
REVIEW COMMITTEE
REPORT AND RECOMMENDATIONS ON THE D.C.
RULES GOVERNING
IOLTA**

February 5, 2009

Introduction

For more than twenty years, the D.C. Bar Foundation, through the interest revenue generated from D.C. IOLTA accounts, has distributed thousands of dollars to legal services providers to help address the large unmet legal needs of residents and families in the District of Columbia. In 1985, the District of Columbia Court of Appeals established rules to allow a lawyer or law firm to hold client funds that are nominal in amount, or are to be held for a short period of time, in a single pooled client trust account, commonly known as an IOLTA account (“Interest on Lawyers Trust Account”). The interest produced by such an account, which would amount to a small sum for each individual client, is distributed to the D.C. Bar Foundation, which in turn distributes a predominant amount of the interest revenue collected to legal services providers serving low income individuals in the District of Columbia.

Much good has been accomplished through the D.C. IOLTA Program, but it appears that the District of Columbia has not kept pace with changes that have occurred and are occurring in IOLTA programs in a majority of jurisdictions throughout the country. In many jurisdictions, changes to rules governing lawyers and IOLTA accounts have significantly increased the interest revenue available to legal services providers in those jurisdictions.

For this reason, in July 2006, the D.C. Bar Foundation commenced an in-depth review of the rules governing the D.C. IOLTA Program.¹ Ultimately, in October 2007, the Foundation completed its review and recommended revisions to the D.C. Rules governing the IOLTA program, including Rules 1.15 and 1.19 of the D.C. Rules of Professional Conduct and Appendix B of the Court of Appeals Rules Governing the Bar. Those recommendations were adopted by the Foundation’s Board of Directors and forwarded to the D.C. Bar President, Melvin White on November 6, 2007.²

Shortly thereafter, the D.C. Bar leadership asked the Rules of Professional Conduct Review Committee (“Rules Review Committee” or “Committee”) to consider the Bar Foundation’s proposed amendments and to make recommendations to the Board of Governors.³ The Rules Review Committee⁴ is pleased to present its review of the Bar

¹ That review included the hiring of an expert consultant and the formation of a subcommittee that included members of various groups, including representatives from the Bar Foundation, Office of Bar Counsel, Board on Professional Responsibility, and the D.C. Bar. The Foundation’s subcommittee reviewed and compared D.C.’s IOLTA Program and the rules of other jurisdictions and engaged knowledgeable individuals from the banking industry, the American Bar Association, and IOLTA programs country wide.

² The D.C. Bar Foundation’s original proposal dated November 6, 2007, is attached as Appendix A.

³ The Rules Review Committee is the standing committee of the D.C. Bar charged with the ongoing review of the D.C. Rules of Professional Conduct.

⁴ The Committee Chair, Eric Hirschhorn, appointed a subcommittee to review the Bar Foundation’s proposal and to make recommendations to the full committee for its consideration. Serving on this subcommittee were Daniel Schumack, as subcommittee Chair, and Joel Perrell, Faith Mullen, and Susan Carle as members.

Foundation's proposed amendments and its recommendations for revising the Rules governing the D.C. IOLTA Program.

This report includes a summary of the existing D.C. IOLTA rules, a summary of the Committee's analysis of the Bar Foundation's November 2007 proposed amendments, and the Committee's proposed recommendations and amendments to the Rules governing the D.C. IOLTA program.

Because of concerns about the Foundation's initial proposal raised by the Rules Review Committee (and discussed herein), the Bar Foundation has worked closely with the Rules Review Committee during the past several months to resolve those concerns within the text of the rules. The Bar Foundation supports the Rules Review Committee's proposed amendments to the IOLTA Rules as attached.

The Existing D.C. IOLTA Rules

Under D.C. Rules 1.15, 1.19, and Appendix B, lawyers in the District of Columbia must hold all IOLTA eligible funds in one or more pooled client trust accounts in a banking depository approved by the Board on Professional Responsibility. IOLTA-eligible funds are defined by Rule 1.15(e) as client funds that are "nominal in amount or to be held for a short period of time."

Pursuant to Appendix B, however, a lawyer currently can "opt out" of placing IOLTA eligible funds into a D.C. IOLTA account if the lawyer otherwise properly holds the funds separately from his or her own property in accordance with Rules 1.15(a) and 1.19(a) and (b). To "opt out" of the D.C. IOLTA requirements, a lawyer must make a one-time filing with the District of Columbia Court of Appeals.⁵

Rules 1.19(a) and (b) require that funds that come into the possession of a lawyer and are to be held apart from the lawyer's funds⁶ must be placed in an account maintained only in banking institutions approved by the Board on Professional Responsibility ("D.C. Bar Approved Depositories"). Pursuant to Rule 1.19(b) and (c), such institutions have agreed to report promptly any overdraft notifications on attorney trust accounts to the Office of Bar Counsel, and to respond promptly to any subpoenas from the Office of Bar Counsel seeking such account records.

Rule 1.19(b) also provides direction to lawyers who practice outside the District of Columbia. The existing Rule states that if a lawyer is a member of the D.C. Bar and

⁵ It is the Committee's understanding that since the adoption of the IOLTA program in 1985, there has been no systematic retention of filings of attorneys "opting out," essentially rendering a determination of who may have appropriately opted out of the IOLTA program impossible. Presumably, it would also make difficult the prosecution of an attorney not in compliance with Appendix B because he/she could, in some instances, merely claim that he/she had previously properly opted out.

⁶ Generally, this includes all fee advances (unless the client otherwise gives informed consent pursuant to Rule 1.15[d]), settlement proceeds, and any other funds belonging to a client or to a third party.

practices law outside the District of Columbia, “D.C. Bar approved depositories” shall be used for deposits of trust funds that are transactionally-related to the District of Columbia under any of these three categories:

- 1) trust funds received by the lawyer in the District of Columbia;
- 2) trust funds received by the lawyer from, or for the benefit of, parties or persons located in the District of Columbia; and/or
- 3) trust funds received by the lawyer that arise from transactions negotiated or consummated in the District of Columbia.

The IOLTA opt-out provision of Appendix B does not, on its face, relieve lawyers practicing outside of the District of Columbia from utilizing approved depositories for trust funds that are transactionally-related to the District of Columbia.

As a practical matter, when an attorney opens a D.C. IOLTA account at a branch office of a D.C. Bar Approved Depository (whether within the District of Columbia or elsewhere), the bank is supposed to complete and submit a form to the D.C. Bar Foundation in which it agrees to forward the interest from the D.C. IOLTA Account to the D.C. Bar Foundation on a quarterly basis.

The Bar Foundation’s Initial Proposal

The Bar Foundation's proposed revisions would effect two principal changes: 1) all D.C. Bar members who receive “IOLTA eligible funds” must place those funds in a D.C. IOLTA account (thus, the existing voluntary “opt out” program would become mandatory); and 2) for a banking institution to qualify as an “Approved Depository” -- an institution where lawyers are allowed to open and maintain client trust accounts -- the bank must agree to provide certain interest rates on IOLTA Accounts (rate comparability).⁷

The purpose of the proposed revisions is to increase revenue from D.C. IOLTA accounts. This increase is intended to be accomplished in two ways: (1) by increasing the number of IOLTA accounts and funds placed into those accounts. (This is accomplished by making the program mandatory for all D.C. Bar lawyers holding IOLTA-eligible funds, and by ensuring that lawyers place appropriate IOLTA-eligible funds into D.C. IOLTA accounts); and (2) by increasing the interest paid by banks on funds held in D.C. IOLTA accounts (rate comparability).⁸ The revisions are also intended to clarify when and how a D.C. lawyer must maintain such accounts.

⁷ At least 38 states now have a comprehensive/mandatory IOLTA program, and at least 23 states have enacted some form of rate comparability for IOLTA accounts.

⁸ Historically, banks have paid very low interest on IOLTA accounts. A bank voluntarily participates in the IOLTA Program when it chooses to become a depository for attorney trust accounts and is approved by the Board on Professional Responsibility.

Rules Review Committee's Analysis

As an initial matter, the Rules Review Committee supports amendments to the D.C. IOLTA Rules that are consistent with the Bar Foundation's goals of increasing IOLTA interest revenue by 1) making the IOLTA Program mandatory for members of the D.C. Bar; and 2) adopting rate comparability provisions for approved depositories. Upon consideration of the Bar Foundation's proposed revisions, however, the Committee concluded that the territorial reach of the proposed rules might be overbroad. Specifically, the Committee was concerned that the reach of the Foundation's proposed rules could present serious conflict issues for multi-state practitioners because of conflicting or inconsistent trust account requirements in other jurisdictions.

The Committee recognizes that some of the concerns with the proposed revisions are actually caused by weaknesses in the existing Rules that, until now, have been relatively benign because a lawyer has the right to opt out of the current provisions.⁹ Although existing Rule 1.19(b) purports to have the same extraterritorial reach as the Foundation's proposed Rule, commanding out-of-state lawyers to use a D.C.-approved trust depository under certain specified conditions, the proposed requirement that interest on those out-of-state trust accounts be paid to the D.C. IOLTA program creates an additional difficulty. This proposed mandatory requirement is, in some instances, inconsistent with the requirements governing trust funds of other jurisdictions.

Significantly, Rule 1.19(b) as initially proposed by the Bar Foundation would have provided no safe harbor for a lawyer facing conflicting jurisdictional obligations. The plain language of Rule 1.19(b) would have trumped Rule 8.5, the general rule that governs disciplinary authority choice of law. The Committee is unaware of any instance where Bar Counsel has enforced the current text of Rule 1.19(b) against an out-of-state practitioner who is otherwise compliant with his/her home state's trust requirements. Under the proposed revisions, however, this would no longer have been merely a question of protecting client property vis-à-vis trust accounts (which a foreign jurisdiction is presumptively capable of doing). Rather, non-compliance will result in a monetary loss to the D.C. IOLTA program and potentially a disciplinary proceeding brought against the lawyer by D.C. Bar Counsel. Multijurisdictional lawyers would have been compelled to decide which jurisdiction's IOLTA rules control, risking discipline if Bar Counsel were to disagree.

It is important to underscore the unique posture of the D.C. Bar with respect to multi-jurisdictional lawyers¹⁰ and the substantial cross-border practice with our sister jurisdictions, Virginia and Maryland. The District of Columbia Bar has over 66,000

⁹ This is true whether lawyers formally opted out by means of a court filing or did so merely by failing to comply with the existing rules. It is the Committee's understanding that, absent other improper conduct by a lawyer, the existing IOLTA provisions are enforced infrequently by the disciplinary system.

¹⁰ I.e., a lawyer with licenses to practice in at least one other jurisdiction in addition to the District of Columbia.

active members, nearly 48,000 of whom practice in the Metropolitan D.C. area, which includes the District of Columbia and parts of Virginia and Maryland. Of those members, a significant number may not maintain a D.C. office, yet represent D.C. clients. Likewise, there are D.C. lawyers who maintain offices only in D.C., but who are also licensed and practice in Virginia and/or Maryland.

The Committee did not want to subject D.C. lawyers to D.C. mandatory rules that conflict with mandatory rules of other jurisdictions, absent an appropriate guideline and safe harbor to reconcile conflicting obligations.¹¹ The Committee accordingly sought to draft an IOLTA rule to which all D.C. Bar members would be subject but that also would provide a means for reconciling conflicting mandatory rules.

The Committee also considered whether the provisions pertaining solely to banking institutions, such as the requirement that depositories gain approval from the Board on Professional Responsibility, were appropriately housed in the D.C. Rules of Professional Conduct, as both the existing and proposed Rules provide. The Committee concluded that because the Rules of Professional Conduct regulate the conduct of lawyers and not banking institutions, provisions that do not apply to lawyers should not appear in the text of the Rules. The Committee concluded that such requirements would be more appropriately located in Court Rule XI of the Rules Governing the D.C. Bar, which governs the disciplinary system, including the BPR.

Finally, as a general matter, the Committee agreed with the Foundation that the Rules and Comments should provide clear direction to lawyers about their obligations under the IOLTA Rules to the greatest extent possible.

The Committee chair, IOLTA subcommittee chair, and Bar Ethics Counsel had numerous meetings and other communications with representatives of the Bar Foundation about the concerns expressed above. We are pleased to report that the recommendations that accompany this report are supported by the Bar Foundation.

Committee Recommendations

In light of the foregoing analysis, the Committee proposes amendments to D.C. Rule 1.15 to govern the obligations of D.C. lawyers and IOLTA accounts,¹² and the creation of a new subsection of Rule XI § 20¹³ to address the requirements of banking institutions with

¹¹ For example, the Virginia rule states that a Virginia lawyer who receives trust funds should deposit those funds in a trust account located in the jurisdiction in which the lawyer maintains his/her principal office. If a Virginia lawyer does not affirmatively opt out of the Virginia IOLTA program, IOLTA-eligible funds must be placed in a Virginia IOLTA account. Thus, if a VA/D.C. lawyer who principally practices in VA received a D.C. client's money, that lawyer under the Bar Foundation's initial proposal could be subject to two mandatory requirements without means for reconciling contrary requirements.

¹² Proposed Rule 1.15 is attached as Appendix B. A red-line document showing the proposed amendments to existing Rule 1.15 is attached as Appendix C.

¹³ Proposed Rule IX § 20 is attached as Appendix D.

respect to such accounts.¹⁴ The Committee recommends that existing Rule 1.19 and Appendix B be deleted entirely, with appropriate provisions being relocated as proposed to Rule 1.15 and Court Rule XI.

To address the Committee's primary concern of D.C. lawyers facing conflicting mandatory trust requirements, the Committee proposes that Rule 1.15 mandate participation in the District of Columbia's IOLTA Program by all active D.C. Bar members, regardless of where the lawyer principally practices, *except* when the lawyer is required by any tribunal, or by a foreign jurisdiction in which that lawyer principally practices, to follow a contrary rule regarding particular trust accounts. This would include requirements of a foreign jurisdiction's IOLTA Program where the lawyer is voluntarily participating either by failing to "opt out" or by affirmatively "opting in." To the extent that Rule 1.15 does not resolve a multi-jurisdictional conflict, the general conflict of laws provisions of Rule 8.5 will govern. The Committee believes that this proposed Rule will increase IOLTA revenues, by generally mandating compliance of D.C. Bar members, while simultaneously ensuring that D.C. lawyers are not subject to conflicting mandatory rules.

The Committee further recommends adopting the Bar Foundation's provisions relating to rate comparability, which the Committee anticipates will produce increased revenue for the Foundation. As discussed above, however, the Committee recommends that all provisions relating to bank approval and institutional requirements be placed in section 20 of Court Rule XI.

The Committee's proposed revisions to Rule 1.15(b) contain a reporting and periodic certification requirement to the D.C. Bar Foundation, "in the form and manner prescribed by the Bar Foundation." The Committee has not been asked to consider the specific "form and manner" of this requirement, and as such takes no position on it.

Finally, the Committee recommends that the Board of Governors publish these proposed Rule revisions for public comment. The Committee is prepared, upon request, to review any comments received and to make appropriate recommendations to the Board.

¹⁴ Some of the proposed revisions to Rule 1.15 merely delete redundant language contained within the existing Rules. Much of the language of proposed Rule XI § 20 is adopted directly from existing provisions of Rule 1.19, addressing banking requirements, and/or proposed language of the D.C. Bar Foundation's November 2007 proposal relating to banks and rate comparability.