No. _____

STATE OF MINNESOTA
IN SUPREME COURT

_____

In re:

Proposed Amendment of Minnesota Rules
of Professional Conduct

_____

PETITION OF MINNESOTA STATE BAR ASSOCIATION

_____

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Petitioner

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No. _____

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Proposed Amendment of Minnesota Rules
of Professional Conduct

PETITION OF MINNESOTA STATE BAR ASSOCIATION

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully submits this petition asking this Honorable Court to amend Minnesota Rule of Professional Conduct 1.15 to change the requirements governing the financial accounts that attorneys practicing in Minnesota may use as IOLTA ("Interest on Lawyer's Trust Accounts") accounts. This proposed change is intended to increase the amount of interest that such accounts receive and thereby to increase the funding of the legal aid programs that depend on such interest.

In support of this petition, the MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys admitted to practice law before this Court and the lower courts throughout the State of Minnesota.

2. This Honorable Court has and exercises the exclusive and inherent power to regulate the legal profession in the interest of the public good and the efficient administration of justice. The Minnesota legislature has expressly recognized this power. See Minn. Stat. § 480.05 (2006). In the exercise of that power, this Honorable Court has propounded the Minnesota Rules of Professional Conduct ("MRPC" or "the Rules"),

mandatory standards governing attorney conduct that include, among other things, requirements concerning the types and characteristics of trust accounts in which attorneys may hold funds owned by clients and third persons. See generally MRPC 1.15.

3. The Rules require attorneys to deposit certain short-term or nominal funds received from clients or third parties into pooled interest-bearing accounts. MRPC 1.15(e). Lawyers may establish or maintain such IOLTA accounts only in financial institutions that the Office of Lawyers Professional Responsibility has approved. MRPC 1.15(j).

4. The interest accruing on such IOLTA accounts, net of transaction costs, must be paid to the Lawyer Trust Account Board established by this Court. MRPC 1.15(e); In re LMN, 463 N.W.2d 902 (Minn. 1990). The Lawyers Trust Account Board distributes this IOLTA revenue via a grant process, principally to legal aid organizations that provide civil legal services to disadvantaged Minnesotans. See Lawyers Trust Account Board Grant Guidelines 2006-2007. Every state in the country similarly funds legal aid services through such IOLTA interest. See Brown v. Legal Foundation of Washington, 538 U.S. 216, 222 (2003).

5. This scheme of capturing interest on lawyer trust accounts (which would otherwise be paid to no one) and using it to fund legal aid has withstood constitutional challenge. In Brown, supra, the United States Supreme Court held that such use of interest on client funds was not a compensable taking of property. This decision removed a cloud from IOLTA programs created by the pendency of the litigation.

6. Following the Brown decision, a joint task force of the American Bar Association's IOLTA Commission and the National Association of IOLTA Programs undertook to review best practices for IOLTA programs in light of the Brown decision. The Commission's reports were released in 2004 and identified IOLTA rules changes that could enhance program revenues. These included (a) requiring that rates paid on IOLTA funds be comparable to rates paid on similar non-IOLTA funds; (b) prohibiting the netting of charges against multiple IOLTA accounts held by a financial institution; and (c) defining the reasonable fees that could be charged against IOLTA accounts.[1]

7. The national Legal Services Corporation recently published a study finding that close to 80% of the need for civil legal services among the poor is unmet. See generally Legal Services Corporation, "Documenting the Justice Gap in America" (2005), http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf. With federal funding falling short and the number of unserved low-income people increasing, id. at 2, the burden has fallen on state, local, and private sources to find creative and innovative ways to fund legal assistance programs.

8. Against this background, the Legal Assistance to the Disadvantaged (LAD) Committee of the MSBA examined current IOLTA rules and practices in Minnesota, and considered possible changes to Minnesota's IOLTA rules to enhance revenues available

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[1] Former MSBA President Kent Gernander was a member of the Commission and of the Task Force that produced the reports.

to fund legal services. Its findings and recommendations form the basis for the changes sought by this Petition.

9. The current Minnesota rule requires only that each IOLTA account be interest-bearing; it does not specify how much interest must be paid. Rule 1.15(a), (d) and (e). The rates of interest paid on IOLTA accounts by Minnesota financial institutions have varied widely. Some Minnesota banks pay rates comparable to those paid on similar non-IOLTA accounts, but several have paid only nominal interest on their IOLTA accounts. One bank currently pays only .001% interest on such accounts, as shown in that bank's reports to the Lawyers Trust Account Board. This amounts to one cent per year for every $1000 on deposit.

10. The proposed amendments would require comparability of interest rates or dividends between IOLTA accounts and similar accounts. To comply with the amended rules, an IOLTA account would need to earn no less than the interest rate or dividend generally available to non-IOLTA depositors at the same institution when the IOLTA account meets or exceeds the same minimum balance or other account eligibility requirements. As an alternative, the proposed amendments would permit a bank to pay a "safe harbor" rate equivalent to 80% of the Federal Funds Target Rate. See Proposed Amended Rule 1.15(o).

11. The proposed amendments would also allow IOLTA funds to be held in money market accounts and in sweep accounts and open-end money-market funds invested in or fully collateralized with U.S. Government securities. See Proposed Amended Rule 1.15(o). The current rule does not forbid such deposits of IOLTA funds,

but its requirement that each trust account be "an interest bearing account" has been read narrowly by some. These changes would sanction deposit and investment products that are commonly used by prudent investors and meet the objectives of safety and liquidity for lawyer trust funds.

12. The proposed amendments would also prohibit the practice of "negative netting," in which a bank charges fees incurred by one IOLTA account against the earnings of another. Under the proposed amendment, a bank could not takes fees or charges in excess of the earnings accrued on an IOLTA account for a given period either from the principal of that account or from earnings accrued on other IOLTA accounts. See Proposed Amended Rule 1.15(o).

13. The proposed amendments would define for the first time the "allowable reasonable fees" that a bank may charge directly against an IOLTA account. Such allowable fees would be limited to per-check charges, per-deposit charges, sweep fees, and similar charges assessed against comparable accounts by the bank. The lawyer maintaining the account would be responsible for all other fees incurred in connection with the IOLTA account. See Proposed Amended Rule 1.15(o).

14. Finally, the proposed amendments would include an explicit statement that only funds that could not accrue earnings for the client, net of allowable costs, may be placed or retained in an IOLTA account. See Proposed Amended Rule 1.15(g). This has generally been considered the import of the current rule, but in view of the heavy reliance placed on such a requirement in the rule upheld in Brown, supra, the MSBA considers it prudent to include such a statement.

15. The LAD Committee and the MSBA's Rules of Professional Conduct Committee presented a Report recommending these changes to MRPC 1.15 to the MSBA Assembly on April 21 2006. The Assembly approved the Report and Recommendation and resolved to ask that this Honorable Court amend Rule 1.15 in accordance with those recommendations.

16. The recommended changes have been considered and endorsed by other committees of the MSBA and by the Minnesota Lawyers Professional Responsibility Board and the Minnesota Legal Services Planning Committee.

17. Members of the LAD Committee have discussed the proposed changes in Rule 1.15 with officials of the Minnesota banking community, including the Minnesota Bankers Association and the Independent Community Bankers of Minnesota. The officials were generally supportive of the proposed changes, and one revision was made in response to a concern expressed by the Minnesota Bankers Association's general counsel.

18. Several other states have adopted new rules governing IOLTA accounts, and have reported substantial increases in IOLTA revenues. Some of the proposed amendments are similar to measures adopted in Florida, Michigan, Alabama, and New Jersey. See, e.g., Fla. Rule 5-1.1(e) (http://www.flabarfndn.org/iota/supcourt.asp and http://www.flabarfndn.org/iota/appendix.asp; see also Mich. R. Prof. Cond. 1.15 (http://courtofappeals.mijud.net/rules/documents/5MichiganRulesOfProfessionalConduct.pdf); N.J. Disc. R. 1:28A-2(e) (http://www.judiciary.state.nj.us/rules/r1-28a.htm).

19. To allow time to educate financial institutions and lawyers about the new requirements, the MSBA requests that any Order amending Rule 1.15 provide an effective date for the amendments not earlier than six months after the date of the order.

The MSBA therefore petitions this Honorable Court to amend Rule 1.15's IOLTA account provisions as described herein in order to increase the interest paid on IOLTA accounts and thus increase the monies available for distribution to legal aid organizations. The proposed amendments are set out in full, including both clean and redlined versions, in the Addendum to this Petition. The MSBA stands ready to address any comments or questions the Court may have concerning the proposed amendments in whatever form may be most convenient to the Court.

Dated: August ____, 2006

Respectfully submitted,
MINNESOTA STATE BAR ASSOCIATION

BY _____
Patrick J. Kelly
Its President
and
FAEGRE & BENSON LLP

BY _____
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Attorneys for the Minnesota State Bar Association

ADDENDUM TO MSBA PETITION

Proposed Amendments to Rule 1.15
Clean Version

MRPC RULE 1.15 : SAFEKEEPING PROPERTY

(a) All funds of clients or third persons held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable trust accounts as set forth in paragraphs (d) through (g) and as defined in paragraph (o). No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein;

(2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein.

(b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the law firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established, and the lawyer must provide the client or third person with: (i) written notice of the time, amount, and purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account. If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client or third person of the receipt of the client's or third person's funds, securities, or other properties;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them;

(4) promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive; and

(5) deposit all fees in advance of the legal services being performed into a trust account and withdraw the fees as earned, unless the lawyer and the client have entered into a written agreement pursuant to Rule 1.5(b).

(d) Each trust account referred to in paragraph (a) shall be an account in an eligible financial institution selected by a lawyer in the exercise of ordinary prudence.

(e) A lawyer who receives client or third person funds shall maintain a pooled trust account ("IOLTA account") for deposit of funds that are nominal in amount or expected to be held for a short period of time.

(f) All client or third person funds shall be deposited in the account specified in paragraph (e) unless they are deposited in a:

(1) separate trust account for the particular third person, client, or client's matter on which the earnings, net of any transaction costs, will be paid to the client or third person; or

(2) pooled trust account with subaccounting which will provide for computation of earnings accrued on each client's or third person's funds and the payment thereof, net of any transaction costs, to the client.

(g) In determining whether to use the account specified in paragraph (e) or an account specified in paragraph (f), a lawyer shall take into consideration the following factors:

(1) the amount of earnings which the funds would accrue during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of financial institutions described in paragraph (d) to calculate and pay earnings to individual clients.

Only funds that could not accrue earnings for the client, net of the costs described in subparagraph (2) above, may be placed or retained in the account specified in paragraph (e).

(h) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f). Equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail are acceptable. The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients or third persons, for at least six years after completion of the employment to which they relate.

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer's registration and in such form as the Clerk of the Appellate Courts may prescribe, that the lawyer or the lawyer's law firm maintains books and

records as required by paragraph (h). The Lawyers Professional Responsibility Board shall publish annually the books and records required by paragraph (h).

(j) Lawyer trust accounts, including IOLTA accounts, shall be maintained only in eligible financial institutions approved by the Office of Lawyers Professional Responsibility. Every check, draft, electronic transfer, or other withdrawal instrument or authorization shall be personally signed or, in the case of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm.

(k) A financial institution, to be approved as a depository for lawyer trust accounts, must file with the Office of Lawyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether the instrument is honored. The Lawyers Professional Responsibility Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon three days notice in writing to the Office.

(l) 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;

(2) in the case of an instrument that is presented against insufficient funds but which instrument is 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.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(m) 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.

(n) 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.

(o) Definitions.

A "trust account" is an account denominated as such in which a lawyer or law firm holds funds on behalf of a client or third person(s) and is: 1) an interest-bearing checking account; 2) a money market account with or tied to check-writing; 3) a sweep account which is a money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or 4) an open-end money market fund solely invested in or fully collateralized by U.S. Government Securities. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940, and, at the time of the investment, have total assets of at least $250,000,000. "U.S. Government Securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof. A daily overnight financial institution repurchase agreement may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

"IOLTA Account" is a pooled trust account in an eligible financial institution that has agreed to:

(1) remit the earnings accruing on this account, net of any allowable reasonable fees, monthly to the Lawyer Trust Account Board (LTAB) established by the Minnesota Supreme Court;

(2) transmit with each remittance a report on a form approved by the LTAB that shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of earnings applied, the amount of earnings accrued, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and

(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.

An approved eligible financial institution must pay no less on IOLTA accounts than (i) the highest earnings rate generally available from the institution to its non-IOLTA customers on each IOLTA account that meets the same minimum balance or other eligibility qualifications, or, (ii) 80% of the Federal Funds Target Rate on all its IOLTA accounts. The rate to be paid shall be fixed on the first day of each month, subject to rate changes during the month reflected in normal month-end calculations. Accrued earnings and fees shall be calculated in accordance with the eligible financial institution's standard practice, but institutions may elect to pay a higher earnings rate and may elect to waive

any fees on IOLTA accounts. A financial institution may choose to pay the higher sweep or money market account rates on a qualifying IOLTA checking account.

"Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, sweep fees and similar charges assessed against comparable accounts by the eligible financial institution. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA accounts.

"Eligible Financial Institution" for trust accounts is a bank or savings and loan association authorized by federal or state law to do business in Minnesota, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Minnesota.

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Notice of dishonor" refers to the notice which an eligible financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

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, including prospective clients, must 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.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (a) (1) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds is the lawyer's.

[3] Lawyers often receive funds 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 must be kept in a trust account 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.

[4] Paragraph (b) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] 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 only 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 and is not governed by this rule.

Proposed Amendments to Rule 1.15
Redlined Version
(Text to be added indicated by underlining and italics;
text to be deleted indicated by strike-out.)

MRPC RULE 1.15 : SAFEKEEPING PROPERTY

(a) All funds of clients or third persons held by a lawyer or law firm in connection with a representation shall be deposited in one or more identifiable ~~interest bearing~~ trust accounts as set forth in paragraphs (d) through (g) *and as defined in paragraph (o)*. No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) funds of the lawyer or law firm reasonably sufficient to pay service charges may be deposited therein;

(2) funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein.

(b) A lawyer must withdraw earned fees and any other funds belonging to the lawyer or the law firm from the trust account within a reasonable time after the fees have been earned or entitlement to the funds has been established, and the lawyer must provide the client or third person with: (i) written notice of the time, amount, and purpose of the withdrawal; and (ii) an accounting of the client's or third person's funds in the trust account. If the right of the lawyer or law firm to receive funds from the account is disputed by the client or third person claiming entitlement to the funds, the disputed portion shall not be withdrawn until the dispute is finally resolved. If the right of the lawyer or law firm to receive funds from the account is disputed within a reasonable time after the funds have been withdrawn, the disputed portion must be restored to the account until the dispute is resolved.

(c) A lawyer shall:

(1) promptly notify a client or third person of the receipt of the client's or third person's funds, securities, or other properties;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them;

(4) promptly pay or deliver to the client or third person as requested the funds, securities, or other properties in the possession of the lawyer which the client or third person is entitled to receive; and

(5) deposit all fees in advance of the legal services being performed into a trust account and withdraw the fees as earned, unless the lawyer and the client have entered into a written agreement pursuant to Rule 1.5(b).

(d) Each trust account referred to in paragraph (a) shall be an ~~interest bearing~~ account in ~~a bank, savings bank, trust company, savings and loan association, savings association, or federally regulated investment company~~ *an eligible financial institution* selected by a lawyer in the exercise of ordinary prudence.

(e) A lawyer who receives client or third person funds shall maintain a pooled ~~interest bearing~~ trust account *("IOLTA account")* for deposit of funds that are nominal in amount or expected to be held for a short period of time. ~~The interest accruing on this account, net of any transaction costs, shall be paid to the Lawyer Trust Account Board established by the Minnesota Supreme Court.~~

(f) All client or third person funds shall be deposited in the account specified in paragraph (e) unless they are deposited in a:

(1) separate ~~interest bearing~~ trust account for the particular third person, client, or client's matter on which the ~~interest~~ *earnings*, net of any transaction costs, will be paid to the client or third person; or

(2) pooled ~~interest bearing~~ trust account with subaccounting which will provide for computation of ~~interest earned by~~ *earnings accrued on* each client's or third person's funds and the payment thereof, net of any transaction costs, to the client.

(g) In determining whether to use the account specified in paragraph (e) or an account specified in paragraph (f), a lawyer shall take into consideration the following factors:

(1) the amount of ~~interest~~ *earnings* which the funds would ~~earn~~ *accrue* during the period they are expected to be deposited;

(2) the cost of establishing and administering the account, including the cost of the lawyer's services;

(3) the capability of financial institutions described in paragraph (d) to calculate and pay ~~interest~~ *earnings* to individual clients.

Only funds that could not accrue earnings for the client, net of the costs described in subparagraph (2) above, may be placed or retained in the account specified in paragraph (e).

(h) Every lawyer engaged in private practice of law shall maintain or cause to be maintained on a current basis books and records sufficient to demonstrate income derived from, and expenses related to, the lawyer's private practice of law, and to establish compliance with paragraphs (a) through (f). Equivalent books and records demonstrating the same information in an easily accessible manner and in substantially the same detail

are acceptable. The books and records shall be preserved for at least six years following the end of the taxable year to which they relate or, as to books and records relating to funds or property of clients or third persons, for at least six years after completion of the employment to which they relate.

(i) Every lawyer subject to paragraph (h) shall certify, in connection with the annual renewal of the lawyer's registration and in such form as the Clerk of the Appellate Courts may prescribe, that the lawyer or the lawyer's law firm maintains books and records as required by paragraph (h). The Lawyers Professional Responsibility Board shall publish annually the books and records required by paragraph (h).

(j) Lawyer trust accounts*, including IOLTA accounts,* shall be maintained only in *eligible* financial institutions approved by the Office of Lawyers Professional Responsibility. Every check, draft, electronic transfer, or other withdrawal instrument or authorization shall be personally signed or, in the case of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm.

(k) A financial institution, ~~shall~~ *to* be approved as a depository for lawyer trust accounts, ~~if it~~ *must* file~~s~~ with the Office of Lawyers Professional Responsibility an agreement, in a form provided by the Office, to report to the Office in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether the instrument is honored. The Lawyers Professional Responsibility Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon three days notice in writing to the Office.

(l) 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;

(2) in the case of an instrument that is presented against insufficient funds but which instrument is 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.

Such reports shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is

honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

(m) 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.

(n) 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.

(o) Definitions.

A "trust account" is an account denominated as such in which a lawyer or law firm holds funds on behalf of a client or third person(s) and is: 1) an interest-bearing checking account; 2) a money market account with or tied to check-writing; 3) a sweep account which is a money market fund or daily overnight financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or 4) an open-end money market fund solely invested in or fully collateralized by U.S. Government Securities. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Act of 1940, and, at the time of the investment, have total assets of at least $250,000,000. "U.S. Government Securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof. A daily overnight financial institution repurchase agreement may be established only with an institution that is deemed to be "well capitalized" or "adequately capitalized" as defined by applicable federal statutes and regulations.

"IOLTA Account" is a pooled trust account in an eligible financial institution that has agreed to:

(1) remit the earnings accruing on this account, net of any allowable reasonable fees, monthly to the Lawyer Trust Account Board (LTAB) established by the Minnesota Supreme Court;

(2) transmit with each remittance a report on a form approved by the LTAB that shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of earnings applied, the amount of earnings accrued, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and

(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.

An approved eligible financial institution must pay no less on IOLTA accounts than (i) the highest earnings rate generally available from the institution to its non-IOLTA customers on each IOLTA account that meets the same minimum balance or other eligibility qualifications, or, (ii) 80% of the Federal Funds Target Rate on all its IOLTA accounts. The rate to be paid shall be fixed on the first day of each month, subject to rate changes during the month reflected in normal month-end calculations. Accrued earnings and fees shall be calculated in accordance with the eligible financial institution's standard practice, but institutions may elect to pay a higher earnings rate and may elect to waive any fees on IOLTA accounts. A financial institution may choose to pay the higher sweep or money market account rates on a qualifying IOLTA checking account.

"Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, sweep fees and similar charges assessed against comparable accounts by the eligible financial institution. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account. Eligible financial institutions may elect to waive any or all fees on IOLTA accounts.

~~"Financial Institution" includes banks, savings and loan associations, savings banks, and any other businesses or persons that accept for deposit funds held in trust by lawyers.~~

"Eligible Financial Institution" for trust accounts is a bank or savings and loan association authorized by federal or state law to do business in Minnesota, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Minnesota.

"Properly payable" refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

"Notice of dishonor" refers to the notice which a*n eligible* financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

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, including prospective clients, must 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.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (a) (1) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds is the lawyer's.

[3] Lawyers often receive funds 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 must be kept in a trust account 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.

[4] Paragraph (b) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] 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 only 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 and is not governed by this rule.