SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 43, RULES OF THE SUPREME COURT	)	Arizona Supreme Court No. R-11-0014
	)	**FILED 09/01/2011**

ORDER AMENDING
RULE 43, RULES OF THE SUPREME COURT

A petition for rule change having been filed relating to lawyers' trust accounts, and comments having been received, upon consideration,

IT IS ORDERED that Rules 43(f) and 43(g), Rules of the Supreme Court, be abrogated, and that the text in the Attachment hereto be adopted to replace the abrogated language, effective July 1, 2012.

DATED this _____ day of September, 2011.

_____
REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT

RULES OF THE SUPREME COURT

Rule 43. Trust Accounts

* * *

(f) Establishment of Trust Accounts; State Bar Oversight.

1. A lawyer or law firm receiving funds belonging in whole or in part to a client or third person in connection with a representation must hold the funds in one of the following types of accounts:

A. a pooled interest-bearing or dividend-earning trust account ("IOLTA account") on which the interest or dividends accrue for the benefit of the Arizona Foundation for Legal Services and Education ("Foundation");

B. a separate interest-bearing or dividend-earning trust account for the particular client or client's matter on which the interest or dividends, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, will be paid to the client; or

C. a pooled interest-bearing or dividend-earning trust account, with subaccounting provided by the lawyer or the law firm, which will provide for computation of interest or dividends earned by each client's funds and the payment thereof, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, to the client.

2. In determining which type of account provided for in section (f)(1) to use, a lawyer or law firm shall take into consideration the following factors:

A. the amount of 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 a separate non-IOLTA account 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 to calculate and pay income to individual clients; and

F. any other circumstances that affect the ability of the client's funds to earn a net return for the client.

Funds should be deposited in an IOLTA account as provided for in section (f)(1)(A) if the interest does not cover the cost of opening and maintaining a separate interest-bearing or dividend-earning account. The State Bar shall not pursue a disciplinary matter against any lawyer or law firm solely based on the good-faith determination of the appropriate account in which to deposit or invest client funds.

3. A lawyer or law firm must maintain any client trust account provided for in section (f)(1) only at a regulated financial institution, which is either (i) a financial institution authorized by federal or state law to take deposits and conduct financial transactions with Arizona lawyers and is insured by the Federal Deposit Insurance Corporation or any successor insurance corporation(s) established by federal or state laws or (ii) any open-ended investment company registered with the Securities and Exchange Commission that is authorized by federal or state law to take deposits and conduct financial transactions with Arizona lawyers. A regulated financial institution must agree to comply with the requirements of section (f)(4) below and agree to pay IOLTA interest to the Foundation. The lawyer or law firm must ensure that:

A. withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation, and

B. the deposited funds are invested in the higher earning return of:

i. an interest-bearing checking account;

ii. a money-market deposit account with or tied to checking;

iii. 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

iv. an open-end money-market fund solely invested in or fully collateralized by U.S. Government Securities.

A daily financial institution repurchase agreement may be established only with a regulated institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "money-market fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940, and at the time of the investment must have total assets of at least $250,000,000. "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.

C. All service charges to the account are reasonable, related to the cost of maintaining the account, and computed in accordance with the financial institution's standard accounting practices.

D. The financial institution sends notification immediately to the State Bar chief bar counsel of any properly payable instrument that is presented for payment against a client trust account containing insufficient funds, uncollectible funds, or a negative available balance, regardless of whether the financial institution honors the instrument. All occurrences shall be reported to the State Bar regardless of the cause.

If a financial institution ceases to operate as a regulated financial institution and has no successor operating as a regulated financial institution, a lawyer or law firm that maintains an account listed under section (f)(1) at that financial institution must, upon receiving notice of the financial institution's change in status, promptly notify any clients whose funds may be affected by the change in status, promptly transfer, to the extent possible, any client trust account funds from that financial institution into another account provided for in section (f)(1), and promptly deposit into the other account provided for in

section (f)(1) any insurance, collateral, or proceeds resulting from the financial institution's change in status.

4. In addition to the requirements of section (f)(3), a lawyer or law firm may only maintain an IOLTA account as provided for in section (f)(1)(A) at an authorized regulated financial institution. To be designated as authorized, a regulated financial institution must sign a participation certification before the fiscal year beginning July 1, with the State Bar as representative of its members, and the Foundation as a third-party beneficiary and administrator of the interest or dividends.

A. The participation certification must:

i. define a reasonable charge for managing IOLTA accounts, which may include fees for reporting and recordkeeping;

ii. direct that interest or dividends, net of any reasonable service charges or fees, be remitted at least quarterly to the Foundation;

iii. provide that the financial institution transmit, with each remittance to the Foundation, a statement, as directed by the Foundation, showing information including the name of the lawyer or law firm on whose account the remittance is sent, the period for the remittance submitted, the account number, the account status, the rate of interest applied or the dividends earned, and the charges imposed against the interest remitted;

iv. provide that the financial institution transmit a report on each separate account, similar to the report required by section (f)(4)(a)(iii), to the lawyer or law firm opening said trust account;

v. direct that if the financial institution receives a subpoena duces tecum requesting documents pertaining to a lawyer's IOLTA account with the financial institution, the financial institution shall provide the documents specified in the subpoena duces tecum;

vi. provide that the terms apply to all branches of the regulated financial institution holding Arizona IOLTA accounts;

vii. provide that the financial institution be allowed to charge a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule;

viii. provide that the participation certification may not be cancelled by the regulated financial institution except upon 30 days' advance written notice to the State Bar and the Foundation;

ix. provide that the participation certification may not be cancelled or revoked except upon 30 days' advance written notice to the regulated financial institution;

x. provide for an annual approval period; and

xi. provide that any participation certification continues in existence during any time the authorized regulated financial institution is attempting to become reauthorized.

B. If an authorized regulated financial institution does not sign the participation certification for the fiscal year beginning July 1 during which the regulated financial institution wishes to be re-authorized:

i. The matter will be referred to a mediator selected by the Court.

ii. The mediator will have 60 days to meet with the parties and attempt to reach a settlement.

iii. If after 60 days with mediation the parties do not reach a participation certification as provided for in section (f)(4)(A) above, the State Bar shall:

(a) notify the Supreme Court that the financial institution has failed to sign a participation certification for the following fiscal year;

(b) notify members who maintain trust accounts at that regulated financial institution that the regulated financial institution has failed to sign a participation certification for the following fiscal year; and

(c) notify other members that the regulated financial institution is not in compliance and that no new trust accounts may be opened at that financial institution for the following fiscal year.

iv. Upon receiving the State Bar's request provided for in section (f)(4)(B)(iii)(a), the Court may issue an order de-authorizing a previously authorized regulated financial institution that is seeking to become reauthorized.

C. The State Bar and the Foundation shall ensure the maintenance of a website listing of authorized regulated financial institutions' status.

5. If the State Bar and the Foundation become aware of information indicating that an authorized regulated financial institution has not complied with the duties provided for in section (f), the State Bar shall notify the regulated financial institution of its failure to comply and that it has 90 days to cure its noncompliance.

A. If, after 45 days, the noncompliance has not been cured, then the State Bar shall:

i. notify members who maintain trust accounts at that regulated financial institution that the regulated financial institution had been given 90 days to cure its noncompliance and to date it has not complied;

ii. notify other members that the regulated financial institution is not in compliance and that no new trust accounts may be opened at that financial institution;

iii. notify the Supreme Court that the financial institution is in noncompliance and had been given 90 days to cure its noncompliance.

B. If the financial institution cures its noncompliance, the State Bar shall promptly notify its members and the Supreme Court.

C. If the financial institution fails to cure the noncompliance, the State Bar shall file with the Court a request for termination of authorized status of that financial institution.

D. The Court may issue an order terminating the authorized status of the financial institution and instructing the State Bar to:

i. assure removal of the institution from the list of authorized financial institutions, and

ii. notify all members of the removal.

E. Upon receiving the notice provided for in section (f)(5)(D):

i. Members who maintain trust accounts at the de-authorized financial institution shall:

(a) have 90 days to transfer their accounts to an authorized financial institution, and

(b) by the end of 90 days, notify the State Bar that their trust accounts have been transferred and provide pertinent account information.

ii. Members who continue to maintain trust accounts at the de-authorized financial institution more than 90 days after notice or who fail to tell the State Bar that they have done so shall be referred to the State Bar Lawyer Regulation Office.

6. Interest or dividends generated on accounts specified in section (f)(1)(A) shall be paid by the financial institution or investment company to the Foundation. The Foundation shall use the interest or dividends solely to:

A. support programs designed to assist in the delivery of legal services to the poor and law-related education programs designed to teach young people, educators and other adults about the law, the legal process and the legal system;

B. fund studies or programs designed to improve the administration of justice;

C. maintain a reasonable reserve; and

D. pay the actual costs of administering this rule and the activities set forth above.

7. In addition to other obligations under section (f) of this rule, all lawyers admitted to practice in this state shall:

A. as a condition thereof, consent to the reporting and production requirements set forth in this rule, and

B. provide information requested by the State Bar on the annual dues statement regarding any and all client trust accounts they maintain.

(g) Reserved.

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