

Tennessee IOLTA Program FREQUENTLY ASKED QUESTIONS

On July 8, 2009, the Tennessee Supreme Court granted a petition to amend Rule 8, Rule of Professional Conduct 1.15 and Rule 43 of the Rules of the Tennessee Supreme Court to convert lawyer participation in the IOLTA program to mandatory status. As a result, Tennessee joins 39 other states in which lawyers in private practice are required to maintain pooled client trust funds in IOLTA accounts. In addition to this change, Tennessee joins 25 other states whose IOLTA rules include interest rate comparability requirements. The implementation of these Rules is the responsibility of the Tennessee Bar Foundation (TBF), administrator of the IOLTA program. The following are common questions and answers related to the new Rules:

1. WHAT DO THE NEW IOLTA RULES CHANGE?

They make participation in IOLTA by lawyers and law firms mandatory. Lawyers holding IOLTA eligible funds may no longer opt-out of the program as they were previously able to do.

The Rules also define institutions “eligible” to hold IOLTA accounts as only those which pay IOLTA accounts the highest interest rate or dividend generally available at that institution to similarly situated, non-IOLTA accounts and meet other requirements of the Rules.

2. WHY WERE THESE CHANGES ADOPTED?

The new Rules will maximize the revenue available for the charitable purposes of the IOLTA program by insuring that all appropriate funds are maintained in IOLTA accounts and that those accounts earn competitive interest rates.

The charitable purposes of the IOLTA program, as established by the Tennessee Supreme Court are:

- (a) To provide legal assistance to the poor;
- (b) To provide student loans, grants, and/or scholarships to deserving law students;
- (c) To improve the administration of justice; and
- (d) For such other programs for the benefit of the public as are specifically approved by the Tennessee Supreme Court.

3. ARE THE NEW RULES VOLUNTARY FOR LAWYERS AND LAW FIRMS?

No. On January 1, 2010, lawyers holding IOLTA-eligible funds will not be in compliance with Rule 8, Rule of Professional Conduct 1.15, unless those funds have been placed in an IOLTA account at an eligible financial institution.

4. WHAT ARE “IOLTA-ELIGIBLE” FUNDS?

Funds of a client or third person are “IOLTA-eligible” and shall be deposited in a lawyer or law firm IOLTA account unless the funds can earn income for the benefit of the client or third person in excess of the costs incurred to secure and distribute such income to the client or third person.

5. IF I ALREADY MAINTAIN AN IOLTA ACCOUNT FOR ALL MY CLIENT OR THIRD PARTY FUNDS, DOES THE RULE CHANGE AFFECT ME?

No. If you deposit all eligible funds in an IOLTA account, you will maintain that account as you always have, and you should discard the enclosed “Notice to Financial Institutions” (blue form). However, if you have multiple, pooled client trust accounts and one or more of those accounts is not an IOLTA account, use the enclosed form to enroll those accounts in the IOLTA program.

6. I PRACTICE IN A LAW FIRM. MUST ALL THE LAWYERS ACT?

No. While each lawyer is required to comply with the IOLTA provisions of the Rules, members or associates of law firms may meet those requirements using law firm IOLTA accounts. You are not required to maintain an individual IOLTA account. If you are unsure whether your firm is placing all eligible funds in IOLTA participating accounts, contact your firm administrator.

7. WHAT IF I HAVE A POOLED TRUST CHECKING ACCOUNT, BUT IT’S NOT ENROLLED IN IOLTA?

If you are a lawyer engaged in the private practice of law and you receive IOLTA-eligible client funds (those that cannot earn income for the benefit of the client in excess of the costs incurred to secure and distribute that income to the client), then you or your law firm must establish and maintain a pooled IOLTA trust account. In addition, that account must be held at a financial institution certified as eligible by the TBF.

8. HOW DO I OPEN A NEW IOLTA ACCOUNT?

Lawyers/law firms that need to open an IOLTA account should complete the enclosed “Notice to Financial Institution” (blue form) and visit that financial institution to establish the new account. A copy of the completed form should be forwarded to the Tennessee Bar Foundation once the account is established.

9. HOW CAN THIS CHANGE BEST BE HANDLED AT A LAW FIRM?

Similar to individual lawyers, if a law firm maintains multiple pooled client trust accounts, and one or more of those accounts is not an IOLTA account, use the enclosed “Notice to Financial Institutions” (blue form) to enroll those accounts or to open new IOLTA accounts. Firm

administrators should insure that all IOLTA eligible funds accepted by the firm's lawyers are properly maintained.

10. MAY LAWYERS STILL DEPOSIT INDIVIDUAL CLIENT OR THIRD PARTY FUNDS IN ACCOUNTS WHICH PAY INTEREST TO BE PASSED ON TO THE CLIENT?

Yes. In fact, lawyers are expected to establish separate, interest-bearing accounts for individual client or third party funds when the sum is large enough and/or the duration is long enough to justify the cost of opening, administering and closing the account. Any interest accrued becomes the property of the client or third party. If the client or third party funds are not large enough or the duration is not long enough to earn income net of the costs associated with the account, then the funds must be placed in an IOLTA account at an eligible financial institution.

11. WHAT IS AN "ELIGIBLE" FINANCIAL INSTITUTION?

Eligible financial institutions are those that voluntarily offer IOLTA accounts and comply with the requirements of the Rules. The requirements include paying on an IOLTA account the highest rate of interest or dividends generally available from the institution to its non-IOLTA customers -- when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. The TBF will certify financial institutions as "eligible."

12. HOW WILL MY FINANCIAL INSTITUTION LEARN ABOUT THE NEW RULE?

The TBF has already distributed materials to all participating financial institutions regarding the specific requirements of the Rules. Between now and the implementation deadline of January 1, 2010, the TBF will work with each institution to structure its IOLTA account offerings to insure they comply with those Rules. Financial institutions will be certified as eligible to hold IOLTA accounts upon completion of that process.

13. HOW WILL I KNOW IF MY FINANCIAL INSTITUTION IS IN COMPLIANCE WITH THE NEW RULES?

The TBF will publish the list of eligible financial institutions on its website <http://www.tnbarfoundation.org/banks.aspx> beginning in early November 2009. Alternatively, lawyers may call the TBF at any time to get the status of their financial institution.

14. WILL LAWYERS OR LAW FIRMS BE REQUIRED TO MOVE THEIR IOLTA ACCOUNTS?

It is highly unlikely that you will need to move your IOLTA account. It is the goal of the TBF to bring all financial institutions into compliance with the new Rules. In other states, few financial

institutions have chosen to withdraw from the program. In the rare instance where a financial institution determines it cannot comply with the Rules for whatever reason, lawyers will be assisted in locating a new institution. The TBF will advise the affected lawyer or law firm of the bank's decision and provide a list of eligible financial institutions in the area. The TBF will cover the cost of replacing existing supplies of IOLTA and other account checks from the old bank. Lawyers will also be given ample time to move their accounts.

15. MUST LAWYERS HAVE NEW CHECKS PRINTED FOR IOLTA ACCOUNTS?

No. Lawyers may continue to use their checks as they did prior to establishing the account, if the financial institution converts it to an IOLTA account that meets the requirements of the Rules.

16. WHO PAYS SERVICE CHARGES AND FEES ON IOLTA ACCOUNTS?

Rule 43 of the Rules of the Supreme Court defines allowable reasonable service charges that may be netted against the interest earned on IOLTA accounts. They are “(a) per check or electronic debit charges; (b) per deposit or electronic credit charges; (c) a fee in lieu of minimum balance; (d) FDIC insurance fees or FDIC account guarantee fees; (e) a sweep fee; and (f) a reasonable IOLTA account administrative fee.” Check printing charges, wire transfer fees, bank or certified checks, cash management fees and overdraft costs, etc., are the responsibility of and may be charged to the lawyer or law firm maintaining the account. Lawyers with questions regarding applicable account fees should contact their financial institution to request a service charge disclosure.

17. DO THE NEW RULES CREATE ADDITIONAL ADMINISTRATIVE BURDENS AND COSTS FOR LAWYERS, PARTICULARLY SOLE PRACTITIONERS?

No. The current Rules require every lawyer in private practice who holds client or third party funds to establish and maintain a trust account. This is true regardless of the size of the firm or whether the account is enrolled in IOLTA. The current Rules also require every lawyer who holds client or third party funds to make a good faith judgment about whether those funds belong in a pooled trust account or one set up solely for the benefit of that party. Under the new Rules, the only administrative change is that the pooled trust account must now be an IOLTA account.

18. I'M NOT IN PRIVATE PRACTICE. HOW DO THE NEW RULES AFFECT ME?

If you are not in private practice in Tennessee, you are “exempt” from participation in IOLTA and are only required to certify that status on the Board of Professional Responsibility annual registration statement. Additionally, if you serve as a Judge, Attorney General, Public Defender, U.S. Attorney, District Attorney, in-house counsel, teacher of law, are on active duty in the armed forces or employed by state, local or federal government and not otherwise engaged in the private practice of law, you are also exempt from participating in IOLTA.

19. ARE THERE EXEMPTIONS OTHER THAN FOR LAWYERS NOT IN PRIVATE PRACTICE?

Yes. If a lawyer does not maintain a law office in Tennessee, as defined in Rule 43, that lawyer is exempt from the IOLTA provisions. Also, a lawyer may seek an exemption for an existing IOLTA account that "... has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees." (See Rule 43, Section 14d). A lawyer is also exempt following a determination by the TBF that there is no eligible financial institution in geographic proximity to the lawyer's principal office.

20. ARE THERE OTHER REASONS I WOULD NOT NEED AN IOLTA ACCOUNT?

If the nature of your practice is such that you do not hold "IOLTA-eligible" funds of any client or third person, you do not need to establish an IOLTA account. Under the Rules, lawyers who do not hold IOLTA funds are only required to certify that status on the Board of Professional Responsibility annual registration statement.

21. ARE THERE CONSEQUENCES FOR LAWYERS WHO DO NOT MEET THE REQUIREMENTS OF THE NEW MANDATORY IOLTA RULE?

Yes. Compliance will be enforced by the Board of Professional Responsibility. The new Rules have monetary penalties and license suspension provisions similar to those for non-compliance with mandatory Continuing Legal Education (CLE).

WHAT HAPPENS NEXT?

IF YOU:

1. Currently have all client and third party funds handled by you/your law firm placed in IOLTA-participating account(s):

2. Maintain a pooled, non interest-bearing trust account for funds that cannot earn interest for the individual client or third party:

3. Expect to hold IOLTA-eligible funds but do not currently have a trust account:

4. Have questions:

THEN:

A. You have complied with the new Rules. You may discard the enclosed “Notice to Financial Institutions” form.

A. Complete the enclosed “Notice to Financial Institution” form.

B. Take it to your financial institution and have your account converted to an IOLTA account.

C. After the account is converted, send a copy of the completed form to the TBF at the address below.

D. Insure all IOLTA-eligible funds are deposited in your IOLTA account.

A. Complete the enclosed “Notice to Financial Institution” form.

B. Take it to your financial institution and open a new IOLTA account.

C. After the account is opened, send a copy of the completed form to the TBF at the address below.

D. Insure all IOLTA-eligible funds are deposited in your IOLTA account.

A. Contact the TBF at:
618 Church Street, Suite 120
Nashville, TN 37219-2456
615.242.1531/800.634.2516
info@tnbarfoundation.org