M 2008-02603-SC-RL1-RL

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February 6, 2009

Hon. Michael W. Catalano, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Proposed change to RPC 1.15 - IOLTA program

Dear Mr. Catalano:

In late December 2008 the TBA announced a proposed amendment to RPC 1.15 and advised that the deadline to comment on the Rule would be mid February, 2009. The proposed amendment to the Rule would make mandatory a lawyer's participation in the IOLTA program. This letter is a comment in opposition to mandatory participation.

I think mandatory participation is wrong and assumes that all lawyers maintain large trust accounts that would pay hefty interest to programs chosen by the Foundation. We do not, and mandatory participation would be an unnecessary burden on small law firms and lawyers in solo practice in particular. I am opposed to mandatory participation. I note that the volunteer program is quite successful and the Foundation just announced $1.4 million dollars in grant funding to organizations that meet the qualifications, and $15.8 million awarded since the program was begun (tbaLINK).

The proposal is that if all lawyers are mandated to participate under threat of punishment, more funds will become available. Provisions to punish lawyers including the lost of one's law license for mere failure to place client trust funds in an interest-bearing account that pays to others unbeknown to the client or the lawyer is more than merely heavy-handed. It destroys a lawyer's independence to even accept trust funds in the first place and it unduly threatens a lawyer with disbarment for something that

has literally nothing to do with his/her skills, knowledge of law, training, preparation or attention to client responsibilities. It in effect makes the lawyer just another instrument of a government more interested in its own decisions and power than the people it professes to represent.

Trust accounts that serve no purpose more than depositories for fees paid in advance to be earned by the attorney during the course of his/her representation of the client up to an average minimum balance should be exempt. Such a fee depository will change each time a lawyer earns any portion of a fee held in trust for the client, causing the average minimum balance to change frequently even in a month's time. For many, many small firms and solo practictioners, who accept small sums as security for taking some cases, the time to keep up with the accounting, which is not billable to anybody, is not worth it. As a consequence, solo lawyers may just close trust accounts and not accept trust funds of any nature.

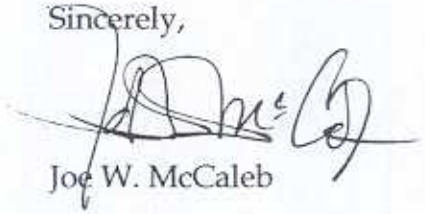
A reasonable average minimum monthly balance at which or below would exempt an attorney or law firm could be reasonably set at $20-25,000.00. That is a responsible rule. In my 37 years of the solo practice of law, I have rarely held more than that sum in my trust account more than a week. The exception would be a property damage or personal injury settlement received from an insurance carrier deposited in trust only until time could lapse for the check to clear and arrangements made to pay the client.

The rule being proposed is not responsible. It does absolutely nothing to advance the lawyers' professional service to his/her clients, in my opinion.

The voluntary, opt-out program has worked well. There are no objections to it except by those who demand more money for special programs. Threatening attorneys with disciplinary actions that would lead to penalties and disbarment because they might choose not to participate in a Bar sponsored program is grossly overbearing and destroys a lawyer's independence. Greed doesn't sit well in any circle even if the money collected is used beneficially for poor or displaced persons.

Mandatory participation should not be imposed on Tennessee attorneys.

Sincerely,



Joe W. McCaleb

217 S. James Campbell Boulevard
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Columbia, TN 38402-1970

Phone 931-388-1970
Fax 931-388-1979
heritagebankandtrust.com

HERITAGE
BANK & TRUST

RECEIVED BY FAX
DATE: 2-20-09

February 20, 2009

VIA FACSIMILE and E MAIL

Tennessee Supreme Court
Supreme Court Building, Room 100
401 Seventh Avenue North
Nashville, TN 37219

Attention: Mr. Michael Catalano, Clerk of Tennessee Supreme Court

RE: PROPOSED AMENDMENT TO RULE 1.15 OF THE RULES OF THE PROFESSIONAL CONDUCT AND SUPREME COURT RULE 43 – RESPECTING THE TENNESSEE INTEREST ON LAWYERS TRUST ACCOUNT (IOLTA) PROGRAM

Dear Justices of the Tennessee Supreme Court:

As a Tennessee State Chartered community bank, I support the goals of the IOLTA program. However, I do not want to see outside groups to direct the bank in setting and establishing interest rates on its accounts. Interest rates should be a function of market forces in my geographic area.

We are in unprecedented times as far as our interest rate environment with the historical low of the Fed Funds rate as established by the Federal Reserve Bank. I caution the Supreme Court to be very thoughtful in making any changes in the rules. As a banker I appreciate clarity in the rules of the Supreme Court of Tennessee and not ambiguity.'

I am totally in support of the Tennessee Bankers Association's proposed amendments to the petitioners recommended rule changes.

I appreciate the opportunity to comment on the proposed rules. If you have any question or would like to discuss this with me you may call me at (931) 388 -1970.

Thank you,

Mark W. Hines

Mark W. Hines
President and CEO

TLAW
TENNESSEE LAWYERS' ASSOCIATION FOR WOMEN

RECEIVED BY FAX
DATE:

February 19, 2009

Mr. Michael Catalano
Clerk
Supreme Court of Tennessee
Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
(615) 741-2681
FAX 615-532-8757

Re: IOLTA Rule Changes

Dear Mr. Catalano:

Please be advised that TLAW supports the proposed rule changes.

With best regards,

Barbara Zoccola

Barbara Zoccola
TLAW President

BZ:ls

P.O. Box 331214 Nashville, TN 37203 Tel: 615-385-5300 Fax: 615-385-5300
Email: tlaw@tlaw.org Web: www.tlaw.org

LEGAL AID OF EAST TENNESSEE

502 S. Gay Street, Suite 404, Knoxville, TN 37902
(865) 637-0484 facsimile (865) 525-1162

Executive Director
David R. Yoder

M 2008- 02603

February 13, 2009

Mike Catalano
The Clerk of the Supreme Court
Supreme Court Building, Room 100
401 Seventh Avenue North
Nashville, TN 37217

Re: Changes to IOLTA Rules
Supreme Court Rule 8, RPC 1.5 and Rule 43

Dear Mr. Catalano:

I am writing on behalf of the East Tennessee Lawyer's Association for Women (ETLAW) to inform you and the Supreme Court that ETLAW has endorsed the proposed changes to Supreme Court Rule 8, RPC 1.5 and Rule 43. The endorsement was by vote of the membership on January 21, 2009.

Please do not hesitate to contact me should you have any questions or require further information.

Sincerely,

Debra L. House
President, ETLAW

IN THE SUPREME COURT OF TENNESSEE

IN RE	PROPOSED AMENDMENT TO RULE 1.15 OF THE RULES OF PROFESSIONAL CONDUCT AND SUPREME COURT RULE 43	)))))	No. M2008-02603 SC-RL1-RL

Comments of the Tennessee Bar Foundation, the Tennessee Bar Association and the Tennessee Alliance for Legal Services to the November 24, 2008 Petition of the Tennessee Bar Foundation, the Tennessee Bar Association, the Tennessee Association for Justice and the Tennessee Alliance For Legal Services for the Approval Of Rules Amendments Enhancing The Interest On Lawyers' Trust Accounts (IOLTA) Program

I. Background

On November 24, 2008 the Tennessee Bar Foundation (the "Bar Foundation"), Tennessee Bar Association ("TBA"), the Tennessee Association For Justice ("TAJ") and the Tennessee Alliance for Legal Services ("TALS") petitioned the Tennessee Supreme Court to amend RPC 1.15 of the Rules of Professional Conduct and this Court's Rule 43 to (1) require that all attorneys who hold eligible client funds participate in the Bar Foundation's Interest On Lawyers' Trust Accounts (IOLTA) program, i.e., to make IOLTA mandatory (joining 38 other states), and (2) require that lawyers maintain their IOLTA accounts at financial institutions which pay IOLTA accounts the highest rate of interest or dividend generally available at an institution to its non-IOLTA customers when IOLTA accounts meet the same minimum balance or other requirements , i.e., interest rate comparability (joining 23 other states).

Since it and the other co-Petitioners filed the Petition on November 24, 2008 seeking amendment to the Court's Rule 43 respecting the administration of Tennessee's IOLTA program, the Bar Foundation has observed the adverse impact on IOLTA programs nationwide of the December 16, 2008 decrease in the Federal Funds Rate adopted by the United States Federal Reserve down to the 0.0% - 0.25% range. (See "Interest Rate Drop Has Dire Results for Legal Aid", *New York Times*, January 19, 2009.)

As a result of these developments, the Bar Foundation, the TBA and TALS offer this comment.

II. Comments of the Bar Foundation, the TBA and TALS

The Bar Foundation, the TBA and TALS propose the following modifications to the version of the amended Rule 43 which they, as Petitioners, originally proposed in their November 24, 2008 Petition.

1. Eliminate a "safe harbor" benchmark rate linked to the Federal Reserve's Federal Funds Rate. The compliance option to implement comparability set forth in our originally proposed Section 3(c) of Rule 43 for a safe harbor rate on IOLTA accounts tied to a percentage of the Federal Funds Rate should be deleted. Instead, the general compliance guidelines (paying an interest rate on IOLTA accounts "equal to the highest yield available" on account products offered by the financial institution to non-IOLTA customers) set forth in the other provisions of Section 3 of Rule 43 should apply without an additional "safe harbor" benchmark tied to the Federal Funds Rate. The recent experience of the 13 state IOLTA programs which have used a "safe harbor" benchmark rate linked to the Federal Funds Rate as an option for comparability

compliance by financial institutions shows that the Federal Funds Rate is no longer a reliable indicator of market rates for comparable non-IOLTA accounts.

2. Allow the Bar Foundation and a Bank to Voluntarily Enter into a Short-Term Agreement Setting a Rate as a Comparability Compliance Option. The Bar Foundation should be authorized, as state IOLTA programs are in at least five comparability states, to enter into individual safe harbor/benchmark agreements with individual banks for periods of up to twelve months. This would be entirely voluntary by any financial institution. It would offer administrative convenience to both the Bar Foundation and willing banks for a reasonable period without locking either into a rate structure indefinitely. The Bar Foundation has been informed by a national IOLTA consultant that such individual agreements have worked well in Texas, New York and other states where its use is permitted by rule or statute.

III. Additional Comments of the Bar Foundation, the TBA and TALS

Representatives of the Bar Foundation have recently engaged in discussions with representatives of the Tennessee Bankers Association. Of the suggestions made by representatives of the Tennessee Bankers Association, the Bar Foundation, the TBA and TALS are agreeable to amended Rule 43 including the following provisions:

(a) providing written notice to a financial institution prior to the Tennessee Bar Foundation making a determination that the financial institution is not an "eligible institution" under Section 1 of Rule 43;

(b) expressly stating that the selection of a financial institution by a lawyer as the depository for the lawyer's IOLTA accounts rests with the individual lawyer; and

(c) granting an exemption for banks with less than 30 IOLTA accounts to any otherwise uniform requirement for electronic reporting of IOLTA account information to the Bar Foundation.

The Bar Foundation, the TBA and TALS respectfully submit that any other substantive modifications to proposed Rule 43 that might be suggested by representatives of financial institutions, however well intended, would be unnecessary and could have a material adverse effect on the operation and success of the IOLTA program in the State of Tennessee.

IV. Conclusion

The Bar Foundation, the TBA and TALS respectfully recommend that the Court adopt proposed Rule 43 in the form attached as Exhibit 1 to this Comment. A blacklined copy showing modifications set forth in this Comment compared to the version originally proposed by the undersigned Petitioners is attached as Exhibit 2.

RESPECTFULLY SUBMITTED,

By: /s/ George T. Lewis by permission

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By: B. Riney Green

B. RINEY GREEN (07047)
Chair-Elect,
Tennessee Bar Foundation
Bass Berry & Sims PLC
315 Deaderick Street
Nashville, TN 37238
(615) 742-7866

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been (will be) served upon the individuals and organizations identified in Exhibit 3 by regular U.S. Mail, postage prepaid on February 23, 2009.

B. Riney Green

EXHIBIT 1

Proposed S. Ct. Rule 43

As modified by this Comment of the Bar Foundation

The TBA and TALS

Submitted February 20, 2009
by the Tennessee Bar Foundation,
the Tennessee Bar Association and
the Tennessee Alliance for Legal Services

Proposed

Supreme Court Rule 43

Interest On Lawyers' Trust Accounts

Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.15, requires that Tennessee lawyers who maintain pooled trust checking accounts for the deposit of client funds participate in the IOLTA (Interest On Lawyers' Trust Accounts) program.

The following rule shall govern the operation of IOLTA accounts and the IOLTA program:

1. The determination of whether or not a financial institution is an eligible institution which meets the requirements of this Rule shall be made by the Tennessee Bar Foundation, the organizational administrator of the IOLTA program. The Foundation shall maintain a list of eligible financial institutions and shall make that list available to Tennessee lawyers. The selection of an institution from the list of those eligible rests with the lawyer or law firm.

2. Eligible institutions are those financial institutions which voluntarily offer IOLTA accounts and comply with the requirements of this Rule, including maintaining IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. To determine the highest interest rate or dividend

generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered when setting interest rates or dividends for customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. Nothing in this Rule shall prohibit an eligible institution from paying an interest rate or dividend higher than required herein.

3. (a) Eligible financial institutions satisfy the requirements of this Rule by paying an interest rate on IOLTA accounts equal to the highest yield available among certain product types (if the product is available from the financial institution to non-IOLTA customers) by either:

(i) Using the identified product as the IOLTA account , or

(ii) Paying the equivalent yield on the existing IOLTA account in lieu of using the highest yield bank product.

(b) The product types that may be used are:

(i) A business checking account with an automated investment feature, such as an overnight investment in repurchase agreements or money market funds fully collateralized by or invested solely in United States government securities which are direct debt obligations of the government of the United States or of agencies or instruments thereof guaranteed by

the full faith and credit of the government of the United States as to the payment of principal and interest at maturity;

(ii) A checking account paying preferred interest rates, such as money market or indexed rates;

(iii) A government interest-bearing checking account such as accounts used for municipal deposits; or

(iv) Any other suitable interest-bearing deposit account offered by the institution to its non-IOLTA customers;

(v) A business demand deposit checking-interest bearing transaction account (when permitted by federal law).

4. As an alternative to the options in Section 3, a financial institution may comply with this Rule if it agrees to pay a rate specified by the Foundation (if the Foundation chooses to specify a rate) which would be in effect for and remain unchanged during a period of up to twelve months as provided pursuant to a voluntary agreement between the financial institution and the Foundation.

5. A daily financial institution repurchase agreement shall be fully collateralized by United States Government 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.

6. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities

and shall 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, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

7. An eligible financial institution participating in the IOLTA program must also:

(a) Remit interest or dividends net of any allowable service charges or fees, preferably monthly, but at least quarterly, to the Tennessee Bar Foundation;

(b) Transmit to the Tennessee Bar Foundation, in a format specified by the Tennessee Bar Foundation, a report which contains:

(i) the name of the lawyer or law firm on whose account the remittance is sent;

(ii) the account number;

(iii) the balance on which the interest rate is applied;

(iv) the rate of interest or dividends applied;

(v) the gross interest or dividends earned;

(vi) the type and amount of any allowable service charges or fees deducted; and

(vii) the net amount remitted.

A financial institution which maintains more than thirty IOLTA accounts, may, at the request of the Tennessee Bar Foundation, be required to transmit the report in an electronic format.

(c) Transmit information to the lawyer or law firm maintaining that account in accordance with the institution's normal procedures for reporting to depositors.

8. No financial institution service charges or fees may be deducted from the principal of any IOLTA account.

9. Deductions by the financial institution from interest earned may only be for allowable reasonable service charges or fees calculated in accordance with the institution's standard practice for non-IOLTA customers. For purposes of this Rule, "allowable reasonable service charges or fees" are defined as:

(a) per check charges;

(b) per deposit charges;

(c) a fee in lieu of minimum balance;

(d) federal deposit insurance fees;

(e) a sweep fee; and

(f) a reasonable IOLTA account administrative fee.

Other financial institution service charges or fees shall not be deducted from IOLTA account interest and shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. Nothing in this Rule shall be construed to require that a

financial institution charge fees on an IOLTA account, nor does anything in this Rule prohibit a financial institution from waiving or discounting fees associated with an IOLTA account.

10. Allowable reasonable service charges or fees in excess of the interest earned on any one IOLTA account may not be deducted from interest earned on any other IOLTA account.

11. If the Tennessee Bar Foundation, for any reason, determines a financial institution does not meet the requirements of this rule, the Tennessee Bar Foundation will notify the financial institution. The financial institution will be provided not less than thirty days to take corrective action that results in compliance with this rule.

12. A lawyer or law firm who objects to a determination of the Tennessee Bar Foundation that a financial institution is not an eligible institution under Section 1 through 10 of this Rule or that the lawyer is not eligible for an exemption under Section 14(e) may appeal such determination to the Board of Professional Responsibility in accordance with regulations adopted by the Board of Professional Responsibility.

13. Interest transmitted shall, after deductions for the necessary and reasonable administrative expenses of the Tennessee Bar Foundation for operation of the IOLTA program, be distributed by that entity, in proportions it deems appropriate, for the following purposes:

(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.

14. Unless exempt under this Section 14, every lawyer admitted to practice in Tennessee shall certify in the lawyer's annual registration statement required by Tennessee Supreme Court Rule 9, Section 20.5, as a condition of licensure, that all funds in the lawyer's possession that are required pursuant to RPC 1.15(b) to be held in an IOLTA account are, in fact, so held and shall list the name(s) of the financial institution(s) and account number(s) where such funds are deposited. This certification shall be made on a form provided by the Board of Professional Responsibility and shall be submitted by the lawyer within the time period set forth in Rule 9, Section 20, for the annual registration statement.

A lawyer licensed in Tennessee is exempt, and shall so certify on the lawyer's annual registration statement, if:

(a) the lawyer is not engaged in the private practice of law in the State of Tennessee;

(b) the lawyer serves as a Judge, Attorney General, Public Defender, U.S. Attorney, District Attorney, corporate counsel, teacher of law, 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;

Responsibility any evidence of the lawyer's noncompliance known by the Tennessee Bar Foundation. Noncompliance with this Rule will result in the following action:

(a) On or before May 15 of each year, the Board of Professional Responsibility shall compile a list of those lawyers who are not in compliance with this Rule. On or before the first business day of May of each year, the Board of Professional Responsibility shall serve each lawyer on the list compiled under this Rule a Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice on or before May 31 of that year. Each lawyer to whom a Notice of Noncompliance is issued shall pay to the Board of Professional Responsibility a Noncompliance Fee of One Hundred Dollars ($100.00). Such Noncompliance Fee shall be paid on or before May 31 of that year, unless the lawyer shows to the satisfaction of the Chief Disciplinary Counsel that the Notice of Noncompliance was erroneously issued, in which case no such fee shall be due.

(b) On or before May 31 of that year, each lawyer on whom a Notice of Noncompliance is served also shall file with the Board of Professional Responsibility an affidavit, in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied. In the event a lawyer fails to timely remedy any such deficiency or fails to timely file such affidavit, the lawyer shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee, a Delinquent Compliance Fee of Two Hundred Dollars ($200.00).

(c) the lawyer does not have an office in Tennessee; however, for purposes of this Rule, a lawyer who practices, as a principal, employee, of counsel, or in any other capacity, with a firm that has an office in Tennessee shall be deemed for purposes of this Rule to have an office in Tennessee if the lawyer utilizes one or more offices of the firm located in Tennessee more than the lawyer utilizes one or more offices of the firm located in any other single state;

(d) under regulations adopted by the Board of Professional Responsibility under criteria established upon recommendation of the Tennessee Bar Foundation, the lawyer or law firm is exempted from maintaining an IOLTA account because such an IOLTA account has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees; or

(e) the lawyer is exempted by the Tennessee Bar Foundation from the application of this Rule following a written request for exemption by the lawyer and determination by the Tennessee Bar Foundation that no eligible financial institution (as defined and determined in accordance with this Rule 43) is located within reasonable proximity of that lawyer.

15. Upon its receipt of a lawyer's certification under Section 14 of this Rule, the Tennessee Bar Foundation shall, on or before March 31 of each year, report to the Board of Professional

(c) On or before June 30 of each year, the Board of Professional Responsibility shall: (i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance and who failed to remedy their deficiencies by May 31; (ii) submit the proposed Suspension Order to the Supreme Court; and (iii) serve a copy of the proposed Suspension Order on each lawyer named in the Order. The Supreme Court will review the proposed Suspension Order and enter such order as the Court may deem appropriate suspending the law license of each lawyer deemed by the Court to be not in compliance with the requirements of this Rule.

(d) Each lawyer named in the Suspension Order entered by the Court shall file with the Board of Professional Responsibility an affidavit in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied and shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee and the Delinquent Compliance Fee, a Five Hundred Dollar ($500.00) Suspension Fee as a condition of reactivation of his or her law license. Payment of all fees imposed by this section shall be a requirement for compliance with this Rule and for reactivation of a license. The Board of Professional Responsibility shall not reactivate the license of any lawyer whose license is suspended pursuant to this Rule until the Chief Disciplinary Counsel certifies compliance with the requirements of this Rule.

(e) All notices required or permitted to be served on a lawyer under the provisions of this Rule shall be served by United States Postal Service Certified Mail, return receipt requested, at the address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9, Section 20.5, and shall be deemed to have been served as of the postmark date shown on the Certified Mail Receipt.

16. The Board of Professional Responsibility, acting in concert with the Tennessee Bar Foundation, may promulgate such forms and procedures to implement Sections 14 and 15 of this Rule and of Supreme Court Rule 8, RPC 1.15.

17. The information contained in the statements forwarded to the Tennessee Bar Foundation under Section 14 and/or Section 15 of this Rule shall remain confidential other than as to Tennessee Supreme Court or the Board of Professional Responsibility. The Tennessee Bar Foundation shall not release any information contained in such statements other than as a compilation of data from such statements, except as directed in writing by the Tennessee Supreme Court or the Board of Professional Responsibility or in response to a subpoena.

18. Transition Provisions. For the purpose of adopting regulations consistent with this Rule and educating the bar and financial institutions regarding the new requirements, the provisions of Rule 43 authorizing regulations and approval shall take effect upon entry of order adopting the Rule by the Tennessee Supreme Court.

For the purposes of certification on annual registrations by lawyers required in Tennessee Supreme Court Rule 43 and the provisions of Tennessee Supreme Court Rule 8, RPC 1.15 requiring deposit in IOLTA accounts, these amendments shall take effect on January 1, 2010.

7282597.6

EXHIBIT 2

Blacklined Comparison of Proposed Rule 43 (revised by This Comment) to the Version Originally Proposed in the November 24, 2008 Petition

Submitted February 20, 2009
by the Tennessee Bar Foundation,
the Tennessee Bar Association and
the Tennessee Alliance for Legal Services
Blacklined to show changes to
November 24, 2008 Proposal

Proposed

Supreme Court Rule 43

Interest On Lawyers' Trust Accounts

Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.15, requires that Tennessee lawyers who maintain pooled trust checking accounts for the deposit of client funds participate in the IOLTA (Interest On Lawyers' Trust Accounts) program.

The following rule shall govern the operation of IOLTA accounts and the IOLTA program:

1. The determination of whether or not a financial institution is an eligible institution which meets the requirements of this Rule shall be made by the Tennessee Bar Foundation, the organizational administrator of the IOLTA program. The Foundation shall maintain a list of eligible financial institutions and shall make that list available to Tennessee lawyers. The selection of an institution from the list of those eligible rests with the lawyer or law firm.

2. Eligible institutions are those financial institutions which voluntarily offer IOLTA accounts and comply with the requirements of this Rule, including maintaining IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA

account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. To determine the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered when setting interest rates or dividends for customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. Nothing in this Rule shall prohibit an eligible institution from paying an interest rate or dividend higher than required herein.

3. ~~An eligible~~ (a) Eligible financial ~~institution may~~institutions satisfy the requirements of this Rule by ~~electing one of the following options~~paying an interest rate on IOLTA accounts equal to the highest yield available among certain product types (if the product is available from the financial institution to non-IOLTA customers) by either:

~~a. Establish qualifying IOLTA accounts as the comparable interest rate or dividend-paying product; or~~

(i) Using the identified product as the IOLTA account , or

~~b. Pay the comparable interest rate or dividend on the qualifying IOLTA account in lieu of actually establishing the comparable interest rate or dividend-paying product; or~~(ii) Paying the equivalent yield on the existing IOLTA account in lieu of using the highest yield bank product.

~~e. Pay an amount on funds that would otherwise qualify for the investment options described in Section 4 of this Rule equal to X% of the Federal Funds Target Rate as of the first business day of the month or other IOLTA remitting period, which is deemed to be already net of allowable service charges or fees. This benchmark yield rate may be adjusted once per year by the Foundation, upon 90 days written notice to financial institutions participating in the IOLTA program.~~

~~4. IOLTA accounts may be established as:~~

(b) The product types that may be used are:

~~a.~~ (i) A business checking account with an automated investment feature, such as an overnight investment in repurchase agreements or money market funds fully collateralized by or invested solely in United States government securities which are direct debt obligations of the government of the United States ~~of America~~ or of agencies or instruments thereof guaranteed by the full faith and credit of the government of the United States ~~of America~~ as to the payment of principal and interest at maturity;

~~b.~~ (ii) A checking account paying preferred interest rates, such as money market or indexed rates;

~~c.~~ (iii) A government interest-bearing checking account such as accounts used for municipal deposits; or

(iv) ~~d.~~ Any other suitable interest-bearing deposit account offered by the institution to its non-IOLTA customers;

(v) A business demand deposit checking-interest bearing transaction account (when permitted by federal law).

4. As an alternative to the options in Section 3, a financial institution may comply with this Rule if it agrees to pay a rate specified by the Foundation (if the Foundation chooses to specify a rate) which would be in effect for and remain unchanged during a period of up to twelve months as provided pursuant to a voluntary agreement between the financial institution and the Foundation.

5. A daily financial institution repurchase agreement shall be fully collateralized by United States Government 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.

6. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities and shall 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, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

7. An eligible financial institution participating in the IOLTA program must also:

(a.) Remit interest or dividends net of any allowable service charges or fees, preferably monthly, but at least quarterly, to the Tennessee Bar Foundation;

(b.) Transmit to the Tennessee Bar Foundation, in a format specified by the Tennessee Bar Foundation, a report which contains:

(i) the name of the lawyer or law firm on whose account the remittance is sent;

(ii) the account number;

(iii) the balance on which the interest rate is applied;

(iv) the rate of interest or dividends applied;

(v) the gross interest or dividends earned;

(vi) the type and amount of any allowable service charges or fees deducted; and

(vii) the net amount remitted.

~~e~~A financial institution which maintains more than thirty IOLTA accounts, may, at the request of the Tennessee Bar Foundation, be required to transmit the report in an electronic format.

(c) Transmit information to the lawyer or law firm maintaining that account in accordance with the institution's normal procedures for reporting to depositors.

8. No financial institution service charges or fees may be deducted from the principal of any IOLTA account.

9. Deductions by the financial institution from interest earned may only be for allowable reasonable service charges or fees calculated in accordance with the institution's standard practice for non-IOLTA customers. For purposes of this Rule, "allowable reasonable service charges or fees" are defined as:

(a) per check charges;

(b) per deposit charges;

(c) a fee in lieu of minimum balance;

(d) federal deposit insurance fees;

(e) a sweep fee; and

(f) a reasonable IOLTA account administrative fee.

Other financial institution service charges or fees shall not be deducted from IOLTA account interest and shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. Nothing in this Rule shall be construed to require that a financial institution charge fees on an IOLTA account, nor does anything in this Rule prohibit a financial institution from waiving or discounting fees associated with an IOLTA account.

10. Allowable reasonable service charges or fees in excess of the interest earned on any one IOLTA account may not be deducted from interest earned on any other IOLTA account.

11. If the Tennessee Bar Foundation, for any reason, determines a financial institution does not meet the requirements of this rule, the Tennessee Bar Foundation will notify the financial institution. The financial institution will be provided not less than thirty days to take corrective action that results in compliance with this rule.

12. A lawyer or law firm who objects to a ~~decision~~determination of the Tennessee Bar Foundation ~~with respect to whether~~that a financial institution is not an eligible institution under Section 1

through 10 of this Rule or ~~whether~~that the lawyer is not eligible for an exemption under Section ~~13~~14(e) may appeal such ~~decision~~determination to the Board of Professional Responsibility in accordance with regulations adopted by the Board of Professional Responsibility.

~~12.~~ 13. Interest transmitted shall, after deductions for the necessary and reasonable administrative expenses of the Tennessee Bar Foundation for operation of the IOLTA program, be distributed by that entity, in proportions it deems appropriate, for the following purposes:

(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.

~~13.~~ 14. Unless exempt under this Section ~~13~~,14, every lawyer admitted to practice in Tennessee shall certify in the lawyer's annual registration statement required by Tennessee Supreme Court Rule 9, Section 20.5, as a condition of licensure, that all funds in the lawyer's possession that are required pursuant to RPC 1.15(b) to be held in an IOLTA account are, in fact, so held and shall list the name(s) of the financial institution(s) and account number(s) where such funds are deposited. This certification shall be made on a form provided by the Board of Professional Responsibility and

shall be submitted by the lawyer within the time period set forth in Rule 9, Section 20, for the annual registration statement.

A lawyer licensed in Tennessee is exempt, and shall so certify on the lawyer's annual registration statement, if:

(a) the lawyer is not engaged in the private practice of law in the State of Tennessee;

(b) the lawyer serves as a Judge, Attorney General, Public Defender, U.S. Attorney, District Attorney, corporate counsel, teacher of law, 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;

(c) the lawyer does not have an office in Tennessee; however, for purposes of this Rule, a lawyer who practices, as a principal, employee, of counsel, or in any other capacity, with a firm that has an office in Tennessee shall be deemed for purposes of this Rule to have an office in Tennessee if the lawyer utilizes one or more offices of the firm located in Tennessee more than the lawyer utilizes one or more offices of the firm located in any other single state;

(d) under regulations adopted by the Board of Professional Responsibility under criteria established upon recommendation of the Tennessee Bar Foundation, the lawyer or law firm is exempted from maintaining an IOLTA account because such an IOLTA account has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees; or

(e) the lawyer is exempted by the Tennessee Bar Foundation from the application of this Rule following a written request for exemption by the lawyer and determination by the Tennessee Bar Foundation that no eligible financial institution (as defined and determined in accordance with this Rule 43) is located within reasonable proximity of that lawyer.

~~14.~~ 15. Upon its receipt of a lawyer's certification under Section ~~13~~14 of this Rule, the Tennessee Bar Foundation shall, on or before March 31 of each year, report to the Board of Professional Responsibility any evidence of the lawyer's noncompliance known by the Tennessee Bar Foundation. Noncompliance with this Rule will result in the following action:

(a) On or before May 15 of each year, the Board of Professional Responsibility shall compile a list of those lawyers who are not in compliance with this Rule. On or before the first business day of May of each year, the Board of Professional Responsibility shall serve each lawyer on the list compiled under this Rule a Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice on or before May 31 of that year. Each lawyer to whom a Notice of Noncompliance is issued shall pay to the Board of Professional Responsibility a Noncompliance Fee of One Hundred Dollars ($100.00). Such Noncompliance Fee shall be paid on or before May 31 of that year, unless the lawyer shows to the satisfaction of the Chief Disciplinary Counsel that the Notice of Noncompliance was erroneously issued, in which case no such fee shall be due.

(b) On or before May 31 of that year, each lawyer on whom a Notice of Noncompliance is served also shall file with the Board of Professional Responsibility an affidavit, in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied. In the event a lawyer fails to timely remedy any such deficiency or fails to timely file such affidavit, the lawyer shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee, a Delinquent Compliance Fee of Two Hundred Dollars ($200.00).

(c) On or before June 30 of each year, the Board of Professional Responsibility shall: (i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance and who failed to remedy their deficiencies by May 31; (ii) submit the proposed Suspension Order to the Supreme Court; and (iii) serve a copy of the proposed Suspension Order on each lawyer named in the Order. The Supreme Court will review the proposed Suspension Order and enter such order as the Court may deem appropriate suspending the law license of each lawyer deemed by the Court to be not in compliance with the requirements of this Rule.

(d) Each lawyer named in the Suspension Order entered by the Court shall file with the Board of Professional Responsibility an affidavit in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied and shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee and the Delinquent Compliance Fee, a Five Hundred Dollar ($500.00) Suspension Fee as a condition of reactivation of his or her law license. Payment of all fees imposed by this section shall be a requirement for compliance with this Rule and for reactivation of a license. The Board of Professional

Responsibility shall not reactivate the license of any lawyer whose license is suspended pursuant to this Rule until the Chief Disciplinary Counsel certifies compliance with the requirements of this Rule.

(e) All notices required or permitted to be served on a lawyer under the provisions of this Rule shall be served by United States Postal Service Certified Mail, return receipt requested, at the address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9, Section 20.5, and shall be deemed to have been served as of the postmark date shown on the Certified Mail Receipt.

~~15.~~ 16. The Board of Professional Responsibility, acting in concert with the Tennessee Bar Foundation, may promulgate such forms and procedures to implement Sections ~~13~~14 and ~~14~~15 of this Rule and of Supreme Court Rule 8, RPC 1.15.

~~16.~~ 17. The information contained in the statements forwarded to the Tennessee Bar Foundation under Section ~~13~~14 and/or Section ~~14~~15 of this Rule shall remain confidential other than as to Tennessee Supreme Court or the Board of Professional Responsibility. The Tennessee Bar Foundation shall not release any information contained in such statements other than as a compilation of data from such statements, except as directed in writing by the Tennessee Supreme Court or the Board of Professional Responsibility or in response to a subpoena.

~~17.~~ 18. Transition Provisions. For the purpose of adopting regulations consistent with this Rule and educating the bar and financial institutions regarding the new requirements, the provisions of Rule

43 authorizing regulations and approval shall take effect upon entry of order adopting the Rule by the Tennessee Supreme Court.

For the purposes of certification on annual registrations by lawyers required in Tennessee Supreme Court Rule 43 and the provisions of Tennessee Supreme Court Rule 8, RPC 1.15 requiring deposit in IOLTA accounts, these amendments shall take effect on January 1, 2010.

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February 20, 2009

FEB 23 2009

Honorable Mike Catalono
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Rules of Professional Conduct 1.15 and Supreme Court Rule 43

Dear Mr. Catalono:

I wanted to take this opportunity to express my strong support for the initiative of the Tennessee Bar Foundation supported by the Tennessee Bar Association, the Tennessee Association for Justice, and the Tennessee Alliance for Legal Services reflected in their Petition to the Supreme Court to amend Rule of Professional Conduct 1.15 and Supreme Court Rule 43.

As you are aware, there are thirty-eight (38) other States which now require all lawyers who maintained pooled client trust accounts for funds which are modest in amount and are kept for a short duration to participate in that State's IOLTA Program. In addition, there are twenty-three (23) States which currently require lawyers to maintain any IOLTA Account at banks which pay the same rate of interest on IOLTA Accounts as the bank generally pays its non IOLTA customers.

As a past Chair of the Board of Trustees of the Tennessee Bar Foundation, I have personal experience concerning discussions with representatives of banks in Tennessee who administer IOLTA Accounts who have offered a number of reasons why they cannot provide "comparability." I also have experienced the significant reduction in benefits received through the IOLTA Program during the low market return years of the late 90's and early 2000s.

These low market return years were damaging and in some instances devastating to the beneficiaries of IOLTA funds.

The IOLTA Program has proven its effectiveness over its lifetime, having administered and awarded more than 15 Million Dollars in Grants to Civil Legal Aid Providers, Bar Association and Pro Bono Projects, and other Organizations that seek to improve the administration of justice, including local CASA Programs. With these changes requested by the Foundation, the IOLTA Program and the Bar Foundation's administration of that Program will be permitted to continue to provide those benefits and services so needed by Tennesseans, particularly in these times of economic concern.

Please express my thoughts and opinions to the Members of the Court.

Very truly yours,

HARWELL, PLANT & WILLIAMS

Paul B. Plant

kld

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February 20, 2009

Honorable Mike Catalano
Clerk of the Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219

In Re: Petition to Amend Rule 8 RPC 1.15
And Rule 43 Rules of Tennessee Supreme Court - IOLTA

Dear Honorable Catalano,

I have just received through the mail my advance sheet dated February 3 but received on February 19 from West Publishing Company. I don't know why there was a delay on this particular advance sheet but in any event I just received same. I have reviewed with interest and some agitation the proposal submitted by lawyers on behalf of the various professional organizations of the State of Tennessee concerning mandatory IOLTA. As a small practitioner and an attorney that has been practicing continuously since 1974 I have very specific feelings concerning this which I would appreciate the Supreme Court consider before they take this matter under advisement for entry of such an Order making it mandatory for all lawyers to participate.

As can be noted by my low Board number of 596, which several years ago had three zeros placed in front of same to get to a six digit number, I've been practicing law a long time. I have engaged in small office practice with as many as four lawyers but have, for the past ten years or so, engaged in solo practice of law. I have always practiced in the Knoxville area. I fancy myself to basically take cases in Civil Trial Court on behalf of Plaintiffs or individual Defendants. A substantial portion of the practice now days is domestic and to a much lesser extent some personal injury in the low to medium five figure range. Seldom am I involved in anything that would generate significant revenue in the Trust Account for more than a day or two. I have each year written my letter to the Tennessee Supreme Court Chief Justice then in office opting out of IOLTA. I have a number of reasons for doing so. Candidly some of those reasons are still held as a personal belief of my rights as an individual practitioner of the practice of law in spite of the U. S. Supreme Court's ruling mentioned throughout the Petition and the explanation thereof.

I note with interest the names of the various lawyers, some of whom I know well and some I only know by reputation. Some, candidly, I don't know. It appears that most of them have a couple of things in common that evidence's a status in the community that I, as a solo practitioner, will never share. Many are lawyers who

routinely practice in large practices or practices which represent large corporate, insurance, or other similar wealthy clientele. That's not the style of practice that I and many other lawyers like me maintain. It is, however, a style of practice that almost requires the office in which they work to hire bookkeepers or other personnel to keep up with their Trust accounting and for which they expend a fair amount of money. On the other hand, at my office, I do it all myself. Only I sign the Trust account checks. Only I have the authority to handle the client's funds from the time they come in in the envelope or otherwise paid to me as a retainer or for other similar reasons. Only I deposit those funds. This is in spite of the fact that for the last three years my secretary and sole employee has been my Wife of many years. I view it as my personal obligation not to delegate the responsibility of handling my client's money. I know that flies in the face of large office practice particularly where there are bonded bookkeepers taking care of the money and so forth. Nonetheless I and many small practitioners just like me do not choose to spend Thirty or Forty Thousand Dollars a year to hire somebody else to handle money that I am personally responsible for to my client.

Based on the foregoing, it is clear why it's not much trouble for the types of lawyers who have signed this Petition to take the position that all lawyers "must be made" to engage in IOLTA whether they have theoretical, practical, or even personal belief ideology that is different from that expressed by IOLTA. I understand that they would maintain that there is not any more bookkeeping involved with mandatory IOLTA than there is with my own Trust account. I would, however, beg to differ with them on a number of bases, most particularly being that very few, if any, of those lawyers actually handle the account themselves and are the only person in their firm to sign checks on the account.

I seldom have very much in my Trust account at all. I do maintain a small balance in the Trust account for the specific purpose of paying any bank fees but I try to comply as best I can with the dictates of the Board and the Rules of Professional Conduct which maintain that my money should not be in the account except for that purpose. I likewise try to adhere that anytime I receive a check that includes any client money, it first goes into the Trust account and the client money is attributed to paying fees, Court costs, expenses or whatever and then, and only then, does my own portion of that check get remitted back to me. As a small office practitioner I might have at a given busy time a hundred and fifty active litigations in some stage or other. More often, just as at the present, that number is around sixty active litigations. After practicing law for darn near Thirty-five years, I don't intend to work as hard in future as I have in the past particularly now that all the kids have graduated from college and I no longer have significant financial commitments that have to be made on a monthly basis. On the other hand, adding a new employee to do this for me would not only relinquish control but would, in fact, cut into my own after tax income to the extent of approximately forty or fifty percent. Unlike many lawyers, including those lawyers I know who have signed this Petition, I don't make Two Hundred to Three Hundred Thousand a year and have all my insurance and other aspects paid along with a pension fund. I am, like many lawyers in similar practice, simply making the funds

necessary and proper to represent people who are poor and who otherwise don't have access to the big named law firms and the big named lawyers with huge annual income but who, nonetheless need help. Approximately twenty percent of my practice, one way or the other, involves some pro bono work. Virtually every divorce client pays a good deal less than the multiple of the hours times my hourly fee rate when the case is over and done. I like to pick my charities and there are many others like me whether they are willing to say so or not. I don't need IOLTA to do it for me.

Not only would IOLTA receive very little revenue from my Trust account but the added expense in time and energy for me to monitor this even further and to move my account from where it has been since October of 1974 is a gross imposition of Governmental authority upon my personal life. It is also an unnecessary intervention.

I don't have any objection whatsoever to IOLTA for any and every lawyer who wishes to be involved. I do have some objection to where they spend their money but that's my objection and my right under Tennessee and Federal Constitutions to feel that way. It is, regardless of the U. S. Supreme Court's rulings, an imposition on me to force me to support things through IOLTA that I would not otherwise support. I understand the concept of the greater good. I understand more than most I see in our practice now days, the obligation as a professional to give back to society generally for the blessings that we have had by virtue of our allowance of the practice of law. I wanted to be a lawyer from the time I was ten years old and I have been privileged to represent many people over many years in the Courts of our State. I view it as a privilege and not a right. But I do view the handling of my time, the money of my clients who mostly see things the way I do, and the over reach of government generally into funds which I control on behalf of my client to be an imposition.

I mentioned above that I have had the same bank account which started out as Hamilton National Bank and is now First Tennessee Bank with the intervening U.A.B. in between. I maintain the same bank account that I started shortly after being licensed to practice law in October of 1974. I've never violated any law with regard to banking or any rule or regulation with regard to the Board, even before the Board made it illegal to write a bad check on a Trust account. I think it ought to be illegal for a lawyer to write a bad check on any account. That's a personal opinion. I do not want to change my banking relationship either in the fact of the account number itself or the banking relationship itself. It means something to me and assists me in my time when I walk into the bank and they recognize the very old account number and the continuous activity in that account without any bank service charges for misconduct of any kind.

An IOLTA account according to the officers at First Tennessee that I deal with would require a change in that banking status assuming I stayed with First Tennessee. That includes buying new checks, which is not all that expensive but is an expense, and includes a new and different way of having to account for moneys along with someone else looking over my shoulder just to take the pittance of interest that might be earned in two or three days handling of the account. More importantly it's more invasive than is otherwise necessary. I have never had a dispute with a client about money that I held of the client nor do I expect to ever have such a dispute. I have, from time to time, had

disputes concerning fees with clients and I have followed the Rules of Professional Conduct in handling those disputes. It seems to me that we ought to be focusing on those lawyers that don't do what's right and not forcing something down the throat of one who does.

There are many other things that I could say without being repetitive and which I think are important. The biggest problem here from my perspective and those lawyers that think like me is one of freedom of choice for ourselves and our clients. I have read through the proposal. I understand the good that IOLTA does. As a lawyer who devotes a good deal of my time toward pro bono or low fee representation of poor people, I think I understand as well as, if not better, than some of the lawyers that signed this Petition how the real world really thinks about us lawyers generally and what they think about us taking money that would otherwise belong to them and dedicating it to our usages rather than theirs. From time to time, I have had money that I have held for a period of time on behalf of a client either with regard to a dispute with an insurance company about repayment or some similar sort of transaction where I was protecting the res while the dispute was resolved. Where litigation had ensued, it has always been my practice to pay the money directly into the Court immediately. I note with interest that no Court Clerk is required to involve themselves in IOLTA although the large majority of them are lawyers. I am not suggesting that they be forced to do that either. It's just noting that where people who have substantial interest are involved and have the bookkeepers to keep up with it, we are not taking that money away from them. No, instead, we take the money away from poor people that I represent. Where there is going to be any interest of any appreciable value, I get that money into an interest bearing account and hold that money for the client remitting all of the revenue from the account to them.

I have never asked a client to pay any Trust account expenses. My relationship with First Tennessee has been such that for more than Thirty years of the Thirty-five years I have practiced, I have paid no on going bank service charges whatsoever on the money. I have, of course, bought checks when necessary out of my own pocket and where I needed to wire transfer money to someone or make some other extraordinary expenditure for my practice, I have paid those expenses myself. I see no reason for me to be forced to change the activity in the twilight days of my practice of law at this point in my life. Finally, I certain recognize that the Tennessee Supreme Court will be more than reasonably inclined to enforce this law. I would ask that the Court consider an opt procedure for lawyers such as myself in the small office practice and where candidly the on going accounting is a good deal more involved than the account methods for the money. If I settle a personal injury case with a front line insurance company that is well known, after my clients sign the check, I deposit the money into First Tennessee Bank. The next business day after the deposit is recorded, the funds are available to me based upon my own line of credit with the bank should the check turn out to be inappropriate. This serves to get the money into my client's hands immediately. It serves to render the on going interest that that money would generate in IOLTA to pennies.

Surely the Court can fashion an Order that for small solo practitioners such as

myself that IOLTA not be a requirement of life particularly when we seldom handle very much money for very long. I understand why law firms with Three or Four hundred lawyers or even with Thirty or Forty lawyers would have a great deal of money even considering the float time which could generate revenue for IOLTA. I do not understand a requirement that I change what has worked for me for Thirty-five years without a mistake into some new and different program requiring other expenditure of money, requiring bank service charges on my account for the first time in Thirty years, and requiring additional quantities of my time at a time when I am trying to cut back on my practice of law. I do not have the revenue to hire someone to deal with this even on a part time basis. I will not allow someone else to sign for money that I personally am responsible for to a client. It seems that there could be some Order fashioned that would take care of lawyers such as I and I would urge the Tennessee Supreme Court, before implementing this mandatory rule for everyone, to at least try and do that for us. I do not want to be in violation of any law and will comply with whatever dictates the Supreme Court demands. That is obvious and goes without saying. On the other hand, I don't need their help and you are not going to get any money to speak of out of my Trust account in any event. I see service fees that I will have to pay out of my own pocket just for the privilege of giving money to charities that the folks that run this think are good but that I might strenuously disagree based upon my own practice of law for low these many years.

I know that I am just a small fish in the sea and I doubt that you will hear from many lawyers of my style of practice and length of service. On the other hand, I want to be counted as one that would urge the Tennessee Supreme Court not to adopt a mandatory, one size fits all for those of us who don't fit in that category, don't have the revenue to make a difference, don't have clients that desire that their money (after all it is their money) be given to other charities and to get that Ordered after being sought by lawyers that have absolutely nothing in common with me in the style of their practice versus mine. So often we, those lawyers that deal with the poor regularly, are forgotten about unless we work for Legal Aid. Even they have government paid insurance and things of that nature that I must provide for myself. They have secretaries paid for on the government dole one way or the other that I provide for myself. Yet I do a fair amount of pro bono work regularly and have regularly for many years. The difference is I get my pro bono cases from the Church I go to or other pastors that I know in the community I have resided in for over Thirty years, from clients who have friends that are disadvantaged, or from other people that I know in the community who have already considered the potential candidate and can vouch for their worthiness not only of free or reduced rate legal services but also the worthiness of their case. Hopefully some accommodation can be made for those like me.

Thank you for considering my input such as it is. With kindest personal regards, I remain

Yours very truly,

J. Terry Holland

JTH/lmh IOLTA Petition

Knoxville Bar Association

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February 20, 2009

VIA FACSIMILE & U.S. MAIL

Mr. Michael W. Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Amended Rule 1.5 of the Rules of Professional Conduct and Supreme Court Rule 43

Dear Mr. Catalano:

Pursuant to the Tennessee Supreme Court's Order soliciting comments on the Proposed Amended Rule 1.5, the Knoxville Bar Association submitted the Proposed Amended Rule to its Professionalism Committee for review. I have attached a copy of the Committee's comments which were presented to the KBA Board of Governors at its meeting on February 18, 2009.

The Knoxville Bar Association respectfully submits the foregoing comments for the Court's further consideration. As always, we appreciate the opportunity to comment on proposed rules promulgated by the Tennessee Supreme Court.

With kind regards,

Sincerely yours,

Thomas R. Ramsey III
President
Knoxville Bar Association

cc: KBA Executive Committee
Melinda Meador, Co-Chair, KBA Professionalism Committee
Hon. John Weaver, Co-Chair, KBA Professionalism Committee
Timothy C. Houser, Board Liaison, KBA Professionalism Committee

MEMORANDUM

TO: Knoxville Bar Association Board of Governors

FROM: Melinda Meador, Co-Chair, KBA Professionalism Committee

DATE: February 20, 2009

RE: Comments on Proposed Petition to Amend the IOLTA Program

At the request of the Board of Governors, the Professionalism Committee met recently to consider the Proposed Amendment to Rule 1.5 of the Rules of Professional Conduct and Supreme Court Rule 43. While the members present at the meeting were in unanimous agreement that the IOLTA Program should be mandatory subject to the exceptions carved out in proposed Rule 43 at ¶ 13, several concerns were expressed regarding the comparability requirement which would require lawyers to maintain their IOLTA accounts at financial institutions that pay rates of interest on IOLTA accounts that are not less than the rates the institutions pay on their equivalent non-IOLTA accounts.

The primary concern raised by several members is that the requirement might force a lawyer to move his or her bank accounts from a non-compliant financial institution to a new financial institution with whom the lawyer had no established relationship. In general, most committee members assume that once the requirements are implemented, the financial institutions will want to comply in order to retain law firm business. The committee view, however, is that the comment period should be extended so that this issue, and others, can be fully vetted. The committee believes it may also be advisable to follow the path many other

states have taken when adopting the changes by first instituting mandatory IOLTA accounts, and, following an adjustment period, adopting the comparability requirements.

I am available to answer any further questions the Board may have.

cc: Chancellor John Weaver, Professionalism Committee Co-Chair
Marsha Wilson, KBA Executive Director

IN THE SUPREME COURT OF TENNESSEE

IN RE	PROPOSED AMENDMENT TO RULE 1.15 OF THE RULES OF PROFESSIONAL CONDUCT AND SUPREME COURT RULE 43	) No. _____))) ORAL ARGUMENT REQUESTED

COMMENT AND PETITION TO AMEND OF THE TENNESSEE BANKERS ASSOCIATION FOR THE APPROVAL OF RULES AMENDEMENTS ENHANCING THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA) PROGRAM

The Tennessee Bankers Association ("TBA") appreciates the opportunity to comment on the petition filed in this matter. The comment of TBA is limited to Proposed Court Rule 43 regarding the requirement that financial institutions pay IOLTA accounts the highest rate of interest or dividend generally available at an institution to its non-IOLTA customers when IOLTA accounts meet the same minimum balance or other requirements. ("interest rate comparability"). TBA does not object to the adoption of Rule 1.15 requiring all lawyers to participate in the IOLTA program.

The TBA is a trade association that was established in 1890 to serve Tennessee's banks and thrift institutions. All 235 commercial banks and savings associations in Tennessee are members, together with over one hundred associate members, including out-of-state banks and thrifts, and commercial firms that market products or services to the members of the TBA. The TBA provides training and continuing education to its members concerning commercial and consumer lending and operates four banking schools that train bankers throughout the southeast United States. It publishes *The Tennessee Banker,* a monthly magazine covering current issues in the banking industry. The TBA also develops and monitors state and federal legislative agendas; informs

members of recent legal developments in the area of banking law; and provides lobbying services at the state level.

SUMMARY

The TBA and its members support the concept of the IOLTA program and its mission to "raise funds to be distributed, in the form of grants, to organizations in Tennessee that provide direct legal services to the indigent, to organizations that seek to improve the administration of justice and to students, in the form of scholarships, at the state-supported law schools." At present, approximately 167 banks participate in the program. With mandatory lawyer participation, more banks are also likely to participate. Since the program's inception, TBA member banks have been supportive of IOLTA and cooperative participants in the creation and maintenance of IOLTA accounts across the state. As part of this cooperative participation, the TBA is confident that banks have been and will continue to treat IOLTA accounts and non-IOLTA accounts in a comparable manner with regard to interest rates. Despite general support for the IOLTA program, the proposed amendment to Supreme Court Rule 43, as drafted, contains both substantive and technical issues that need to be revised and/or clarified.

As a basis for the amendment to Rule 43, the Petitioners highlight the decline in revenue to the IOLTA program over the past twelve months, noting "from a monthly average of $203,012 during the third quarter of 2007, IOLTA revenue in Tennessee dropped 45% to a monthly average of $111,057.33 during the third quarter of 2008."[1] This is a dramatic change in remittals; however, this decline is reflective of the same type of activity that is being experienced throughout the economy and by bank depositors in general. During the time period referenced, the federal funds

[1] Petition of the Tennessee Bar Foundation, the Tennessee Bar Association, the Tennessee Association for Justice and the Tennessee Alliance for Legal Services dated November 24, 2008.

target rate declined, based on an average of third quarter rates, from 5.08 to 2.0, a decline of more than 61%.[2] The current Fed Funds target rate is 0-.25%.[3] The rates of interest paid by banks on all types of deposits have declined as the target rate has declined, as have the rates charged by banks for loans. Thus, the banks' income from loans has dropped as well as the amount they pay depositors has decreased.

Other states' adoption of mandatory participation and comparability standards has varied both in time and approach. Thus, no conclusion should be drawn that these factors would have a similar impact in Tennessee. The addition of an estimated 1,000 – 2,000 lawyer participants[4] in the program could, by itself, produce the desired result of increasing the availability of funding to the IOLTA program. There has been no factual showing that Tennessee banks pay lower interest rates on IOLTA accounts than they pay to customers with non-IOLTA accounts. Accordingly, there is no factual basis in the record for the "interest rate compatibility" change sought by Petitioner.

In the event, however, that the Court should deem it appropriate, even with an extended implementation date, to adopt a revised comparability standard, the proposed rule, as drafted, needs significant clarification. As proposed, the rule would be better named a "Preferred Depositor Standard" rather than an "interest rate comparability standard." The rule fails to make a significant distinction between types of accounts that are available to a particular depositor and which carry certain rates and other features, from other types of accounts applicable to depositors operating with

[2] FRB: Monetary Policy, Open Market Operations, http://www.federalreserve.gov/fomc/fundsrate.htm (2/4/09).
[3] FRB: Monetary Policy, Open Market Operations, http://www.federalreserve.gov/fomc/fundsrate.htm (2/4/09).
[4] Estimate obtained from the Tennessee Bar Foundation.

different goals or under different conditions. It further fails to use bank regulatory structure or language causing additional confusion among bankers.[5] Refer to Proposed 43(3).

EFFECT OF ADOPTING A COMPARABILITY REQUIREMENT

The Petitioners suggest that the current rule is inadequate. They, however, provide no statistical data or analysis to suggest that Tennessee banks are not paying appropriate rates to IOLTA accounts. Interest rates on deposit accounts are established on a local market basis, not on a statewide or a multi-state basis. The Tennessee Bar Foundation should recognize that a large multi-state bank paying a rate in Nashville, Tennessee, may or may not pay the same rate in Knoxville, Tennessee, much less Atlanta, Georgia.

One need look only to the headlines of the daily newspaper and the pronouncements from the U.S. Treasury, Federal Reserve Board and other banking regulators to know that the banking industry is under significant stress and faces uncertain times. Bankers would suggest that adopting a revised comparability standard and requirements during this time frame is not prudent.

Bankers are more than willing to pay comparable rates to the depositors under the same terms and conditions. The rule, however, fails to make this distinction and suggests that an interest rate paid to a depositor in one type of account should be applicable and also paid on an IOLTA account, which may be fundamentally different.[6]

Among the clarifications that the bankers believe are desirable are the following:

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[5] Petition of the Tennessee Bar Foundation, the Tennessee Bar Association, the Tennessee Association for Justice and the Tennessee Alliance for Legal Services and Proposed Rule 43(3) and (4) dated November 24, 2008.

[6] Petition of the Tennessee Bar Foundation, the Tennessee Bar Association, the Tennessee Association for Justice and the Tennessee Alliance for Legal Services and Proposed Rule 43(3) and (4) dated November 24, 2008.

1. Lawyer Selection of Financial Institution. Expressly state in the rule that the selection of a bank, the type of account best suited for the IOLTA account(s), and maintenance of the account(s) rests with the individual lawyer. This would be similar to and parallel to the lawyer's initial determination on whether to establish separate accounts for clients or to use an IOLTA account.
2. Account Offerings by the Financial Institution. Expressly state in the rule that a bank participating in the IOLTA program may, at its option, elect to offer one or more categories of accounts that are consistent with banking law and practice.
3. Bank's Agreement to Pay an Equivalent Interest Rate. Clarify that a bank's agreement to pay an equivalent interest rate is based upon the type of account selected and not upon a rate based on a different type of account.
4. Tiered Schedule for "Safe Harbor" Rate. Clarify that a bank could voluntarily elect a "safe harbor" based upon a predetermined tiered schedule to be set forth in the rule.[7] Authorizing the Tennessee Bar Foundation, at its discretion, to set or establish rates is contrary to principles of maintaining safety and soundness of a bank and if it were a legislative enactment would be preempted by federal statutes.[8]
5. No Authority for Tennessee Bar Foundation to Set or Negotiate All Interest Rates. No provision should be included in the rule that would permit the Tennessee Bar Foundation, which administers the IOLTA program, to enter into individual agreements with banks to set interest rates unless within specific limits.

[7] TBA has proposed such schedule. See Attachment 1.
[8] 12 C.F.R. § 7. 4002

6. Notice. Clarify that if the Tennessee Bar Foundation believes that a bank is in non-compliance with the rule, the board should first notify the lawyer responsible and the bank to seek a remedy prior to decertifying the bank.[9] This notice should be provided in written format to the bank thirty (30) days prior to the Tennessee Bar Foundation making a determination that the bank is not an "eligible institution". Under the most basic form of due process, a bank should have the opportunity to receive notice and to be heard before being decertified.
7. Reporting Format. Clarify that a bank with less than thirty (30) IOLTA accounts is exempt from any requirement for electronic reporting of IOLTA account information to the Tennessee Bar Foundation.
8. Fees. Additional clarification is needed regarding fees that may be assessed on an IOLTA account that are ordinarily and customarily charged to other customers.

In sum, the TBA is not opposed to the Court amending Rule 43; however, modifications to the proposed Rule amendment are required to make this a practical and workable rule for all parties. TBA encourages the Court to adopt a Rule with the modifications proposed in Attachment 1, which shows a red-line against the rule proposed by the petitioners. The reasons for such adoption are discussed in the following:

PROPOSED AMENDMENTS

[9] Many, if not all, banks fund many loan closings through lawyer trust accounts. See Affidavit of Daniel W. Small, Esq., ¶ 2, Appendix C. Particularly in commercial closings, banks seek to fund such closings in IOLTA accounts held by the respective institution. If the proposed rule is adopted as submitted, the Petitioner would have the unilateral right to decertify a bank without any right of that bank to be heard or to seek relief. Aside from the patent lack of due process, such an approach can serve to deter banks from funding loans through IOLTA accounts, as banks have the ability to fund loans directly (or through third parties such as title insurance companies) outside such accounts. See Affidavit of Daniel W. Small, Esq., ¶ 4, Appendix C. This would result in unnecessary and unintended loss of revenue by the Foundation.

1. Lawyer Selection of Financial Institution. The rule needs to state that the selection of a bank, the type of account best suited for the IOLTA account(s) and maintenance of the account(s) rests with the individual lawyer. The lawyer maintaining the account should be responsible for selecting the depository and the type of account appropriate to the lawyer and her practice.

Current Rule 43 expressly provides that the maintenance of an IOLTA account is the responsibility of a lawyer. The proposed Rule, as submitted by the petitioners, fails to emphasize the selection of the depository and type of account appropriate to the lawyer and her practice and the maintenance of the account is the responsibility of the lawyer. The determination of the bank and the type of accounts should lie in the sound discretion of the lawyer and should not be set aside lightly. The relationship of an lawyer and her bank of choice may be determined by many factors that provide an overall benefit to the lawyer and her practice and should not be judged exclusively on the interest rate the lawyer receives on an IOLTA account, provided that the lawyer receives a rate equivalent to other similar accounts at his bank of choice. The lawyer should not be placed in a position of shopping her account relationships exclusively because of an interest rate offered on an IOLTA account. Further, the Tennessee Bar Foundation should seek to certify the broadest range of banks possible so that lawyers can meet their practice and client needs with the effect, also, of expanding the opportunity for IOLTA account revenues.

The TBA would suggest the addition of language at the beginning of Rule 43, as seen in Paragraph 1, to clearly recognize this responsibility.[10] Similar to the lawyer's responsibility to use her sound discretion in determining whether to establish accounts for the exclusive benefit of a client, when appropriate, the lawyer should have similar discretion to establish a banking relationship and an IOLTA account.

2. Account Offerings by the Financial Institution. Expressly state in the rule that a bank participating in the IOLTA program may, at its option, select to offer one or more categories of accounts that are consistent with banking law and practice.

One of the most important and critical areas of banker concern lies in the proposed rule with regard to the selection of types of accounts and "comparability of rates." Paragraph 3 and 4 of the proposed rule are confusing and could be subject to a myriad of interpretations.

There are two fundamental issues. First, what type of account can or should be offered to the lawyer? Second, what is the equivalent rate that should be offered on that account? The confusion arises because it appears that the proposed rule does not clearly separate these concepts. Fundamentally, the proposed rule mixes "apples and oranges." It fails to recognize that different types of accounts may pay differing rates of interest while allowing or limiting the number of checks or other disbursals from the account or the frequency of checks or other disbursals.[11]

[10] See Attachment 1, which shows a TBA red-line version against the Rule proposed by the petitioners.
[11] See Appendix D, "Compare Business Checking" Chart printed from website of Regions Bank on February 20, 2009.

By clearly delineating the types of accounts, consistent with banking law, practice and terminology, bankers and the Tennessee Bar foundation can better comprehend a rate that would be applicable to that type of account. Fundamentally and practically, a transaction (checking) type of account will not have the same interest rate that is provided on a limited transaction money market deposit account, even when the nominal dollar amounts are the same in the accounts. The proposed rule focuses on the idea of "minimum balance" but ignores the fact that the account types are distinguishable and contain important features other than rate that bear upon the rate that is or should be paid.

There is no question that customers who have the same type of account should receive the rate available in that type of account. Most importantly, IOLTA accounts should not be discriminated against. At the same time, the Court should take care to not suggest that in giving priority or preference to IOLTA accounts that IOLTA accounts should receive rates that are higher than those paid to other non-IOLTA customers in similar types of accounts. That is, it is fair to require that banks not discriminate against IOLTA accounts, but it is unfair to require banks to discriminate in favor of them.

From a banking perspective, the TBA has attempted in its alternative proposal to delineate the specific types of accounts that would be available to a lawyer. Within each type of account, the depositor, whether IOLTA nor non-IOLTA, should receive the equivalent rate under the same or similar circumstances. All banks will have rates tiered based upon deposit levels, transaction volume and frequency, and other factors. The TBA would propose clearly identifying the types of accounts as follows:

1) A demand deposit business checking account with an investment (sweep) features;
2) A money market (savings) account;
3) A NOW checking account paying a preferred interest rate equivalent to the rate paid on eligible business customers; and/or
4) A qualifying business demand deposit checking account (when permitted by federal law).

3. Banks Agreement to Pay Equivalent Interest Rate. Clarify that banks agreement to pay interest are at an equivalent rate based upon the type of account selected and not upon a rate based on a different type of account.

In order to better help the Court understand this structure, the following brief discussion of federal banking law is provided for the Court's convenience. Federal Reserve Board Regulations D and Q[12] jointly govern the operation of bank deposit accounts and also govern reserve requirements. The reserve requirements are higher for transaction accounts and thus have a direct impact on the ability of the bank to pay interest on these accounts. Also, it should be noted from the outset that as a general proposition that for-profit entities such as corporations, partnerships, associations, or business trusts are not eligible to have interest-bearing accounts.[13] Most recently, there has been ongoing discussion in Congress about lifting this prohibition against paying interest on business checking accounts through a

[12] Federal Reserve Board Regulation D, 12 C.F.R. 204; Regulation Q, 12 C.F.R. 217.
[13] 12 C.F.R. § 204.130.

number of proposals as part of the economic stimulus plan. Thus, the TBA would recommend including as an option a business demand deposit checking account (when approved by federal law).

Demand Deposit Account with Sweep. A demand deposit account is an account that is payable on demand, or a deposit issued with an original maturity or required notice period of less than seven days.[14] A demand deposit (checking account) is the most common account offered to business customers and often individuals. Because businesses are not permitted to have an interest-bearing checking account, they are offered what is known as a "sweep" account. It is an attempt to accomplish their payments, convenience and earnings objectives in an alternative way.

The sweep account's primary features is that it moves, or "sweeps," money from one account to another account (usually overnight) based upon the amount of funds available versus the amount needed. Funds are swept into an investment feature such as a repurchase agreement covering Treasury bills, notes or other securities, or into some form of money market investment account. Money is then "swept" back into the demand deposit account either on a daily basis or as needed to meet payment obligations. Because the sweep account requires significant operations (and costs typically a minimum $150 per month to operate)[15] it is generally limited to businesses with an excess of $1 million in the account balance on a daily basis and contains additional risk features since the depositors funds are, in fact, not on deposit with the bank and are truly in an investment vehicle of some sort.

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[14] 12 C.F.R § 204.2(e).
[15] Statement of Eugene S. (Gene) Hine, Group Vice President, East Tennessee CFO, SunTrust Banks, Inc.

While this is and should be an option for attorney accounts, it may not always be the best or the typical option selected by most attorneys.

Money Market Deposit Account. The second type of account TBA proposes is a money market deposit account. A money market deposit account is considered a type of savings deposit. A savings deposit means a deposit or account with respect to which the depositor is not required by the deposit contract, but may at any time be required by the depository institution to give written notice of an intended withdrawal not less than seven days before the withdrawal is made, and that is not payable on a specified date or at the expiration of a specified time after the date of deposit.[16] In short, a savings account, while generally available by the institution on request, is not a demand account and thus is potentially restricted. In addition, for the money market deposit account, depositors are not permitted to make more than six transfers and withdrawals or a combination of withdrawals and transfers per calendar month or statement cycle (at least a four-week period). The exception to this six transfer limit is that a depositor may make an unlimited number of transactions provided that 1) if a withdrawal, it is done in person, by messenger, by mail or at an automated teller machine; or 2) if a transfer between accounts of the same depositor at the same institution and is done in person, by messenger, by mail, or at an ATM.

Because, under applicable federal law, a money market account is considered a savings account and the transactions are limited, a bank is in a position to pay a higher rate of interest on a money market account than on a demand deposit or other transaction account. A lawyer, in selecting account types and desiring to gain a higher rate of interest, could elect

[16] 12 C.F.R.204.2(d)(1) and (2).

to have a money market account in parallel with a transaction account. The lawyer would be in a position to transfer funds between accounts in a manner to maximize the interest earnings on the funds.

NOW Account. A NOW "negotiable order of withdrawal" account is an interest-bearing deposit which is payable on demand. Eligibility, however, for NOW accounts is restricted by federal statute.[17] Generally, the NOW account is available only to individuals, including sole proprietorships, and certain non-profit entities. Other businesses or other entities organized to make a profit are not eligible to maintain NOW accounts. The test for eligibility is whether or not the *beneficial interest* of the funds in the account is held by an eligible individual, sole proprietor, or charitable organization.[18]

Funds held in a fiduciary capacity, either by an individual fiduciary or by a corporate fiduciary, such as a bank trust department or a trustee in bankruptcy, may be held in a NOW account, only if the entire *beneficial interest* is held by individuals or other entities eligible to maintain NOW accounts directly.[19]

IOLTA accounts have been determined to meet this *beneficial interest* eligibility standard. The FDIC staff, on several occasions, has stated "that funds held in interest-bearing accounts pursuant to IOLTA programs (IOLTA deposits) may be in NOW accounts insured

[17] 12 C.F.R. § 204.130.
[18] 12 C.F.R. § 204.130.
[19] 12 C.F.R. § 204.130.

nonmember banks."[20] Otherwise, the fact that some beneficial interest in the principal of the account might belong to ineligible customers would disqualify that account from NOW account eligibility. The result is that IOLTA accounts can be established as a NOW account in a bank. The similar type of customer for interest paying purposes would be a typical small business.

Business Demand Deposit Checking Account (when approved by federal law). As noted above, for-profit businesses may not maintain interest-bearing checking accounts. The TBA has included this as an option on the belief that Congress may act in the near future to authorize these types of business accounts which would be an appropriate and comparable account for IOLTA. By including it as part of the proposal, it would avoid the necessity to repetition the Court for its inclusion at a later date.

4. Tiered Schedule for "Safe Harbor" Rate. Clarify that a bank could voluntarily elect a "safe harbor" or deemed equivalent rate based upon a predetermined tiered schedule proposed in the rule.

The revised proposal in Rule 43 3(c) provides that the IOLTA participating bank would pay a rate "equal to a X% of the Federal Funds Target Rate as of the first day of the first business day of the month or other IOLTA remitting period, which is deemed to be already net of allowable service charges or fees."[21] As filed with the Court, the determination of the rate is up to the Tennessee Bar Foundation. In conversations with the Bar Foundation, they

[20] See Appendix I, FDIC Advisory Opinion - Interest on lawyer trust accounts, FDIC-98-2, June 16, 1998 (Copy attached as Appendix I).
[21] Petition of the Tennessee Bar Foundation, the Tennessee Bar Association, the Tennessee Association for Justice and the Tennessee Alliance for Legal Services dated November 24, 2008.

suggested an alternative that would propose an initial rate of 60% of the federal funds target rate, but not less than 1%, with the discretion of the board to change this percentage amount annually.

This is arguably the most controversial portion of the proposed rule. The Bar Foundation notes that other states have comparability standards, but concedes that only 13 of the 23 have adopted some form of specific rate index.

Among the most important functions of a bank, or for that matter any other business, is to establish the appropriate pricing of its bank products. This determination should be totally voluntary based upon sound economic judgment and free from any outside influence or coercion. It could be considered an unsafe and unsound banking practice for a bank to leave the determination on the pricing of a product or the interest paid or received on a product to an interested outside third party. The concept that the Tennessee Bar Foundation would have discretionary authority to adjust the percentage of a fed funds rate is simply unacceptable. In the current low-rate environment where the fed funds target rate is 0-.25% (one-quarter percent or 25 basis points), conceivably the Tennessee Bar Foundation could suggest that an appropriate rate would be 400 or 500% of the fed funds target. Having such discretion is both unwise and unreasonable. Were the legislature to enact a rate or fee structure, such an enactment would almost certainly be preempted by federal law and statute.[22]

[22] For a national bank, 12 C.F.R. § 7.4002, and OCC Regulation § 7.4002 requires national banks to establish their prices based on the determination of the bank and preempts contrary state law. See Appendix B. Also See Appendix J, *Bank of America v. Lawson*, 2002 WL 31965741 (M.D. Tenn.). Similarly, state-chartered banks, under a parity

Even adopting a system where a bank could voluntarily accept a predetermined rate structure is of some concern to bankers. While such a voluntary structure might not violate a strict preemption, it should be noted that a default structure should not be construed as a minimum requirement unless adopted voluntarily by the bank.

Where a rate structure is adopted, it should be included on a tiered basis to recognize the differences in various rate environments and on a tiered scale. The Tennessee Bar Foundation will note that 23 states have adopted some form of comparability requirements. These vary in their approach and only 13 include some form of tiered rate structure for rate comparability tied to the federal funds rate. These rates vary from 55% to 80% of the federal funds rate.[23]

The TBA has included in its proposed alternative optional language which would establish a tiered rate structure to provide certainty to the bank and avoid the disruption that discretionary changes made by the Bar Foundation could cause. The TBA, while providing this as an option, is not generally in support of this approach. Should the Court, however, determine that it is absolutely necessary to have a graduated benchmark scale, the scale proposed by the TBA would be acceptable and possibly used by some banks in Tennessee. It would be provided only if it is on a voluntary basis and could not be used as a reference point for those banks that chose not to elect it on a voluntary basis.

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provision (TCA, 45-2-601), would enjoy a similar preemption. See Appendix K, Tenn. Op. Atty. Gen. No. 06-072, 2006 WL 1197466 (Tenn. A.G.).

[23] Based on research of other IOLTA programs (IOLTA.org - http://www.iolta.org).

Unlike other states that have adopted a fixed percentage of the federal funds target rate, the TBA believes that the variable rate outlined as an option would better reflect that actual market rate that would be paid on other comparable accounts in a variable rate market.

5. No Authority for Tennessee Bar Foundation to Set or Negotiate All Interest Rates.

No provision should be included in the rule which would permit the Tennessee Bar Foundation, which administers the IOLTA program, to enter into individual agreements with banks to set interest rates unless within specific limits.

The ability of the Bar Foundation to determine the eligibility of a bank or to decertify a bank is of critical importance in the bank operations. In the same manner that bankers have concern over the ability of the Bar Foundation to have discretionary authority to change rates, the bankers have serious concern of giving similar discretionary authority to negotiate rates on an individual basis. The comparability standard in the proposed rule cites the highest rates paid on sweep or governmental accounts. While these do have negotiated rates, they are only in accounts that have substantial balance. Apparently, the Bar Foundation's concern with comparability and with appropriate rates focuses for the most part on accounts with a very high-dollar amount, generally $750,000 and above. This represents a relatively small portion of the total IOLTA accounts in the state.

Giving the Bar Foundation discretion to negotiate rates on individual accounts poses both a burden on the Bar Foundation and on the certainty needed for banking operations. The TBA was advised today (February 20, 2009) that the Bar Foundation would make this proposal.

If the Court determines that granting the Bar Foundation the right to negotiate as a third-party beneficiary, a contract which is fundamentally between a bank and its customer, the lawyer or law firm, the Court should do so only under limited circumstances. In achieving a rate comparability basis, if the issue is high-dollar demoninated accounts, the Court should provide clear direction that the ability to negotiate is only with accounts of a certain dollar amount and up, recommended to be $750,000, and on a bank-wide basis, not on an individual account basis. To provide certainty, the board would only be approved to negotiate to establish a rate equivalent tier that applied to all IOLTA accounts in that bank, in a local geographic area, that exceeded a specified amount of $750,000 and up. This would prevent the Bar Foundation from attempting to negotiate rates on every account and with every participating financial institution.

6. Notice. Clarify that if the Tennessee Bar Foundation believes that a bank is in non-compliance with the rule, the board should first notify the lawyer responsible and the bank to seek a remedy before decertifying the bank. Decertification is a harsh remedy and should, therefore, come only after appropriate due process.

As proposed, Rule 43(11) provides that a lawyer or firm, but not the bank, that objects to the decision of the Tennessee Bar Foundation may appeal such decision to the Board of Professional Responsibility. It is the recommendation of the TBA that this be the second step in a review process and that banks be granted standing.

The TBA would recommend and propose that the item 11 be divided into subsections (a) and subsection (b). As an initial step, the board making a determination that the bank would either not be certified or would be in the process of being decertified would provide notice to the lawyer and to the bank of its pending decision. The lawyer and bank would then have the opportunity to request that the Foundation review the proposed decision before making it final. In practice, this is already what the board does. However, by adopting this in a much more formal rule and providing for review by the Board of Professional Responsibility, it is reasonable that the initial step be acknowledged and included in the rule itself and it is only fair that affected banks be granted standing.

The Bar Foundation has substantial authority in its determinations to certify or decertify a bank. This authority goes beyond merely regulating lawyers and impacts substantial rights of banks. To allow such discretionary authority to the Bar Foundation without recognizing the interests of the bank to seek redress is to ignore fundamental concepts of due process.

7. Technical Corrections. In addition to the substantive areas that the TBA has recommended changes, there are several areas where technical corrections have been recommended. These are noted and highlighted on the TBA red-line version of the proposed Rule. See Attachment 1. They include areas that acknowledge where certain types of banking fees should or should not be included and acknowledging that where the fees are not appropriate, they should not be charged against an IOLTA account, remain the responsibility of the lawyer or law firm.

Conclusion. As noted above, the IOLTA program provides significant benefits and will continue to be supported by the TBA and the bankers in Tennessee. It is unfortunate that the economy as a whole is under the unprecedented stresses that we all encounter. As a result, the financial markets, and correspondingly, rates paid to depositors, including the IOLTA accounts, have declined. However, proposing a revision to the IOLTA program rules to adopt a "preferred depositor" rule in the guise of an interest rate "compatibility standard" when there has been no showing that IOLTA accounts are receiving discriminatory treatment will not bridge the gap to recovering the level of revenue produced in better economic times. The current proposal could prove the law of unintended consequences: by mandating interest rates in a draconian scheme without due process, banks may choose to fund loans outside the lawyers' IOLTA accounts, thus lowering rather than enhancing the funds available for distribution to current and future IOLTA beneficiaries. Moreover, adoption of the rule as proposed arguably amounts to a finding that banks are in fact discriminating against IOLTA accounts without a semblance of proof to substantiate such a negative claim.

In adopting a revision to Rule 43, it is imperative that the Court adopt a rule that is clear and understandable to the Bar Foundation, lawyers, and their bankers. As noted, the rule as proposed suffers from a lack of clarity and a confusion of the types of accounts and the rates applicable. Very simply stated, a basic lawyer NOW account is not comparable to a money market account, business sweep account, or to that of depositors which have negotiated account rates such as local governments. Attempting to define an apple as an orange may be legally permissible, but in practice will not provide any significant benefit.

For the reasons stated above, the TBA would encourage the Court to make substantial revisions and clarifications to Rule 43 if it chooses to adopt a revision at all, consistent with the proposal attached and the comments contained herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the Petitioner by regular U.S. Mail, postage prepaid on February 20, 2009.

Timothy L. Amos

Attachments

Attachment 1 - TBA Redline version of Proposed Supreme Court Rule 43

List of Appendices

Appendix A - FRB: Monetary Policy, Open Market Operations – February 4, 2009 (http://www.federalreserve.gov/fomc/fundsrate.htm).

Appendix B - 12 C.F.R. § 7.4002

Appendix C - Affidavit of Daniel W. Small, Esq.,

Appendix D - "Compare Business Checking" Chart printed from website of Regions Bank on February 20, 2009

Appendix E – Federal Reserve Regulation D, Table of Contents, 12 C.F.R. 204

Appendix F – Federal Reserve Regulation Q, Table of Contents, 12 C.F.R. 217

Appendix G – Eligibility of NOW Accounts, 12 C.F.R. § 204.130

Appendix H – Statement of Eugene S. (Gene) Hine, Group Vice President, East Tennessee SFO, SunTrust Banks, Inc.

Appendix I – FDIC Advisory Opinion – Interest on lawyer trust accounts (FDIC-98-2), June 16, 1998

Appendix J – *Bank of America v. Lawson*, 2002 WL 31965741 (M.D. Tenn.)

Appendix K – Tenn. Op. Atty. Gen. No. 06-072, 2006 WL 1197466 (Tenn. A.G.)

Attachment 1

TBA Redline version of Proposed Supreme Court Rule 43

Proposed Revisions by the
Tennessee Bankers Association
to Proposed Rule 43
February 20, 2009

Proposed

Supreme Court Rule 43

Interest ~~on~~On Lawyers' Trust Accounts

Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.15, requires that Tennessee lawyers who maintain pooled trust checking accounts **or money market deposit account** for the deposit of client funds participate in the IOLTA (Interest On Lawyers' Trust Accounts) program, ~~unless they decline to participate, as described in section 4(c) below~~.

The following rule shall govern the operation of IOLTA accounts and the IOLTA program:

DELETE - Items 1-4 in their entirety

~~**(1) Lawyers or law firms that deposit client funds in a pooled trust checking account in the IOLTA program shall direct the financial institution:**~~

~~**1. The determination of whether or not a financial institution is an eligible institution which meets the requirements of this Rule shall be made by the Tennessee Bar Foundation, The organizational administrator of the IOLTA program. The Foundation shall maintain a list of eligible financial institutions and shall make that list available to Tennessee lawyers:**~~

2. Eligible institutions are those financial institutions which voluntarily offer IOLTA accounts and comply with the requirements of this Rule, including maintaining IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. To determine the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered when setting interest rates or dividends for customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. Nothing in this Rule shall prohibit an eligible institution from paying an interest rate or dividend higher than required herein.

3. An eligible financial institution may satisfy requirements of this Rule by electing one of the following options:

a. Establish qualifying IOLTA accounts as the comparable interest rate or dividend-paying product; or

b. Pay the comparable interest rate or dividend on the qualifying IOLTA account in lieu of actually establishing the comparable interest rate or dividend-paying product; or

c. Pay an amount on funds that would otherwise qualify for the investment

~~options described in Section 4 of this Rule equal to X% of the Federal Funds Target Rate as of the first business day of the month or other IOLTA remitting period, which is deemed to be already net of allowable service charges or fees. This benchmark yield rate may be adjusted once per year by the Foundation, upon 90 days written notice to financial institutions participating in the IOLTA program.~~

~~4. IOLTA accounts maybe established as:~~

~~a. A business checking account with an automated investment feature such as an overnight investment in repurchase agreements or money market funds fully collateralized by or invested solely in United States government securities which are direct debt obligations of the government of the United States of America or of agencies or instruments thereof guaranteed by the full faith and credit of the government of the United States of America as to the payment of principal and interest at maturity;~~

~~b. A checking account paying preferred interest rates, such as money market or indexed rates;~~

~~c. A government interest-bearing checking account such as accounts used for municipal deposits; or~~

~~d. Any other suitable interest-bearing deposit account offered by the institution to its non-IOLTA customers.~~

INSERT – TBA Alternative Language

1. Lawyers or law firms shall deposit client funds in a pooled trust fund checking or money market account in a financial institution approved by the Tennessee Bar Foundation, the organizational administrator of the

IOLTA program (Bar Foundation) as provided in this rule. The lawyer or law firm shall agree with the financial institution to provide an interest rate on an account in accordance with the standards established herein.

The determination of the attorney on the selection of an eligible institution and/or of the appropriate account rests in the sound discretion of the lawyer. No charge of ethical impropriety or other breach of professional responsibility shall attend a lawyer's determination of either the institution or the account..

2. Determination of whether or not a financial institution is an eligible institution which meets the requirements of this rule shall be made by the Bar Foundation. The Bar Foundation shall approve a financial institution that agrees to meet an interest rate comparability standard as outlined herein. The Bar Foundation shall maintain a list of eligible financial institutions and shall make that list available to Tennessee lawyers.

3. Eligible institutions are those financial institutions which voluntarily offer IOLTA accounts and comply with the requirements of this rule, including maintaining IOLTA accounts which pay the equivalent interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance, transaction restrictions, or other eligibility qualifications, if any. To determine the comparable interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors in addition to the IOLTA account balance, customarily considered by such institution when setting interest rates or dividends for customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. Nothing in this rule shall prohibit an eligible institution from paying an interest rate or dividend higher than required herein.

4. An eligible institution shall establish an IOLTA account by electing one or more of the following account options which the financial institution and lawyer deem an appropriate account.

A. Establish a demand deposit business checking account with an automated investment feature (sweep) such as an overnight investment in repurchase agreements or money market funds fully collateralized by or invested solely in United States government securities which are direct debit obligations of the government of the United States of America or of agencies or instrumentalities thereof guaranteed by the full faith and credit of government of the United States of America as to the payment of principal and interest at maturity;

B. Establish a money market deposit account;

C. Establish a NOW checking account paying a preferred interest rate equivalent to the rate paid to eligible business customers meeting minimum balance, transaction volume, and other account requirements;

D. Establish a qualifying business demand deposit checking – interest bearing transaction account (when permitted by federal law)

5. In lieu of the rate paid to equivalent customers of the accounts in items A-C, the bank, at its option, may agree and elect to pay an interest rate based on the following schedule:

Fed Funds Target Rate	Equivalent Rate Requirement
Less than 1%	100%
1.00 – 1.99	75%
2.00 – 2.99	65%
3.00 – 3.99	60%
4.00 – 4.99	55%
5.00 or above	50%

The equivalent rate option, if paid by the financial institution, will be deemed in compliance with this Rule, regardless of the highest yield available at the financial institution to other depositors. No financial institution is required to adopt this equivalent rate option to be certified as an eligible institution. Financial institutions choosing the equivalent rate option may, in future, choose to seek compliance certification from the Foundation under option 4(A) through (C) and may be so certified after a reasonable administrative determination period.

~~5.~~6 A daily financial institution repurchase agreement shall be fully collateralized by United States Government 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.

~~6.~~ 7 An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities and shall 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, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

~~7.~~ 8 An eligible financial institution participating in the IOLTA program must also:

~~(a) To remit~~ Remit interest or dividends net of any allowable service charges or fees, preferably monthly, but at least quarterly, calculated us described in sections 1(c) and 1(d) below to the Tennessee Bar Foundation;

~~(b) To transmit with each remittance~~

b. Transmit to the Tennessee Bar Foundation a statement showing: ~~, in a format specified by the Tennessee Bar Foundation, a report which contains:~~

(i) the name of the lawyer or law firm on whose account the remittance is sent;

(ii) the account number;

(iii) the balance ~~against~~ on which the interest rate is applied;

(iv) the rate of interest or dividends applied;

(v) the gross interest or dividends earned;

(vi) the type and amount of any allowable service charges ~~against the interest; and~~ or fees deducted; and

(vii) the net ~~interest~~ amount remitted.

Provided, the Bar Foundation may require a bank which maintains more than thirty (30) IOLTA accounts to transmit the report in an electronic format.

c. Transmit information ~~shall be transmitted~~ to the lawyer or law firm maintaining that account.

~~(c) That the interest rate paid shall be no less than the highest interest rate generally available from the financial institution to its non IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. (d) That deductions by the financial institution from interest earned may include charges for reasonable fees (other than overdraft charges), which shall be computed~~ in accordance with the ~~financial~~ institution's ~~customary pricing procedures for interest bearing accounts.~~ normal procedures for reporting to depositors.

~~8.~~ 9 No financial institution service charges or fees may be deducted from the principal of any IOLTA account.

~~9.~~ **10** Deductions by the financial institution from interest earned may only be for allowable reasonable service charges or fees calculated in accordance with the institution's standard practice for non-IOLTA customers. For purposes of this Rule, "allowable reasonable service charges or fees" are defined as:

(a) per check charges;

(b) per deposit charges;

(c) a fee in lieu of minimum balance;

(d) federal deposit insurance **or account guarantee** fees;

(e) business account analysis fee, if any;

~~(e)~~ **(f)** a sweep fee; and

~~(f)~~ **(g)** a reasonable IOLTA account administrative fee.

~~Overdraft charges~~ Other financial institution service charges **normally charged to non-IOLTA accounts** or fees shall not be deducted from ~~accrued~~ IOLTA account interest and shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. **Such normal and customary fees may include, among other items, wire transfer, cashier or official checks, overdraft charges, and account research charges.** Nothing in this Rule shall be construed to require that a financial institution charge fees ~~concerning~~ on an IOLTA account, nor does anything in this Rule prohibit a financial institution from waiving or discounting fees associated with an IOLTA account. ~~Financial institutions participating in the IOLTA program are encouraged to discount or write off fees associated with IOLTA accounts as an institutional contribution to the community.~~

~~(e) That fees or~~ ~~10.~~ **11** Allowable reasonable service charges or fees in excess of the interest earned on ~~the account for any month or quarter shall not be taken~~ any one IOLTA account may not be deducted from interest earned on ~~other IOLTA accounts.~~ any other IOLTA account.

~~(2) As provided in Supreme Court Rule 8, RPC 1.15(a)(1), lawyers or law firms may deposit their own funds in such an account for the sole purpose of paying bank service charges on that account, but only in an amount reasonably necessary for that purpose.~~

~~11.~~ **12 (a) If the Tennessee Bar Foundation determines: 1) That the account(s) offered by an applicant do not meet the requirements of this rule or 2) if after approval, that the bank is not applying the applicable rate offered to non-IOLTA customers on an equivalent economic basis; then the Tennessee Bar Foundation shall notify the lawyer and law firm and the bank of its determination. The lawyer and bank shall have not less than thirty (30) days to request a review by the Tennessee Bar Foundation prior to the notification of the Board of Professional Responsibility provided in Subsection (b) below.**

(b) A lawyer or law firm who objects to a decision of the Tennessee Bar Foundation with respect to whether a financial institution is an eligible institution under Section 1 through 10 of this Rule or whether the lawyer is eligible for an exemption under Section 13(e) may appeal such decision to the Board of Professional Responsibility in accordance with regulations adopted by the Board of Professional Responsibility.

~~(3)~~ ~~12.~~ **13** Interest transmitted shall, after deductions for the necessary and reasonable administrative, expenses of the Tennessee Bar Foundation for operation of the IOLTA program, be distributed by that entity, in proportions it deems appropriate, for the following purposes:

(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 ~~from time to time~~.

~~(4) 13.~~**14** Unless exempt under this Section 13, every lawyer admitted to practice in Tennessee shall certify in the lawyer's annual registration ~~form~~ statement required by Tennessee Supreme Court Rule 9, Section ~~20.5 shall also include an IOLTA compliance statement. Each lawyer completing that statement will advise the Board of Professional Responsibility as to his or her compliance with this Rule as follows: (a) A lawyer who deposits client funds in a pooled trust checking account that participates in the IOLTA program~~ 20.5 as a condition of licensure, that all funds in the lawyer's possession that are required pursuant to RPC 1.15(b) to be held in an IOLTA account are, in fact, so held and shall list the name(s) of the financial institution(s) and ~~the~~ account number(s); (b) A lawyer who does not maintain a pooled trust checking account for deposit of client funds shall advise where such funds are deposited. This certification shall he made on a form provided by the Board of Professional Responsibility, utilizing the options printed on the statement, why he or she does not maintain such account; and shall be submitted by the lawyer within the time period set forth in Rule 9, Section 20, for the annual registration statement.

~~(c) A lawyer who deposits client funds in a pooled trust checking account that does not participate in the IOLTA program must notify the Chief Justice of the Supreme Court of his or her declination to participate. The notice must be given to the Chief Justice annually, in the form of a letter, submitted to the Board of Professional Responsibility in conjunction with the registration statement.~~

~~(5) Copies of the IOLTA compliance portion of the registration statements and any letters of declination to participate in the IOLTA program shall be transmitted to the Tennessee Bar Foundation by the Board of Professional Responsibility.~~

A lawyer licensed in Tennessee is exempt, and shall so certify on the lawyer's annual registration statement, if:

(a) the lawyer is not engaged in the private practice of law in the State of Tennessee;

(b) the lawyer serves as a Judge, Attorney General, Public Defender, U.S. Attorney District Attorney, corporate counsel, teacher of law, 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;

(c) the lawyer does not have an office in Tennessee; however, for purposes of this Rule, a lawyer who practices, as a principal, employee, of counsel, or in any other capacity with a firm that has an office in Tennessee shall be deemed for purposes of this Rule to have an office in Tennessee if the lawyer utilizes one or more offices or the firm located in Tennessee more than the lawyer utilizes one or more offices of the firm located in any other single state;

(d) under regulations adopted by the Board of Professional Responsibility under criteria established upon recommendation or the Tennessee Bar Foundation, the lawyer or law firm is exempted from maintaining an IOLTA account because such an IOLTA account has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees; or

(e) the lawyer is exempted by the Tennessee Bar Foundation from the application of this Rule following a written request for exemption by the lawyer and determination by the Tennessee Bar Foundation that no eligible financial institution (as defined and determined in accordance with this Rule 43) is located within reasonable proximity of that lawyer.

~~14.~~ **15** Upon its receipt of a lawyer's certification under Section 13 of this Rule the Tennessee Bar Foundation shall, on or before March 31 of each year, report to the Board of Professional Responsibility any evidence of the lawyer's noncompliance known by the Tennessee Bar Foundation. Noncompliance with this Rule will result in the following action:

(a) On or before May 15 of each year, the Board of Professional Responsibility shall compile a list of those lawyers who are not in compliance with this Rule. On or before the first business day of May of each year, the Board of Professional Responsibility shall serve each lawyer on the list compiled under this Rule a Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice on or before May 31 of that year. Each lawyer to whom a Notice of Noncompliance is issued shall pay to the Board of Professional Responsibility a Noncompliance Fee of One Hundred Dollars ($100.00). Such Noncompliance Fee shall be paid on or before May 31 of that year, unless the lawyer shows to the satisfaction of the Chief Disciplinary Counsel that the Notice of Noncompliance was erroneously issued, in which case no such fee shall be due.

(b) On or before May 31 of that year, each lawyer on whom a Notice of Noncompliance is served also shall file with the Board of Professional Responsibility an affidavit, in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied. In the event a lawyer fails to timely remedy any such deficiency or fails to timely file such affidavit, the lawyer shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee, a Delinquent Compliance Fee of Two Hundred Dollars ($200.00).

(c) On or before June 30 of each year, the Board of Professional Responsibility shall:

(i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance and who failed to remedy their deficiencies by May 31; (ii) submit the proposed Suspension Order to the Supreme Court; and (iii) serve a copy of the proposed Suspension Order on each lawyer named in the Order. The Supreme Court will review the proposed Suspension Order and enter such order as the Court may deem appropriate suspending the law license of each lawyer deemed by the Court to be not in compliance with the requirements of this Rule.

(d) Each lawyer named in the Suspension Order entered by the Court shall file with the Board of Professional Responsibility an affidavit in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied and shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee and the Delinquent Compliance Fee, a Five Hundred Dollar ($500.00) Suspension Fee as a condition of reactivation of his or her law license. Payment of all fees imposed by this section shall be a requirement for compliance with this Rule and for reactivation of a license The Board of Professional Responsibility shall not reactivate the license of any lawyer whose license is suspended pursuant to this Rule until the Chief Disciplinary Counsel certifies compliance with the requirements of this Rule.

(e) All notices required or permitted to be served on a lawyer under the provisions of this Rule shall he served by United States Postal Service Certified Mail, return receipt requested, at the address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9, Section 20.5, and shall be deemed to have been served as of the postmark date shown on the Certified Mail Receipt.

~~(6)~~ 15. The Board of Professional Responsibility, acting in concert with the Tennessee Bar Foundation, may promulgate such forms and procedures ~~as will~~ to implement ~~paragraphs four~~

Sections 13 and ~~five~~ 14 of this Rule and of Supreme Court Rule 8, RPC ~~1.15, as amended herein. [Adopted by order filed August 27, 2002.] [Amended by order filed May 14, 2003.]~~ 1.15.

16. The information contained in the statements forwarded to the Tennessee Bar Foundation under Section 13 and/or Section 14 of this Rule shall remain confidential other than as to Tennessee Supreme Court or the Board of Professional Responsibility. The Tennessee Bar Foundation shall not release any information contained in such statements other than as a compilation of data from such statements, except as directed in writing by the Tennessee Supreme Court or the Board of Professional Responsibility or in response to a subpoena.

17. Transition Provisions. For the purpose of adopting regulations consistent with this Rule and educating the bar and financial institutions regarding the new requirements, the provisions of Rule 43 authorizing regulations and approval shall take effect upon entry of order adopting the Rule by the Tennessee Supreme Court.

For the purposes of certification on annual registrations by lawyers required in Tennessee Supreme Court Rule 43 and the provisions of Tennessee Supreme Court Rule 8, RPC 1.15 requiring deposit in IOLTA accounts, these amendments shall take effect on January 1, 2010.

Appendix A

FRB: Monetary Policy, Open Market Operations – February 4, 2009
(http://www.federalreserve.gov/fomc/fundsrate.htm)

The Federal Reserve Board

Open Market Operations

Open market operations--purchases and sales of U.S. Treasury and federal agency securities--are the Federal Reserve's principal tool for implementing monetary policy. The short-term objective for open market operations is specified by the Federal Open Market Committee (FOMC). This objective can be a desired quantity of reserves or a desired price (the federal funds rate). The federal funds rate is the interest rate at which depository institutions lend balances at the Federal Reserve to other depository institutions overnight.

The Federal Reserve's objective for open market operations has varied over the years. During the 1980s, the focus gradually shifted toward attaining a specified level of the federal funds rate, a process that was largely complete by the end of the decade. Beginning in 1994, the FOMC began announcing changes in its policy stance, and in 1995 it began to explicitly state its target level for the federal funds rate. Since February 2000, the statement issued by the FOMC shortly after each of its meetings usually has included the Committee's assessment of the risks to the attainment of its long-run goals of price stability and sustainable economic growth.

For more information on open market operations, see the article in the *Federal Reserve Bulletin* (102 KB PDF).

Intended federal funds rate
Change and level, 1990 to present

Date	Change (basis points) Increase	Decrease	Level (percent)
2008			
December 16	...	75 - 100	0 - 0.25
October 29	...	50	1
October 8	...	50	1.5
April 30	...	25	2.00
March 18	...	75	2.25
January 30	...	50	3.00
January 22	...	75	3.50
2007			
December 11	...	25	4.25
October 31	...	25	4.50
September 18	...	50	4.75
2006			

February 2	25	...	5.75
1999			
November 16	25	...	5.50
August 24	25	...	5.25
June 30	25	...	5.00
1998			
November 17	...	25	4.75
October 15	...	25	5.00
September 29	...	25	5.25
1997			
March 25	25	...	5.50
1996			
January 31	...	25	5.25
1995			
December 19	...	25	5.50
July 6	...	25	5.75
February 1	50	...	6.00
1994			
November 15	75	...	5.50
August 16	50	...	4.75
May 17	50	...	4.25
April 18	25	...	3.75
March 22	25	...	3.50
February 4	25	...	3.25
1992			
September 4	...	25	3.00
July 2	...	50	3.25
April 9	...	25	3.75
1991			
December 20	...	50	4.00
December 6	...	25	4.50
November 6	...	25	4.75
October 31	...	25	5.00
September 13	...	25	5.25
August 6	...	25	5.50
April 30	...	25	5.75
March 8	...	25	6.00

February 1	...	50	6.25
January 9	...	25	6.75

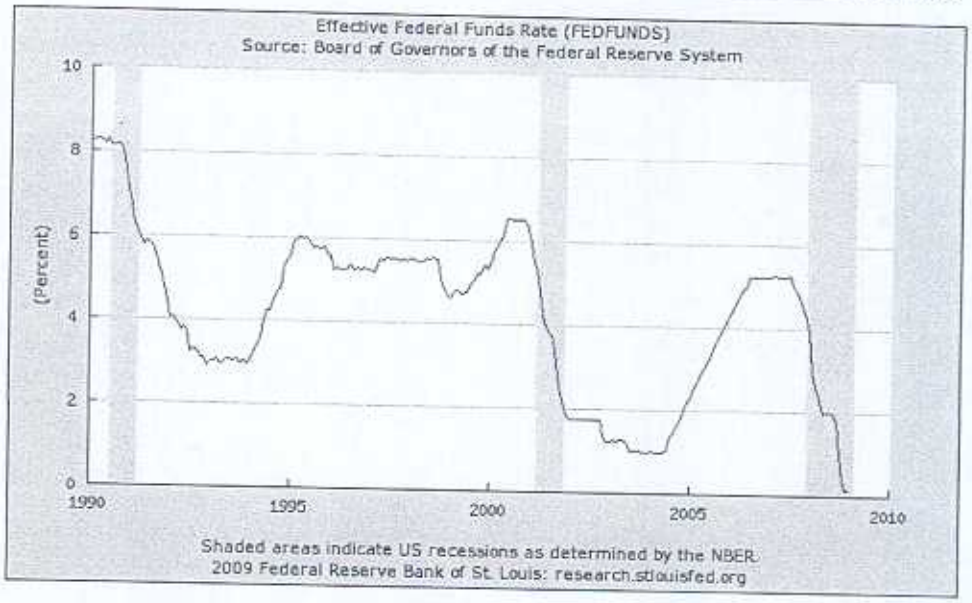
1990

December 18	...	25	7.00
December 7	...	25	7.25
November 13	...	25	7.50
October 29	...	25	7.75
July 13	...	25	8.00

A basis point is 1/100 percentage point.

FRED GRAPH

Link to this graph | View Saved Graphs | Description of growth rates and US recession dates



Refresh Graph Save Graph

Options: Sizes: Medium Large X-Large (W) 630 (H) 378 Preserve Ratio ☑

Recession Bars: On Background Color: ☐ Text Color: ☐

Series 1: FEDFUNDS, Effective Federal Funds Rate, Monthly, Percent, Not Applicable

Remove Units: Percent Scale: Left Line Color: ☐

Date Range: 1990-01-01 to 2009-01-01 Quick Range: Custom 5yrs 10yrs Max

Series 2: Series Id: Find a series

Appendix B

12 C.F.R. § 7.4002

[Code of Federal Regulations]
[Title 12 Volume 1]
[Revised as of January 1, 2004]
From the U.S. Government Printing Office via GPO Access
[CITE: 12CFR7.4002]

[Page 142-143]

TITLE 12--BANKS AND BANKING

CHAPTER I--COMPTROLLER OF THE CURRENCY, DEPARTMENT OF THE TREASURY

PART 7--BANK ACTIVITIES AND OPERATIONS--Table of Contents

Subpart D--Preemption

Sec. 7.4002 National bank charges.

(a) Authority to impose charges and fees. A national bank may charge its customers non-interest charges and fees, including deposit account service charges.

[[Page 143]]

(b) Considerations. (1) All charges and fees should be arrived at by each bank on a competitive basis and not on the basis of any agreement, arrangement, undertaking, understanding, or discussion with other banks or their officers.

(2) The establishment of non-interest charges and fees, their amounts, and the method of calculating them are business decisions to be made by each bank, in its discretion, according to sound banking judgment and safe and sound banking principles. A national bank establishes non-interest charges and fees in accordance with safe and sound banking principles if the bank employs a decision-making process through which it considers the following factors, among others:

(i) The cost incurred by the bank in providing the service;

(ii) The deterrence of misuse by customers of banking services;

(iii) The enhancement of the competitive position of the bank in accordance with the bank's business plan and marketing strategy; and

(iv) The maintenance of the safety and soundness of the institution.

(c) Interest. Charges and fees that are ``interest'' within the meaning of 12 U.S.C. 85 are governed by Sec. 7.4001 and not by this section.

(d) State law. The OCC applies preemption principles derived from the United States Constitution, as interpreted through judicial precedent, when determining whether State laws apply that purport to limit or prohibit charges and fees described in this section.

(e) National bank as fiduciary. This section does not apply to charges imposed by a national bank in its capacity as a fiduciary, which are governed by 12 CFR part 9.

[66 FR 34791, July 2, 2001]

Appendix C

Affidavit of Daniel W. Small, Esq.,

IN THE SUPREME COURT OF TENNESSEE

IN RE	PROPOSED AMENDMENT TO RULE 1.15 OF THE RULES OF PROFESSIONAL CONDUCT AND SUPREME COURT RULE 43	) No. _____

AFFIDAVIT OF DANIEL W. SMALL, ESQ, IN SUPPORT OF COMMENT AND PETITION TO AMEND OF THE TENNESSEE BANKERS ASSOCIATION FOR THE APPROVAL OF RULES AMENDEMENTS ENHANCING THE INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA) PROGRAM

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

The undersigned Daniel W. Small deposes and states that:

1. I am a licensed attorney in the State of Tennessee. Unless otherwise stated, I have personal knowledge of the facts stated in this Affidavit.

2. In the more than thirty years of my practice, I have handled hundreds (if not thousands) of commercial and real estate loan closings on behalf of banks in Tennessee. Most of these loans were funded by the banks by depositing the loan proceeds into a lawyer's IOLTA account.

3. Many banks fund their loan closings, especially those of substantial dollar size ($500,000 or more), by making deposits into lawyer trust accounts. Banks prefer that such accounts be held in their own institutions rather than being deposited into some other bank.

4. Banks are not required to fund loans into IOLTA accounts. They have the complete discretion to fund loans directly by issuing bank checks or by funding through third parties like title insurance companies.

5. Interest rates paid by banks are driven by competitive pressures in their respective marketplaces. In my opinion as a lawyer who has represented more than some two hundred banks in loan transactions, ranging in size from very small to very large (in terms of asset size), if the Tennessee Bar Foundation attempts to dictate interest rates to be paid on IOLTA accounts, many banks will stop or substantially curtail funding large and/or commercial loans (though not necessarily residential real estate loans) by deposits into IOLTA accounts. At any rate, as a supporter of Tennessee Bar Foundation programs, I respectfully oppose taking the risk of chilling bank support of IOLTA accounts by the adoption of Petitioner's proposed revision to Rule 43. I respectfully urge the adoption of the TBA's proposed changes.

FURTHER THIS AFFIDAVIT SAITH NOT, this 20th day of February, 2009.

AFFIANT:

Daniel W. Small, Esq.

ACKNOWLEDGEMENT

Personally appeared before me, KAREN S. HOLMES, the Undersigned Notary Public at Large for the State of Tennessee, Daniel W. Small, who upon oath, acknowledged to me that he signed the foregoing affidavit for the purposes therein contained.

Karen S. Holmes
Notary Public

My commission expires: 7-25-09

KAREN S. HOLMES
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY, TENN.
My Commission Expires JULY 25, 2009

Appendix D

"Compare Business Checking" Chart
printed from website of Regions Bank on February 20, 2009

Compare Business Checking

IT'S YOUR BUSINESS. WE GIVE YOU THE CONTROL.

With Regions Bank we know that one size does not fit all. Your business requires a checking account that can provide you with flexibility along with the additional resources your business demands. Regions offers a variety of checking account solutions to meet your unique business needs.

Compare Accounts - Checking				
Features & Benefits	**LifeGreen Checking for Business**	**Regions Advantage Business Checking**	**Regions Business Analyzed Checking**	**Regions Nonprofit Money Market Checking [1]**
	GET STARTED	GET STARTED	GET STARTED	GET STARTED
24-Hour Automated Telephone Banking	✔	✔	✔	✔
Free Online Banking with Bill Pay	✔	✔	✔	✔
Free Business Visa CheckCard with CheckCard Rewards	✔			
Free Platinum Visa® CheckCard with CheckCard Rewards		✔	✔	✔
Discounted Safe Deposit Box[2]	✔	✔	✔	✔
Overdraft Protection Available[3]	✔	✔	✔	
Free Transactional Items Allowance	150[5]	400[4]	N/A	400[6]
Earns Interest				✔
Earnings Credit Rate Applies to Balances			✔	
Free Image Statements		✔	✔	✔
Monthly Fee†	$5	$15	N/A	$12
Requirement to Waive or Reduce the Monthly Service Charge	Business CheckCard And Five or more electronic transactions per month; OR Online statements	Maintain a minimum balance of $5,000 or combined balances in linked business accounts that exceed $25,000[7]	Earning's Credit Rate is calculated on the average collected balance, minus a 10% reserve, to offset fees	$50,000 minimum daily average balance
Security of FDIC Insurance coverage up to the maximum amount permitted by law	✔	✔	✔	✔
	LifeGreen Checking for Business	**Regions Advantage Business Checking**	**Regions Business Analyzed Checking**	**Regions Nonprofit Money Market Checking [1]**

All accounts subject to the terms and conditions of the Regions Deposit Agreement. [1] Nonprofit money market checking is available to organizations described in Section 501(c)(3) through (13), and (19) of the Internal Revenue Code, political organizations described in Section 527 of the Internal Revenue Code and homeowners and condominium owners associations described in Section 528 of the Internal Revenue Code, including housing cooperative associations that perform similar functions. The prospective account holder must furnish a copy of the Internal Revenue Service nonprofit organization designation letter. [2] Safe deposit boxes 5"x10" or smaller subject to availability. [3] Subject to credit approval. [4] Items include checks and other debits paid (including ACH), deposits and other credits posted, and items deposited; Regions Business Visa CheckCard activity is not included in item tally. Transaction fee of $0.35 for each additional item over 400 per month. [5] Items include checks paid and items deposited. Excludes electronic transactions. Transaction fee of $0.50 for each additional paper item (checks and deposited items) over 150 per month. [6] Items include checks and other debits paid (including ACH), deposits and other credits posted, and items deposited; Regions Business Visa CheckCard activity is not included in item tally. Transaction fee of $0.25 for each additional item over 400 per month. [7] Qualifying business accounts include checking, money market, outstanding credit card, line of credit, and loans.

† For accounts opened in Iowa, this fee is subject to Iowa State Sales Tax of 5%, which will be assessed at the time the fee is charged, unless exempt.

Appendix E

Federal Reserve Regulation D, Table of Contents, 12 C.F.R. 204

Electronic Code of Federal Regulations
e-CFR™

e-CFR Data is current as of February 18, 2009

TITLE 12--Banks and Banking

CHAPTER II--FEDERAL RESERVE SYSTEM

SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

PART 204--RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

	securities.
§204.125	Foreign, international, and supranational entities referred to in 204.2(c)(1)(iv)(E) and 204.8(a)(2)(i)(B)(5).
§204.126	Depository institution participation in "Federal funds" market.
§204.127	Nondepository participation in "Federal funds" market.
§204.128	Deposits at foreign branches guaranteed by domestic office of a depository institution.
§204.130	Eligibility for NOW accounts.
§204.131	Participation by a depository institution in the secondary market for its own time deposits.
§204.132	Treatment of loan strip participations.
§204.133	Multiple savings deposits treated as a transaction account.
§204.134	Linked time deposits and transaction accounts.
§204.135	Shifting funds between depository institutions to make use of the low reserve tranche.
§204.136	Treatment of trust overdrafts for reserve requirement reporting purposes.

Regulations

Compliance Guide to Small Entities

Regulation D: Compliance Guide Go

Regulation D: Reserve Requirements of Depository Institutions 12 CFR 204

This description should not be interpreted as a comprehensive statement of the regulation. Rather, it is intended to give a broad overview of the regulation's requirements. The full regulation is available on the Government Printing Office web site.

Regulation D imposes uniform reserve requirements on all depository institutions with transaction accounts or nonpersonal time deposits, defines such deposits, and requires reports to the Federal Reserve.

A general description of the regulation, by section, follows.

Section 204.1 **Authority, purpose, and scope**
States that reserve requirements are imposed on depository institutions for the purpose of facilitating the conduct of monetary policy by the Federal Reserve. All depository institutions, including commercial banks, savings banks, savings and loan associations, credit unions, and agencies or branches of foreign banks located in the United States, are subject to reserve requirements.

Section 204.2 **Definitions**
Defines key terms used in the regulation.

Section 204.3 **Computation and maintenance**
Sets forth rules for computing the amount of reserves that must be held and the methods for holding them. Also permits carryover of certain reserve excesses and deficiencies and specifies pass-through rules.

Section 204.4 **Transitional adjustments in mergers**
Points out that a merger eliminates the low reserve tranche and reservable liabilities exemption of the nonsurviving depository institution. Thus, the surviving institution faces higher reserve requirements. These higher requirements must be phased in within seven quarters following a merger.

Section 204.5 **Emergency reserve requirement**
Outlines the procedures for imposing reserve requirements under extraordinary circumstances.

Section 204.6 **Supplemental reserve requirement**
Permits the Federal Reserve Board to impose a supplemental reserve requirement of not more than 4 percent on transaction accounts, if deemed essential for the conduct of monetary policy.

Section 204.7 **Penalties**
Establishes a charge of 2 percentage points over the discount rate for deficiencies in a depository institution's required reserves. Also authorizes the Federal Reserve Board to impose civil money penalties.

Section 204.8 **International banking facilities**
Defines the rules for international banking facilities (IBFs) and sets forth recordkeeping requirements for them.

Section 204.9 **Supplement: Reserve requirement ratios**

Specifies the reserve ratios for net transaction accounts, nonpersonal time deposits, and eurocurrency liabilities. Also identifies the amount of net transaction deposits reservable at 3 percent and the amounts of reservable liabilities that are exempt from reserve requirements. These amounts are subject to adjustment every year to reflect changes in the monetary aggregates.

To compute required reserves, refer to the Reserve Maintenance Manual (1.99 MB PDF).

< Back to Regulation D

Last update: February 19, 2009

Appendix F

Federal Reserve Regulation Q, Table of Contents, 12 C.F.R. 217

Electronic Code of Federal Regulations
e-CFR™

e-CFR Data is current as of February 18, 2009

TITLE 12--Banks and Banking

CHAPTER II--FEDERAL RESERVE SYSTEM

SUBCHAPTER A--BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

PART 217--PROHIBITION AGAINST THE PAYMENT OF INTEREST ON DEMAND DEPOSITS (REGULATION Q)

Appendix G

Eligibility of NOW Accounts, 12 C.F.R. § 204.130

[Code of Federal Regulations]
[Title 12, Volume 2]
[Revised as of January 1, 2008]
From the U.S. Government Printing Office via GPO Access
[CITE: 12CFR204.130]

TITLE 12--BANKS AND BANKING

CHAPTER II--FEDERAL RESERVE SYSTEM

PART 204_RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)--Table of Contents

Sec. 204.130 Eligibility for NOW accounts.

(a) Summary. In response to many requests for rulings, the Board has determined to clarify the types of entities that may maintain NOW accounts at member banks.

(b) Individuals. (1) Any individual may maintain a NOW account regardless of the purposes that the funds will serve. Thus, deposits of an individual used in his or her business including a sole proprietor or an individual doing business under a trade name is eligible to maintain a NOW account in the individual's name or in the ``DBA'' name. However, other entities organized or operated to make a profit such as corporations, partnerships, associations, business trusts, or other organizations may not maintain NOW accounts.

(2) Pension funds, escrow accounts, security deposits, and other funds held under various agency agreements may also be classified as NOW accounts if the entire beneficial interest is held by individuals or other entities eligible to maintain NOW accounts directly. The Board believes that these accounts are similar in nature to trust accounts and should be accorded identical treatment. Therefore, such funds may be regarded as eligible for classification as NOW accounts.

(c) Nonprofit organizations. (1) A nonprofit organization that is operated primarily for religious, philanthropic, charitable, educational, political or other similar purposes may maintain a NOW account. The Board regards the following kinds of organizations as eligible for NOW accounts under this standard if they are not operated for profit:

(i) Organizations described in section 501(c)(3) through (13), and (19) of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 501(c)(3) through (13) and (19));

(ii) Political organizations described in section 527 of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 527); and

(iii) Homeowners and condominium owners associations described in section 528 of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 528), including housing cooperative associations that perform similar functions.

(2) All organizations that are operated for profit are not eligible to maintain NOW accounts at depository institutions.

(3) The following types of organizations described in the cited provisions of the Internal Revenue Code are among those not eligible to maintain NOW accounts:

(i) Credit unions and other mutual depository institutions described in section 501(c)(14) of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 501(c)(14));

(ii) Mutual insurance companies described in section 501(c)(15) of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 501(c)(15));

(iii) Crop financing organizations described in section 501(c)(16)

of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 501(c)(16));

(iv) Organizations created to function as part of a qualified group legal services plan described in section 501(c)(20) of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 501(c)(20)); or

(v) Farmers' cooperatives described in section 521 of the Internal Revenue Code (26 U.S.C. (I.R.C. 1954) section 521).

(d) Governmental units. Governmental units are generally eligible to maintain NOW accounts at member banks. NOW accounts may consist of funds in which the entire beneficial interest is held by the United States, any State of the United States, county, municipality, or political subdivision thereof, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, Guam, any territory or possession of the United States, or any political subdivision thereof.

(e) Funds held by a fiduciary. Under current provisions, funds held in a fiduciary capacity (either by an individual fiduciary or by a corporate fiduciary such as a bank trust department or a trustee in bankruptcy), including those awaiting distribution or investment, may be held in the form of NOW accounts if all of the beneficiaries are otherwise eligible to maintain NOW accounts. The Board believes that such a

[[Page 121]]

classification should continue since fiduciaries are required to invest even temporarily idle balances to the greatest extent feasible in order to responsibly carry out their fiduciary duties. The availability of NOW accounts provides a convenient vehicle for providing a short-term return on temporarily idle trust funds of beneficiaries eligible to maintain accounts in their own names.

(f) Grandfather provision. In order to avoid unduly disrupting account relationships, a NOW account established at a member bank on or before August 31, 1981, that represents funds of a nonqualifying entity that previously qualified to maintain a NOW account may continue to be maintained in a NOW account.

[52 FR 47697, Dec. 16, 1987]

Appendix H

Statement of Eugene S. (Gene) Hine, Group Vice President, East Tennessee SFO,
SunTrust Banks, Inc.

Tim Amos

From: Hine.Eugene [Eugene.Hine@suntrust.com]
Sent: Friday, February 20, 2009 2:36 PM
To: Tim Amos
Subject: RE: Industry Rates on Deposit Accounts

Statement of Eugene S. Hine

My background:
I am a CPA. I was with Coopers and Lybrand for 20 years as an audit partner specializing in banks.
For the last 15 years I have been the regional CFO for SunTrust Bank in East Tennessee.
With SunTrust I have been in charge of deposit pricing for our region and continuing to be a system wide resource in specialized deposit pricing.
For your comparisons to proposed IOLTA rates I offer the following pricing practices which I believe to be standard in this area.

1. Sweep Accounts. We charge a monthly fee just to have a sweep of $150. All sweep accounts pay a rate based on a percentage of fed funds target. Average is approximately 65%. We don't even set up sweeps unless there is a minimum of around $500,000. Our current average yield on sweep accounts is .1% (10 basis points).
2. Governmental accounts (and some not for profit accounts). We do negotiate rates on these type accounts. An average rate might be fed funds minus 25 basis points. To get to this rate level there is generally $1,000,000 plus in balances. However we also generally get what is called compensating balances. These are balances that pay 0 interest in order to cover analysis expenses. Compensating balances run anywhere from $100,000 to in excess of $10,000,000 depending on the size of the relationship. I will add that in this extremely unusual rate environment we have put a floor of 40 basis points on all these accounts.
3. Money Markets. Money markets have very limited transactions and therefore have no reserve requirements. Because there are no reserve requirements we generally pay more than transaction accounts like IOLTAs. Our standard business money market rates today are tiered, 0 to $2,500 = .1%, $2,500 to $10,000 =.15%, $10,000 to $25,000 = .2%, $25,000 to $100,000 = .25% above $100,000 pays .3%. We do offer from time to time money market specials with higher than normal rates. These specials generally are to attract new money and generally last less than 4 months after which the rate would revert to standard rates.
4. These rates can vary by markets and especially by state.

I hope this helps in your efforts to get comparability between industry rates and what is currently being discussed for IOLTAs.

Eugene S. (Gene) Hine
Group Vice President, East Tennessee SFO

SunTrust Banks, Inc.
Mail Code TN-Knox-3003
700 East Hill Avenue
Knoxville, TN 37977-3003
Tel: 865.544-2166 (Net 460)
Fax: 865.544-2263 (Net 460)

Live Solid. Bank Solid.

Appendix I

FDIC Advisory Opinion
Interest on lawyer trust accounts (FDIC-98-2), June 16, 1998

FDIC Law, Regulations, Related Acts

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4000 - Advisory Opinions

Interest on lawyer trust accounts
FDIC--98--2
June 16, 1998
Gladys C. Gallagher, Counsel

This is in response to your letter requesting that we reaffirm our previous opinions issued with respect to the IOLTA programs in other states, and FDIC Opinion Letter No. 92--30 concerning deposit insurance coverage of such accounts.

The IOLTA programs have been established under State law and require attorneys who hold customer funds on deposit to place the funds in interest-bearing accounts. The interest on the funds is paid to an entity (generally the State bar association) that is exempt from tax pursuant to section 501(c)(3) of the Internal Revenue Code; the interest so paid is used for certain charitable purposes specified by State law.

The FDIC staff has said on several occasions that funds held in interest-bearing accounts pursuant to IOLTA programs (IOLTA deposits) may be held in NOW accounts in insured nonmember banks. I understand you have copies of these letters. My understanding is that an IOLTA deposit may be held in a NOW account if, under State law as formally interpreted by the State Attorney General, the interest on the IOLTA deposit must be paid to an entity that qualifies as a nonprofit organization under 501(c)(3) of the Internal Revenue Code.

You have enclosed copies of the Indiana Foundation's Articles of Incorporation and Internal Revenue Service exempt organization determination letter. You also enclosed an opinion issued by the Attorney General of the State of Indiana that concludes that the Foundation would hold the entire beneficial interest in the earnings of the IOLTA Accounts.

In my view, based on the information you have provided, funds held by lawyers under the Indiana IOLTA program would be eligible to be maintained in NOW or similar type accounts.

Deposit Insurance Coverage of IOLTAs

You also wish to ascertain that deposit insurance coverage is available for IOLTA accounts.

Section 330.4 of the FDIC's regulations require that the deposit account records of an insured depository institution expressly disclose, by way of specific references, the existence of any fiduciary relationship including, but not limited to, relationships involving a trustee, agent, nominee, guardian, executor or custodian, pursuant to which funds in an account are deposited and on which a claim for insurance coverage is based. These records must also disclose the existence of a relationship which might provide a basis for additional insurance, and the details of the relationship and the interests of other parties in the account must be ascertainable either from the account records of the records of the

insured depository institution or from records maintained, in good faith and in the regular course of business, by the depositor or by some person or entity that has undertaken to maintain such records for the depositor. See 12 C.F.R. sections 330.4(b)(1) and 330.4(b)(2).

An IOLTA account must therefore disclose that the funds in the account are held by the nominal account holder (the lawyer) on behalf of others. If this disclosure requirement is {{12-31-98 p.4984.31}}met, the FDIC then will be able to ascertain the interests of other parties in the IOLTA account from the records of the insured depository institution or from the records of the lawyer (or someone hired by the lawyer to perform this task). If this record keeping requirement is satisfied, funds attributable to each client will be insured to the client in whatever right and capacity that client owns the funds. For example, if an IOLTA account contains funds that belong to an individual, those funds will be insured up to $100,000 as individual funds. These funds will be aggregated and insured to the statutory limit with any other funds which the client may hold individually at the same insured depository institution. The accrued interest which is attributable to the tax-exempt entity will also be recognized as a separately insured interest if the disclosure and record keeping requirements are met.

Please feel free to call me at (202) 898-3833 if you have any further questions.

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Appendix J

Bank of America v. Lawson, 2002 WL 31965741 (M.D. Tenn.)

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2002 WL 31965741 (M.D.Tenn.)
(Cite as: 2002 WL 31965741 (M.D.Tenn.))

Only the Westlaw citation is currently available.

United States District Court,
M.D. Tennessee.
BANK OF **AMERICA**, N.A., Plaintiff,
v.
Fred R. **LAWSON**, in his official capacity as Commissioner of the Tennessee Department of Financial Institutions, Defendant.
No. 02-CV-728.

Oct. 15, 2002.

West Codenotes
PreemptedTennessee Code Ann. § 45-2-617
James F. Sanders (Tenn. Bar No. 5268), W. David Bridgers (Tenn. Bar No. 16603), Neal & Harwell, PLC, Nashville, TN, E. Edward Bruce, pro hac vice, Keith A. Noreika, pro hac vice, Covington & Burling, Washington, D.C., for Plaintiff **Bank** of **America**, N.A.

Paul G. Summers (BPR 6258), Attorney General and Reporter, Ann Louise Vix (10659), Senior Counsel, Janet M. Kleinfelter (BPR 13889), Senior Counsel, Office of the Attorney General and Reporter of the State of Tennessee, Financial Division, Nashville Tennessee, for Defendant Fred R. **Lawson**, in His Official Capacity as Commissioner of the Tennessee Department of Financial Institutions.

CONSENT JUDGMENT

HAYNES, J.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

*1 WHEREAS, Plaintiff **Bank** of **America**, N.A. brought an action in this Court on July 29, 2002, against Defendant Fred R. **Lawson**, in his official capacity as Commissioner of the Tennessee Department of Financial Institutions, alleging that Tennessee Code Ann. § 45-2-617, banning check-cashing fees, is preempted by the National Bank Act, 12 U.S.C. § 24(Seventh), and Office of the Comptroller of the Currency ("OCC") regulation, 12 C.F.R. § 7.4002; and

WHEREAS, the Court has jurisdiction over this civil action pursuant to 28 U.S.C. § 1331; and

WHEREAS, Plaintiff filed a motion for summary judgment and permanent injunctive relief on August 22, 2002; and

WHEREAS, Defendant has not filed an answer or otherwise responded to Plaintiff's complaint or motion for summary judgment and permanent injunctive relief; and

WHEREAS, on September 4, 2002, the Tennessee Attorney General and Reporter, who is the official charged by Tennessee law with representing Defendant under Tennessee Code Ann. § 8-6-109(b)(1), filed a Notice of Intent Not to Defend Tennessee Code Ann. § 45-2-617, pursuant to Tennessee Code Ann. § 8-6-109(b)(9); and

WHEREAS, Defendant has consented to the entry by the Court of a final judgment declaring Tennessee Code Ann. § 45-2-617 to be invalid, null, void and without force of law because it is preempted by the National Bank Act, 12 U.S.C. § 24(Seventh) and OCC regulation, 12 C.F.R. § 7.4002, and to the entry by the Court of a permanent injunction restraining him, and his successors and agents, including the Tennessee Attorney General and Reporter, from future enforcement of Tennessee Code Ann. § 45-2-617 against Plaintiff.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Tennessee Code Ann. § 45-2-617 is DECLARED to be invalid, null, void, and without force of law

under Article VI of the United States Constitution, because it is preempted by the National Bank Act, 12 U.S.C. § 24(Seventh) and OCC regulation, 12 C.F.R. § 7.4002;

2. Defendant Fred R. **Lawson**, in his official capacity as the Commissioner of the Tennessee Department of Financial Institutions, as well as his successors, agents, including the Tennessee Attorney General and Reporter, and all other Tennessee officers and officials, are hereby permanently ENJOINED from enforcing or taking any other action under Tennessee Code Ann. § 45-2-617 against Plaintiff **Bank** of **America**, N.A.

IT IS FURTHER ORDERED that the Court shall retain jurisdiction of this action for the purposes of enforcing the provisions of this Consent Judgment.

IT IS SO ORDERED.

M.D.Tenn.,2002.
Bank of America, N.A. v. Lawson
Not Reported in F.Supp.2d, 2002 WL 31965741 (M.D.Tenn.)

END OF DOCUMENT

Appendix K

Tenn. Op. Atty. Gen. No. 06-072, 2006 WL 1197466 (Tenn. A.G.)

Tenn. Op. Atty. Gen. No. 06-072, 2006 WL 1197466 (Tenn.A.G.)

Office of the Attorney General
State of Tennessee

Opinion No. 06-072

April 17, 2006

Senate Bill 3813 Regarding Credit Cards

Honorable Tommy Kilby
State Senator

QUESTIONS

1. To what extent does Senate Bill 3813 limit the charges or fees that a national **bank** may impose on retail merchants for processing credit card transactions?

2. To the extent it applies to national **banks**, is Senate Bill 3813 preempted by the National **Bank** Act and, therefore, invalid under the Supremacy Clause of the United States Constitution?

3. In the event that application of the bill to national **banks** is preempted by federal law, are such limits also inapplicable to state **banks** under the "wild card" statute, Tenn. Code Ann. § 45-2-601?

OPINIONS

1. The act limits the amount any credit card issuer in Tennessee, including a national **bank**, may impose on retail merchants for processing credit card transactions.

2. We think there is a substantial risk that a court would conclude that, to the extent it applies to national **banks**, Senate Bill 3813 is preempted by the National **Bank** Act and regulations promulgated by the Comptroller of the Currency under that act.

3. Yes, under the "wild card" statute, state **banks** may exercise any of the powers that a national **bank** may exercise. Thus, if the limits are preempted with respect to national **banks**, they would also be inapplicable to state **banks**.

ANALYSIS

This opinion concerns Senate Bill 3813 ("SB 3813"), which is an act "to amend Tennessee Code Annotated, Title 47, Chapter 22, relative to credit cards." Section 3 of the bill provides:

> (a) No card issuer shall charge to any retail merchant more than seventy-five hundreths of one percent (0.75%) per transaction for all processing fees involving the use of a credit or debit card.

Subsection (b) of § 3 would make a violation of subsection (a) an "unfair and deceptive act," subject to the Tennessee Consumer Protection Act, Tenn. Code Ann. §§ 47-18-101, *et seq.* The bill would define the term "card issuer" as "a person doing business in Tennessee that issues a credit card or that person's agent or assignee with respect to the card." § 2(4). The term "retail merchant" means "a business with at least eighty percent (80%) of its credit card transactions conducted through a credit card terminal." § 2(8). The bill also defines the terms "credit card" and "debit card."

> "Credit card" or "card" means any card, plate, coupon book or other single credit device that is issued primarily for consumer credit purposes and that may be used from time to time to obtain credit, including, but not limited to, a card that may be used to effect transactions governed by chapter 11 of this title [retail installment sales];
>
> "Debit card" means any real or forged instrument, writing or other evidence known by any name issued with or without a fee by an issuer for the use of a depositor in obtaining money, goods, services or anything else of value, payment of which is made against funds previously deposited in an account with the issuer.

§ 2(6) & (7). The bill, therefore, seeks to regulate the fee that a credit card issuer may charge a retail merchant as a processing fee when the merchant's customers make their purchases by credit card or debit card.

1. Effect of Bill on National **Banks**

The first question is to what extent SB 3813 limits the fees that a national **bank** may impose on retail merchants for processing credit card transactions. By its terms, the bill applies to any "card issuer." That term includes a person doing business in Tennessee that issues a credit card or that person's agent or assignee with respect to the card. Since national **banks** are not excluded from this definition, the bill would limit the fees that a national **bank**, as a credit card issuer, may impose on retail merchants for processing credit card transactions.

2. Preemption

The second question is whether, as applied to national **banks**, Senate Bill 3813 is preempted under federal law and, therefore, invalid under the Supremacy Clause of the United States Constitution. We think there is a substantial risk that a court would reach this conclusion. Under 12 C.F.R. § 7.4002(a), the Office of the Comptroller of the Currency ("OCC") has granted a national **bank** the authority to charge its customers non-interest fees and charges. This regulation does not exclude retailers who contract with credit card issuers. 12 C.F.R. § 7.4002(d) states that traditional preemption principles apply to state laws, "*that purport to limit or prohibit charges or fees described in this section.*" (Emphasis added). Traditionally, courts defer to OCC regulations. *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984). Further, several courts have recently found that federal law, as contained in OCC regulations, preempts state and local limitations on ATM surcharges for non-account holders. *See, e.g., Wells Fargo* ***Bank****, Texas, N.A. v. James*, 321 F.3d 488, 495 (5th Cir. 2003) (state regulation of surcharges on check cashing fees preempted); ***Bank*** *of America v. City and County of San Francisco*, 309 F.3d 551, 562-63 (9th Cir. 2002), *cert. denied*, 538 U.S. 1069, 123 S.Ct. 2220, 155 L.Ed.2d 1127 (2003); ***Bank*** *One Utah v. Guttau*, 190 F.3d 844, 849 (8th Cir. 1999), *cert. denied*, 529 U.S. 1087, 120 S.Ct. 1718, 146 L.Ed.2d 641 (2000); *Metrobank v. Foster*, 193 F.Supp.2d 1156, 1161 (S.D. Iowa 2002). These fees are comparable to the merchant discount that Senate Bill 3813 seeks to limit. For these reasons, a court would probably find that, at least as applied to national **banks**, Senate Bill 3813 is preempted by federal law.

3. State "Wild Card" Statute

The last question is whether, in the event that Senate Bill 3813, as applied to national **banks**, is preempted by federal law, the limits would be applicable to state **banks** under the Tennessee "wild card" statute. The State's "wild card" statute appears at Tenn. Code Ann. § 45-2-601. It provides in relevant part that "any state **bank** may

exercise any power or engage in any activity which it could exercise or engage in if it were a national **bank** located in Tennessee, subject to regulation by the commissioner for the purpose of maintaining the state **bank's** safety and soundness." Under the last sentence of this statute, any power accorded by federal law to a national **bank** located in Tennessee is automatically extended to state **banks**, subject to regulation by the Commissioner of Financial Institutions for the purpose of maintaining the state **bank's** safety and soundness. Op. Tenn. Att'y Gen. 86-156 (September 2, 1986). Historically, this Office has interpreted this provision to permit state **banks** to exercise any power that national **banks** may exercise, subject to the same terms and conditions, and subject to state regulation to maintain the state **bank's** safety and soundness. Op. Tenn. Att'y Gen. 04-059 (April 7, 2004); Op. Tenn. Att'y Gen. 02-103 (February 1, 2002) (state **banks** may invest in a subsidiary licensed as a title insurance agent on the same terms and conditions as national **banks**); Op. Tenn. Att'y Gen. 89-69 (May 1, 1989) (state **banks** operating in towns of 5,000 or less, like national **banks**, may engage in insurance activities); Op. Tenn. Att'y Gen. 87-192 (December 16, 1987) (since national **banks** are not prohibited from charging document preparation fees in connection with their loans, state **banks** may also do so); Op. Tenn. Att'y Gen. 86-156 (September 2, 1986) (as a result of OCC regulations and federal case law, a state **bank** may operate an ATM without being subject to state law regulations and geographic restrictions). Thus, if the limits under Senate Bill 3813 are preempted with respect to national **banks**, they would also be inapplicable to state **banks**.

Paul G. Summers
Attorney General

Michael E. Moore
Solicitor General

Ann Louise Vix
Senior Counsel

Tenn. Op. Atty. Gen. No. 06-072, 2006 WL 1197466 (Tenn.A.G.)
END OF DOCUMENT

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*Robert S. Holland**

*Shannon M. Holland**

* *Admitted to Practice before*
The Supreme Court of the United States

February 25, 2009

VIA FIRST CLASS U.S. MAIL

Honorable Mike Catalano
Clerk of the Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219

RE: ***Petition to Amend Rule 8 RPC 1.15***
And Rule 43 Rules of Tennessee Supreme Court - IOLTA

Dear Honorable Catalano:

I just received an advance sheet that was actually dated February 3, 2009, but I just received on or about February 19, 2009 from West Publishing Company. For that reason, I think that it is fair for you to extend the time for comment.

I note that the people that signed this Petition are either from large insurance defense firms or from organizations that will benefit by the extension of a mandatory IOLTA.

I understand from another lawyer that the U.S. Supreme Court has basically said it is not a use of someone else's money. If that is true, whose money is it. In fact, it is my client's money, and it is an abuse of this to require me to submit my client's money and then they not receive the benefit of it.

I do not have a problem with me being required to maintain a Trust account as it has always been that way since I started practice in 1980, and it has always seemed reasonable to me. However, if there was going to be interest to accrue to that, it would seem reasonable to me for me to be allowed to pay the expenses of the account out of that interest, and then to refund to my clients. However, I think that would certainly be almost impossible to do, and would take a lot of calculation, so I do not really suggest that. However, I do not suggest that it is appropriate to take my client's money, and give it to someone else. I think that is purely wrong.

As I do not normally have a large amount of money in my Trust account, it will not benefit these organizations in any event. Personally, I also object you using by forced use my client's money to donate to organizations that do not necessarily meet mine or my client's charitable goals.

Of course, I do not have any problem with IOLTA as to different contributions as they, and apparently their clients approve. However, myself nor my clients approve of this usage of their money. I consider an IOLTA account invasive of my rights and my clients rights. It is particularly wrong to invade and take from clients money that belongs to them. If I did that, I would be disciplined.

In the nearly thirty (30) years that I have practiced, I have never had a monetary dispute with a client, except one client demanding his expense money back, and receiving it.

In the event you wish to make it mandatory, it seems to me appropriate to make it mandatory for the big firms that already have accountants hired to handle their Trust account and other matters rather than picking on small law firms.

I would strongly urge the Supreme Court to craft an Order if it is necessary, that does not impose on clients and on the lawyers involved. If it is done, I am just going to have to charge additional fees, which is abhorrent to me, as I prefer to be friendly with my clients, which of course the insurance companies do not do. I represent people and not big businesses or big insurance companies.

With Kindest Personal Regards,

Robert S. Holland

RSH/lmf
cc: File

C:\Users\Holland Law\Documents\RSH\Miscellaneous\Mike.Catalano.022509.Ltr.wpd

TENNESSEE BAR ASSOCIATION

May 20, 2009

The Honorable Michael Catalano
Clerk, Tennessee Supreme Court
Supreme Court Building, Room100
401 Seventh Avenue North
Nashville, TN 37219

IN RE: PROPOSED AMENDMENT OF RULE 1.15 OF RULES OF PROFESSIONAL CONDUCT AND SUPREME COURT RULE 43

Dear Mike:

Attached for filing please find an original and six copies of a Comment in reference to the above new matter.

As always, thank you for your cooperation. I remain,

Very truly yours,

Allan F. Ramsaur
Executive Director

cc: George T. Lewis, President, Tennessee Bar Association
Debra L. House, Chair, Access To Justice Committee
Barri Bernstein, Executive Director, Tennessee Bar Foundation
Riney Green, Chair-Elect, Tennessee Bar Foundation
Tim Amos, Senior VP and General Counsel, Tennessee Bankers Association

Service List

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221 Fourth Avenue North, Suite 400
Nashville, Tennessee 37219-2198
(615) 383-7421 • (800) 899-6993
FAX (615) 297-8058
www.tba.org

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:	PROPOSED AMENDMENT OF RULE 1.15 OF RULES OF PROFESSIONAL CONDUCT AND SUPREME COURT RULE 43	)))))	No. M2008-02603-SC-RL1-RL

JOINT COMMENT OF THE
TENNESSEE BAR FOUNDATION,
TENNESSEE BAR ASSOCIATION
AND
TENNESSEE BANKERS ASSOCIATION

The Tennessee Bar Foundation, Tennessee Bar Association and Tennessee Bankers Association respectfully request the opportunity to make this joint comment to this Honorable Court notwithstanding the expiration of the comment period in the above matter. This joint comment reflects agreement to offer further adjustments to the language proposed to amend Tn. Sup. Ct. Rule 43. The joint commenters now represent to the Court they are in agreement as to the operational details of the proposed revisions to Tennessee's Interest On Lawyers' Trust Accounts "IOLTA" Program.

BACKGROUND

On November 24, 2008, the Tennessee Bar Foundation, Tennessee Bar Association, Tennessee Association for Justice and the Tennessee Alliance for Legal Services petitioned this Honorable Court to make participation in Tennessee's IOLTA program mandatory for lawyers who deposit client funds for a short duration or in small amounts and to enhance provisions for rate comparability for such accounts maintained in financial institutions.

During the comment period, from December 18, 2008 and continuing through February 20, 2009, the Tennessee Bar Foundation and the Tennessee Bar Association held discussions with the Tennessee Bankers Association resulting in an additional comment and a modification to the original November 24 proposal. This comment was timely filed on February 20, 2009.

Parallel to those discussions, the Tennessee Bankers Association timely filed a comment with proposed changes.

Subsequent to the filing of those comments, the Tennessee Bar Foundation, Tennessee Bar Association and Tennessee Bankers Association have continued their discussions towards the end of a mutually agreeable set of operational adjustments. This joint comment represents the fruits of those discussions.

DISCUSSION

As represented by the redline submitted as "Exhibit "A," the additional changes to the operational details reflect the clarification of language in the current parlance of banking operations and improved specificity as to types of accounts which may be employed.

Exhibit "B" is a redline showing the original proposal made by the petitioners and combining the changes offered in the February 20, 2009 comment of the Tennessee Bar Foundation, Tennessee Bar Association and Tennessee Bankers Association along with the changes offered here by the joint commenters in today's comment.

Finally, we offer Exhibit "C" which is a "clean" version as the petitioners and the Tennessee Bankers Association now propose it be adopted. As noted in the

February 20 comment filed by the Tennessee Bankers Association, the banks in Tennessee have supported the IOLTA program and have reiterated their support for the program. The comment filed sought clarification and revision to the operational details of the Tennessee Supreme Court Rule 43 as proposed. The adoption of the proposal with these revisions will accomplish that clarification.

With these revisions, the Tennessee Bar Foundation, Tennessee Bar Association and Tennessee Bankers Association urge the early adoption of the proposed amendments. The need to begin to enhance funding for programs for the poor is urgent. Lawyers will need to begin to adjust their accounts through the Fall in order to come into complete compliance effective January 1, 2010. Preparation for implementation of the changes by the Tennessee Bar Foundation should proceed throughout Summer. In addition, with the new compliance reporting requirement proposed to be implemented by the Tennessee Supreme Court Board of Professional Responsibility, preparation of the appropriate sections of the annual lawyer registration form and process should begin so that there is no disruption in that process.

CONCLUSION

For the reasons stated above, the joint commenters respectfully request that the Court accept this additional comment and adopt the amendments to RPC 1.15 and revised amendments to Tennessee Supreme Court Rule 43 filed herewith.

RESPECTFULLY SUBMITTED,

By: /s/ by permission

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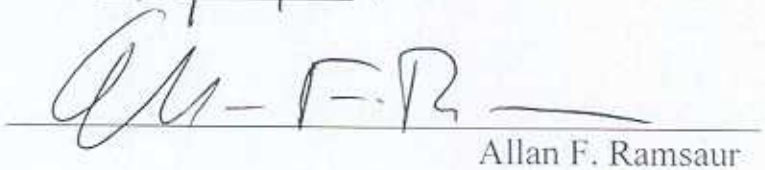
CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "D" by regular U.S. Mail, postage prepaid on May 20, 2009



Allan F. Ramsaur

EXHIBIT "A"

~~Draft April 28,~~May 18, 2009
~~of the Tennessee Bar Foundation,~~
~~the Tennessee Bar Association and~~
~~the Tennessee Alliance for Legal Services~~

Proposed

Supreme Court Rule 43

Interest On Lawyers' Trust Accounts

Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.15, requires that Tennessee lawyers who maintain pooled trust checking accounts for the deposit of client funds participate in the IOLTA (Interest On Lawyers' Trust Accounts) program.

The following rule shall govern the operation of IOLTA accounts and the IOLTA program:

1. The determination of whether or not a financial institution is an eligible institution which meets the requirements of this Rule shall be made by the Tennessee Bar Foundation, the organizational administrator of the IOLTA program. The Foundation shall maintain a list of eligible financial institutions and shall make that list available to Tennessee lawyers. The selection of an institution from the list of those eligible rests with the lawyer or law firm.

2. Eligible institutions are those financial institutions which voluntarily offer IOLTA accounts and comply with the requirements of this Rule, including maintaining IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers in a local market area when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. To determine the highest

interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered when setting interest rates or dividends for customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. The determination of the highest interest rate or dividend generally available shall not include consideration of promotional rates that are offered by the financial institution for a limited time ~~only~~. Nothing in this Rule shall prohibit an eligible institution from paying an interest rate or dividend higher than required herein.

3. If a financial institution offers one or more of the following product types to its non-IOLTA customers and an IOLTA account qualifies for one or more of the products pursuant to Section 2 of this Rule, then, in order to be an eligible financial institution, the financial institution must pay an interest rate on the IOLTA account equal to the highest yield available at that financial institution among those product types. The financial institution may, at its discretion, either use the identified product or products as the IOLTA account or pay the equivalent yield on the IOLTA account in lieu of using the highest yield bank product(s) identified:

(a) A business checking account with an automated investment feature, such as an overnight investment in repurchase agreements or money market funds fully collateralized by or invested solely in United States government securities which are direct debt obligations of the government of the United States or of agencies or instruments thereof guaranteed by the full faith

and credit of the government of the United States as to the payment of principal and interest at maturity; or

(b) A checking account paying preferred interest rates, such as market based or indexed rates; or

(c) A public funds interest-bearing checking account, such as accounts used for governmental agencies and other non-profit organizations; or

(d) An interest bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(e) A business demand deposit checking-interest bearing transaction account (when permitted by federal law); or

(f) Any other suitable interest-bearing deposit account with or tied to unlimited check writing ability offered by the institution to its non-IOLTA customers.

4. As an alternative to compliance under Section 3, a financial institution may also comply with this rule if it agrees to pay a rate voluntarily negotiated with the Foundation to be in effect for and remain unchanged during a period of up to twelve months as provided pursuant to a voluntary agreement between the financial institution and the Foundation.

5. A daily financial institution repurchase agreement shall be fully collateralized by United States Government 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.

6. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities

and shall 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, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

7. An eligible financial institution participating in the IOLTA program must also:

(a) Remit interest or dividends net of any allowable service charges or fees, preferably monthly, but at least quarterly, to the Tennessee Bar Foundation;

(b) Transmit to the Tennessee Bar Foundation, in a format specified by the Tennessee Bar Foundation, a report which contains:

(i) the name of the lawyer or law firm on whose account the remittance is sent;

(ii) the account number;

(iii) the balance on which the interest rate is applied;

(iv) the rate of interest or dividends applied;

(v) the gross interest or dividends earned;

(vi) the type and amount of any allowable service charges or fees deducted; and

(vii) the net amount remitted.

A financial institution which maintains more than thirty IOLTA accounts, may, at the request of the Tennessee Bar Foundation, be required to transmit the report in an electronic format.

(c) Transmit information to the lawyer or law firm maintaining that account in accordance with the institution's normal procedures for reporting to depositors.

8. No financial institution service charges or fees may be deducted from the principal of any IOLTA account.

9. Deductions by the financial institution from interest earned may only be for allowable reasonable service charges or fees calculated in accordance with the institution's standard practice for non-IOLTA customers. For purposes of this Rule, "allowable reasonable service charges or fees" are defined as:

(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.

Other financial institution service charges or fees shall not be deducted from IOLTA account interest and shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. Nothing in this Rule shall be construed to require that a

financial institution charge fees on an IOLTA account, nor does anything in this Rule prohibit a financial institution from waiving or discounting fees associated with an IOLTA account.

10. Allowable reasonable service charges or fees in excess of the interest earned on any one IOLTA account may not be deducted from interest earned on any other IOLTA account.

11. If the Tennessee Bar Foundation, for any reason, determines a financial institution does not meet the requirements of this rule, the Tennessee Bar Foundation will notify the financial institution. The financial institution will be provided not less than thirty days to take corrective action that results in compliance with this rule.

12. A lawyer, law firm or financial institution that objects to a determination of the Tennessee Bar Foundation that a financial institution is not an eligible institution under Section 1 through 10 of this Rule or a lawyer who objects to a determination of the Tennessee Bar Foundation that the lawyer is not eligible for an exemption under Section 14(e), may appeal such determination to the Board of Professional Responsibility in accordance with regulations adopted by the Board of Professional Responsibility.

13. Interest transmitted shall, after deductions for the necessary and reasonable administrative expenses of the Tennessee Bar Foundation for operation of the IOLTA program, be distributed by that entity, in proportions it deems appropriate, for the following purposes:

(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.

14. Unless exempt under this Section 14, every lawyer admitted to practice in Tennessee shall certify in the lawyer's annual registration statement required by Tennessee Supreme Court Rule 9, Section 20.5, as a condition of licensure, that all funds in the lawyer's possession that are required pursuant to RPC 1.15(b) to be held in an IOLTA account are, in fact, so held and shall list the name(s) of the financial institution(s) and account number(s) where such funds are deposited. This certification shall be made on a form provided by the Board of Professional Responsibility and shall be submitted by the lawyer within the time period set forth in Rule 9, Section 20, for the annual registration statement.

A lawyer licensed in Tennessee is exempt, and shall so certify on the lawyer's annual registration statement, if:

(a) the lawyer is not engaged in the private practice of law in the State of Tennessee;

(b) the lawyer serves as a Judge, Attorney General, Public Defender, U.S. Attorney, District Attorney, corporate counsel, teacher of law, 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;

(c) the lawyer does not have an office in Tennessee; however, for purposes of this Rule, a lawyer who practices, as a principal, employee, of counsel, or in any other capacity, with a firm that has an office in Tennessee shall be deemed for purposes of this Rule to have an office in Tennessee if the lawyer utilizes one or more offices of the firm located in Tennessee more than the lawyer utilizes one or more offices of the firm located in any other single state;

(d) under regulations adopted by the Board of Professional Responsibility under criteria established upon recommendation of the Tennessee Bar Foundation, the lawyer or law firm is exempted from maintaining an IOLTA account because such an IOLTA account has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees; or

(e) the lawyer is exempted by the Tennessee Bar Foundation from the application of this Rule following a written request for exemption by the lawyer and determination by the Tennessee Bar Foundation that no eligible financial institution (as defined and determined in accordance with this Rule 43) is located within reasonable proximity of that lawyer.

15. Upon its receipt of a lawyer's certification under Section 14 of this Rule, the Tennessee Bar Foundation shall, on or before March 31 of each year, report to the Board of Professional Responsibility any evidence of the lawyer's noncompliance known by the Tennessee Bar Foundation. Noncompliance with this Rule will result in the following action:

(a) On or before May 15 of each year, the Board of Professional Responsibility shall compile a list of those lawyers who are not in compliance with this Rule. On or before the first business day of May of each year, the Board of Professional Responsibility shall serve each lawyer on the list compiled under this Rule a Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice on or before May 31 of that year. Each lawyer to whom a Notice of Noncompliance is issued shall pay to the Board of Professional Responsibility a Noncompliance Fee of One Hundred Dollars ($100.00). Such Noncompliance Fee shall be paid on or before May 31 of that year, unless the lawyer shows to the satisfaction of the Chief Disciplinary Counsel that the Notice of Noncompliance was erroneously issued, in which case no such fee shall be due.

(b) On or before May 31 of that year, each lawyer on whom a Notice of Noncompliance is served also shall file with the Board of Professional Responsibility an affidavit, in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied. In the event a lawyer fails to timely remedy any such deficiency or fails to timely file such affidavit, the lawyer shall pay to the Board of Professional

Responsibility, in addition to the Noncompliance Fee, a Delinquent Compliance Fee of Two Hundred Dollars ($200.00).

(c) On or before June 30 of each year, the Board of Professional Responsibility shall: (i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance and who failed to remedy their deficiencies by May 31; (ii) submit the proposed Suspension Order to the Supreme Court; and (iii) serve a copy of the proposed Suspension Order on each lawyer named in the Order. The Supreme Court will review the proposed Suspension Order and enter such order as the Court may deem appropriate suspending the law license of each lawyer deemed by the Court to be not in compliance with the requirements of this Rule.

(d) Each lawyer named in the Suspension Order entered by the Court shall file with the Board of Professional Responsibility an affidavit in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied and shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee and the Delinquent Compliance Fee, a Five Hundred Dollar ($500.00) Suspension Fee as a condition of reactivation of his or her law license. Payment of all fees imposed by this section shall be a requirement for compliance with this Rule and for reactivation of a license. The Board of Professional Responsibility shall not reactivate the license of any lawyer

whose license is suspended pursuant to this Rule until the Chief Disciplinary Counsel certifies compliance with the requirements of this Rule.

(e) All notices required or permitted to be served on a lawyer under the provisions of this Rule shall be served by United States Postal Service Certified Mail, return receipt requested, at the address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9, Section 20.5, and shall be deemed to have been served as of the postmark date shown on the Certified Mail Receipt.

16. The Board of Professional Responsibility, acting in concert with the Tennessee Bar Foundation, may promulgate such forms and procedures to implement Sections 14 and 15 of this Rule and of Supreme Court Rule 8, RPC 1.15.

17. The information contained in the statements forwarded to the Tennessee Bar Foundation under Section 14 and/or Section 15 of this Rule shall remain confidential other than as to Tennessee Supreme Court or the Board of Professional Responsibility. The Tennessee Bar Foundation shall not release any information contained in such statements other than as a compilation of data from such statements, except as directed in writing by the Tennessee Supreme Court or the Board of Professional Responsibility or in response to a subpoena.

18. Transition Provisions. For the purpose of adopting regulations consistent with this Rule and educating the bar and financial institutions regarding the new requirements, the provisions of Rule 43 authorizing regulations and approval shall take effect upon entry of order adopting the Rule by the Tennessee Supreme Court.

EXHIBIT "A"

For the purposes of certification on annual registrations by lawyers required in Tennessee Supreme Court Rule 43 and the provisions of Tennessee Supreme Court Rule 8, RPC 1.15 requiring deposit in IOLTA accounts, these amendments shall take effect on January 1, 2010.

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Document comparison done by Workshare DeltaView on Monday, May 18, 2009 9:13:50 AM

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Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
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Insertions	3
Deletions	6
Moved from	0
Moved to	0
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Format changed	0
Total changes	9

EXHIBIT "B"

~~Submitted February 20,~~May 18, 2009
~~by the Tennessee Bar Foundation,~~
~~the Tennessee Bar Association and~~
~~the Tennessee Alliance for Legal Services~~

Proposed

Supreme Court Rule 43

Interest On Lawyers' Trust Accounts

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2. Eligible institutions are those financial institutions which voluntarily offer IOLTA accounts and comply with the requirements of this Rule, including maintaining IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers in a local market area when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. To determine the highest

interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered when setting interest rates or dividends for customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. The determination of the highest interest rate or dividend generally available shall not include consideration of promotional rates that are offered by the financial institution for a limited time. Nothing in this Rule shall prohibit an eligible institution from paying an interest rate or dividend higher than required herein.

3. ~~(a) Eligible financial institutions satisfy the requirements of this Rule by paying~~If a financial institution offers one or more of the following product types to its non-IOLTA customers and an IOLTA account qualifies for one or more of the products pursuant to Section 2 of this Rule, then, in order to be an eligible financial institution, the financial institution must pay an interest rate on the IOLTA ~~accounts~~account equal to the highest yield available at that financial institution among ~~certain product types (if the product is available from the financial institution to non-IOLTA customers) by either~~those product types. The financial institution may, at its discretion, either use the identified product or products as the IOLTA account or pay the equivalent yield on the IOLTA account in lieu of using the highest yield bank product(s) identified:

~~(i) Using the identified product as the IOLTA account , or~~

~~(ii) Paying the equivalent yield on the existing IOLTA account in lieu of using the highest yield bank product.~~

~~(b) The product types that may be used are:~~

~~(i)~~ (a) A business checking account with an automated investment feature, such as an overnight investment in repurchase agreements or money market funds fully collateralized by or invested solely in United States government securities which are direct debt obligations of the government of the United States or of agencies or instruments thereof guaranteed by the full faith and credit of the government of the United States as to the payment of principal and interest at maturity; or

~~(ii)~~ (b) A checking account paying preferred interest rates, such as ~~money~~ market based or indexed rates; or

~~(iii) A government~~ (c) A public funds interest-bearing checking account, such as accounts used for ~~municipal deposits~~governmental agencies and other non-profit organizations; or

(d) An interest bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(e) A business demand deposit checking-interest bearing transaction account (when permitted by federal law); or

~~(iv)~~ (f) Any other suitable interest-bearing deposit account with or tied to unlimited check writing ability offered by the institution to its non-IOLTA customers;

~~(v) A business demand deposit checking-interest bearing transaction account (when permitted by federal law).~~

4. As an alternative to ~~the options in~~compliance under Section 3, a financial institution may also comply with this ~~Rule~~rule if it agrees to pay a rate ~~specified by~~voluntarily negotiated with the Foundation ~~(if the Foundation chooses to specify a rate) which would~~to be in effect for and remain unchanged during a period of up to twelve months as provided pursuant to a voluntary agreement between the financial institution and the Foundation.

5. A daily financial institution repurchase agreement shall be fully collateralized by United States Government 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.

6. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities and shall 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, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

7. An eligible financial institution participating in the IOLTA program must also:

(a) Remit interest or dividends net of any allowable service charges or fees, preferably monthly, but at least quarterly, to the Tennessee Bar Foundation;

(b) Transmit to the Tennessee Bar Foundation, in a format specified by the Tennessee Bar Foundation, a report which contains:

(i) the name of the lawyer or law firm on whose account the remittance is sent;

(ii) the account number;

(iii) the balance on which the interest rate is applied;

(iv) the rate of interest or dividends applied;

(v) the gross interest or dividends earned;

(vi) the type and amount of any allowable service charges or fees deducted; and

(vii) the net amount remitted.

A financial institution which maintains more than thirty IOLTA accounts, may, at the request of the Tennessee Bar Foundation, be required to transmit the report in an electronic format.

(c) Transmit information to the lawyer or law firm maintaining that account in accordance with the institution's normal procedures for reporting to depositors.

8. No financial institution service charges or fees may be deducted from the principal of any IOLTA account.

9. Deductions by the financial institution from interest earned may only be for allowable reasonable service charges or fees calculated in accordance with the institution's standard

practice for non-IOLTA customers. For purposes of this Rule, "allowable reasonable service charges or fees" are defined as:

(a) per check or electronic debit charges;

(b) per deposit or electronic credit charges;

(c) a fee in lieu of minimum balance;

(d) ~~federal deposit~~FDIC insurance fees or FDIC account guarantee fees;

(e) a sweep fee; and

(f) a reasonable IOLTA account administrative fee.

Other financial institution service charges or fees shall not be deducted from IOLTA account interest and shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. Nothing in this Rule shall be construed to require that a financial institution charge fees on an IOLTA account, nor does anything in this Rule prohibit a financial institution from waiving or discounting fees associated with an IOLTA account.

10. Allowable reasonable service charges or fees in excess of the interest earned on any one IOLTA account may not be deducted from interest earned on any other IOLTA account.

11. If the Tennessee Bar Foundation, for any reason, determines a financial institution does not meet the requirements of this rule, the Tennessee Bar Foundation will notify the financial institution. The financial institution will be provided not less than thirty days to take corrective action that results in compliance with this rule.

12. A lawyer ~~or~~, law firm ~~who~~or financial institution that objects to a determination of the Tennessee Bar Foundation that a financial institution is not an eligible institution under Section 1 through 10 of this Rule or a lawyer who objects to a determination of the Tennessee Bar Foundation that the lawyer is not eligible for an exemption under Section 14(e), may appeal such determination to the Board of Professional Responsibility in accordance with regulations adopted by the Board of Professional Responsibility.

13. Interest transmitted shall, after deductions for the necessary and reasonable administrative expenses of the Tennessee Bar Foundation for operation of the IOLTA program, be distributed by that entity, in proportions it deems appropriate, for the following purposes:

(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.

14. Unless exempt under this Section 14, every lawyer admitted to practice in Tennessee shall certify in the lawyer's annual registration statement required by Tennessee Supreme Court Rule 9, Section 20.5, as a condition of licensure, that all funds in the lawyer's possession that are required pursuant to RPC 1.15(b) to be held in an IOLTA account are, in fact, so held and shall list the name(s) of the financial institution(s) and account number(s) where such funds are

deposited. This certification shall be made on a form provided by the Board of Professional Responsibility and shall be submitted by the lawyer within the time period set forth in Rule 9, Section 20, for the annual registration statement.

A lawyer licensed in Tennessee is exempt, and shall so certify on the lawyer's annual registration statement, if:

(a) the lawyer is not engaged in the private practice of law in the State of Tennessee;

(b) the lawyer serves as a Judge, Attorney General, Public Defender, U.S. Attorney, District Attorney, corporate counsel, teacher of law, 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;

(c) the lawyer does not have an office in Tennessee; however, for purposes of this Rule, a lawyer who practices, as a principal, employee, of counsel, or in any other capacity, with a firm that has an office in Tennessee shall be deemed for purposes of this Rule to have an office in Tennessee if the lawyer utilizes one or more offices of the firm located in Tennessee more than the lawyer utilizes one or more offices of the firm located in any other single state;

(d) under regulations adopted by the Board of Professional Responsibility under criteria established upon recommendation of the Tennessee Bar Foundation, the

lawyer or law firm is exempted from maintaining an IOLTA account because such an IOLTA account has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees; or

(e) the lawyer is exempted by the Tennessee Bar Foundation from the application of this Rule following a written request for exemption by the lawyer and determination by the Tennessee Bar Foundation that no eligible financial institution (as defined and determined in accordance with this Rule 43) is located within reasonable proximity of that lawyer.

15. Upon its receipt of a lawyer's certification under Section 14 of this Rule, the Tennessee Bar Foundation shall, on or before March 31 of each year, report to the Board of Professional Responsibility any evidence of the lawyer's noncompliance known by the Tennessee Bar Foundation. Noncompliance with this Rule will result in the following action:

(a) On or before May 15 of each year, the Board of Professional Responsibility shall compile a list of those lawyers who are not in compliance with this Rule. On or before the first business day of May of each year, the Board of Professional Responsibility shall serve each lawyer on the list compiled under this Rule a Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice on or before May 31 of that year. Each lawyer to whom a Notice of Noncompliance is issued shall pay to the Board of Professional Responsibility a Noncompliance Fee of One Hundred Dollars ($100.00). Such

Noncompliance Fee shall be paid on or before May 31 of that year, unless the lawyer shows to the satisfaction of the Chief Disciplinary Counsel that the Notice of Noncompliance was erroneously issued, in which case no such fee shall be due.

(b) On or before May 31 of that year, each lawyer on whom a Notice of Noncompliance is served also shall file with the Board of Professional Responsibility an affidavit, in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied. In the event a lawyer fails to timely remedy any such deficiency or fails to timely file such affidavit, the lawyer shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee, a Delinquent Compliance Fee of Two Hundred Dollars ($200.00).

(c) On or before June 30 of each year, the Board of Professional Responsibility shall: (i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance and who failed to remedy their deficiencies by May 31; (ii) submit the proposed Suspension Order to the Supreme Court; and (iii) serve a copy of the proposed Suspension Order on each lawyer named in the Order. The Supreme Court will review the proposed Suspension Order and enter such order as the Court may deem appropriate suspending the law license of each lawyer deemed by the Court to be not in compliance with the requirements of this Rule.

(d) Each lawyer named in the Suspension Order entered by the Court shall file with the Board of Professional Responsibility an affidavit in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied and shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee and the Delinquent Compliance Fee, a Five Hundred Dollar ($500.00) Suspension Fee as a condition of reactivation of his or her law license. Payment of all fees imposed by this section shall be a requirement for compliance with this Rule and for reactivation of a license. The Board of Professional Responsibility shall not reactivate the license of any lawyer whose license is suspended pursuant to this Rule until the Chief Disciplinary Counsel certifies compliance with the requirements of this Rule.

(e) All notices required or permitted to be served on a lawyer under the provisions of this Rule shall be served by United States Postal Service Certified Mail, return receipt requested, at the address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9, Section 20.5, and shall be deemed to have been served as of the postmark date shown on the Certified Mail Receipt.

16. The Board of Professional Responsibility, acting in concert with the Tennessee Bar Foundation, may promulgate such forms and procedures to implement Sections 14 and 15 of this Rule and of Supreme Court Rule 8, RPC 1.15.

17. The information contained in the statements forwarded to the Tennessee Bar Foundation under Section 14 and/or Section 15 of this Rule shall remain confidential other than as to

Tennessee Supreme Court or the Board of Professional Responsibility. The Tennessee Bar Foundation shall not release any information contained in such statements other than as a compilation of data from such statements, except as directed in writing by the Tennessee Supreme Court or the Board of Professional Responsibility or in response to a subpoena.

18. Transition Provisions. For the purpose of adopting regulations consistent with this Rule and educating the bar and financial institutions regarding the new requirements, the provisions of Rule 43 authorizing regulations and approval shall take effect upon entry of order adopting the Rule by the Tennessee Supreme Court.

For the purposes of certification on annual registrations by lawyers required in Tennessee Supreme Court Rule 43 and the provisions of Tennessee Supreme Court Rule 8, RPC 1.15 requiring deposit in IOLTA accounts, these amendments shall take effect on January 1, 2010.

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Total changes	71

EXHIBIT "C"

May 18, 2009

Proposed

Supreme Court Rule 43

Interest On Lawyers' Trust Accounts

Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.15, requires that Tennessee lawyers who maintain pooled trust checking accounts for the deposit of client funds participate in the IOLTA (Interest On Lawyers' Trust Accounts) program.

The following rule shall govern the operation of IOLTA accounts and the IOLTA program:

1. The determination of whether or not a financial institution is an eligible institution which meets the requirements of this Rule shall be made by the Tennessee Bar Foundation, the organizational administrator of the IOLTA program. The Foundation shall maintain a list of eligible financial institutions and shall make that list available to Tennessee lawyers. The selection of an institution from the list of those eligible rests with the lawyer or law firm.

2. Eligible institutions are those financial institutions which voluntarily offer IOLTA accounts and comply with the requirements of this Rule, including maintaining IOLTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers in a local market area when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if any. To determine the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts,

eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered when setting interest rates or dividends for customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers and that these factors do not include that the account is an IOLTA account. The determination of the highest interest rate or dividend generally available shall not include consideration of promotional rates that are offered by the financial institution for a limited time. Nothing in this Rule shall prohibit an eligible institution from paying an interest rate or dividend higher than required herein.

3. If a financial institution offers one or more of the following product types to its non-IOLTA customers and an IOLTA account qualifies for one or more of the products pursuant to Section 2 of this Rule, then, in order to be an eligible financial institution, the financial institution must pay an interest rate on the IOLTA account equal to the highest yield available at that financial institution among those product types. The financial institution may, at its discretion, either use the identified product or products as the IOLTA account or pay the equivalent yield on the IOLTA account in lieu of using the highest yield bank product(s) identified:

(a) A business checking account with an automated investment feature, such as an overnight investment in repurchase agreements or money market funds fully collateralized by or invested solely in United States government securities which are direct debt obligations of the government of the United States or of agencies or instruments thereof guaranteed by the full faith and credit of the government of the United States as to the payment of principal and interest at maturity; or

(b) A checking account paying preferred interest rates, such as market based or indexed rates; or

(c) A public funds interest-bearing checking account, such as accounts used for governmental agencies and other non-profit organizations; or

(d) An interest bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(e) A business demand deposit checking-interest bearing transaction account (when permitted by federal law); or

(f) Any other suitable interest-bearing deposit account with or tied to unlimited check writing ability offered by the institution to its non-IOLTA customers.

4. As an alternative to compliance under Section 3, a financial institution may also comply with this rule if it agrees to pay a rate voluntarily negotiated with the Foundation to be in effect for and remain unchanged during a period of up to twelve months as provided pursuant to a voluntary agreement between the financial institution and the Foundation.

5. A daily financial institution repurchase agreement shall be fully collateralized by United States Government 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.

6. An open-end money-market fund shall be invested solely in United States Government Securities or repurchase agreements fully collateralized by United States Government Securities and shall 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, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

7. An eligible financial institution participating in the IOLTA program must also:

(a) Remit interest or dividends net of any allowable service charges or fees, preferably monthly, but at least quarterly, to the Tennessee Bar Foundation;

(b) Transmit to the Tennessee Bar Foundation, in a format specified by the Tennessee Bar Foundation, a report which contains:

(i) the name of the lawyer or law firm on whose account the remittance is sent;

(ii) the account number;

(iii) the balance on which the interest rate is applied;

(iv) the rate of interest or dividends applied;

(v) the gross interest or dividends earned;

(vi) the type and amount of any allowable service charges or fees deducted; and

(vii) the net amount remitted.

EXHIBIT "C"

A financial institution which maintains more than thirty IOLTA accounts, may, at the request of the Tennessee Bar Foundation, be required to transmit the report in an electronic format.

(c) Transmit information to the lawyer or law firm maintaining that account in accordance with the institution's normal procedures for reporting to depositors.

8. No financial institution service charges or fees may be deducted from the principal of any IOLTA account.

9. Deductions by the financial institution from interest earned may only be for allowable reasonable service charges or fees calculated in accordance with the institution's standard practice for non-IOLTA customers. For purposes of this Rule, "allowable reasonable service charges or fees" are defined as:

(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.

Other financial institution service charges or fees shall not be deducted from IOLTA account interest and shall be the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account. Nothing in this Rule shall be construed to require that a

financial institution charge fees on an IOLTA account, nor does anything in this Rule prohibit a financial institution from waiving or discounting fees associated with an IOLTA account.

10. Allowable reasonable service charges or fees in excess of the interest earned on any one IOLTA account may not be deducted from interest earned on any other IOLTA account.

11. If the Tennessee Bar Foundation, for any reason, determines a financial institution does not meet the requirements of this rule, the Tennessee Bar Foundation will notify the financial institution. The financial institution will be provided not less than thirty days to take corrective action that results in compliance with this rule.

12. A lawyer, law firm or financial institution that objects to a determination of the Tennessee Bar Foundation that a financial institution is not an eligible institution under Section 1 through 10 of this Rule or a lawyer who objects to a determination of the Tennessee Bar Foundation that the lawyer is not eligible for an exemption under Section 14(e), may appeal such determination to the Board of Professional Responsibility in accordance with regulations adopted by the Board of Professional Responsibility.

13. Interest transmitted shall, after deductions for the necessary and reasonable administrative expenses of the Tennessee Bar Foundation for operation of the IOLTA program, be distributed by that entity, in proportions it deems appropriate, for the following purposes:

(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.

14. Unless exempt under this Section 14, every lawyer admitted to practice in Tennessee shall certify in the lawyer's annual registration statement required by Tennessee Supreme Court Rule 9, Section 20.5, as a condition of licensure, that all funds in the lawyer's possession that are required pursuant to RPC 1.15(b) to be held in an IOLTA account are, in fact, so held and shall list the name(s) of the financial institution(s) and account number(s) where such funds are deposited. This certification shall be made on a form provided by the Board of Professional Responsibility and shall be submitted by the lawyer within the time period set forth in Rule 9, Section 20, for the annual registration statement.

A lawyer licensed in Tennessee is exempt, and shall so certify on the lawyer's annual registration statement, if:

(a) the lawyer is not engaged in the private practice of law in the State of Tennessee;

(b) the lawyer serves as a Judge, Attorney General, Public Defender, U.S. Attorney, District Attorney, corporate counsel, teacher of law, 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;

(c) the lawyer does not have an office in Tennessee; however, for purposes of this Rule, a lawyer who practices, as a principal, employee, of counsel, or in any other capacity, with a firm that has an office in Tennessee shall be deemed for purposes of this Rule to have an office in Tennessee if the lawyer utilizes one or more offices of the firm located in Tennessee more than the lawyer utilizes one or more offices of the firm located in any other single state;

(d) under regulations adopted by the Board of Professional Responsibility under criteria established upon recommendation of the Tennessee Bar Foundation, the lawyer or law firm is exempted from maintaining an IOLTA account because such an IOLTA account has not and cannot reasonably be expected to produce interest or dividends in excess of allowable reasonable fees; or

(e) the lawyer is exempted by the Tennessee Bar Foundation from the application of this Rule following a written request for exemption by the lawyer and determination by the Tennessee Bar Foundation that no eligible financial institution (as defined and determined in accordance with this Rule 43) is located within reasonable proximity of that lawyer.

15. Upon its receipt of a lawyer's certification under Section 14 of this Rule, the Tennessee Bar Foundation shall, on or before March 31 of each year, report to the Board of Professional Responsibility any evidence of the lawyer's noncompliance known by the Tennessee Bar Foundation. Noncompliance with this Rule will result in the following action:

(a) On or before May 15 of each year, the Board of Professional Responsibility shall compile a list of those lawyers who are not in compliance with this Rule. On or before the first business day of May of each year, the Board of Professional Responsibility shall serve each lawyer on the list compiled under this Rule a Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice on or before May 31 of that year. Each lawyer to whom a Notice of Noncompliance is issued shall pay to the Board of Professional Responsibility a Noncompliance Fee of One Hundred Dollars ($100.00). Such Noncompliance Fee shall be paid on or before May 31 of that year, unless the lawyer shows to the satisfaction of the Chief Disciplinary Counsel that the Notice of Noncompliance was erroneously issued, in which case no such fee shall be due.

(b) On or before May 31 of that year, each lawyer on whom a Notice of Noncompliance is served also shall file with the Board of Professional Responsibility an affidavit, in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied. In the event a lawyer fails to timely remedy any such deficiency or fails to timely file such affidavit, the lawyer shall pay to the Board of Professional

Responsibility, in addition to the Noncompliance Fee, a Delinquent Compliance Fee of Two Hundred Dollars ($200.00).

(c) On or before June 30 of each year, the Board of Professional Responsibility shall: (i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance and who failed to remedy their deficiencies by May 31; (ii) submit the proposed Suspension Order to the Supreme Court; and (iii) serve a copy of the proposed Suspension Order on each lawyer named in the Order. The Supreme Court will review the proposed Suspension Order and enter such order as the Court may deem appropriate suspending the law license of each lawyer deemed by the Court to be not in compliance with the requirements of this Rule.

(d) Each lawyer named in the Suspension Order entered by the Court shall file with the Board of Professional Responsibility an affidavit in the form specified by the Board of Professional Responsibility, attesting that any identified deficiencies have been remedied and shall pay to the Board of Professional Responsibility, in addition to the Noncompliance Fee and the Delinquent Compliance Fee, a Five Hundred Dollar ($500.00) Suspension Fee as a condition of reactivation of his or her law license. Payment of all fees imposed by this section shall be a requirement for compliance with this Rule and for reactivation of a license. The Board of Professional Responsibility shall not reactivate the license of any lawyer

whose license is suspended pursuant to this Rule until the Chief Disciplinary Counsel certifies compliance with the requirements of this Rule.

(e) All notices required or permitted to be served on a lawyer under the provisions of this Rule shall be served by United States Postal Service Certified Mail, return receipt requested, at the address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9, Section 20.5, and shall be deemed to have been served as of the postmark date shown on the Certified Mail Receipt.

16. The Board of Professional Responsibility, acting in concert with the Tennessee Bar Foundation, may promulgate such forms and procedures to implement Sections 14 and 15 of this Rule and of Supreme Court Rule 8, RPC 1.15.

17. The information contained in the statements forwarded to the Tennessee Bar Foundation under Section 14 and/or Section 15 of this Rule shall remain confidential other than as to Tennessee Supreme Court or the Board of Professional Responsibility. The Tennessee Bar Foundation shall not release any information contained in such statements other than as a compilation of data from such statements, except as directed in writing by the Tennessee Supreme Court or the Board of Professional Responsibility or in response to a subpoena.

18. Transition Provisions. For the purpose of adopting regulations consistent with this Rule and educating the bar and financial institutions regarding the new requirements, the provisions of Rule 43 authorizing regulations and approval shall take effect upon entry of order adopting the Rule by the Tennessee Supreme Court.

EXHIBIT "C"

For the purposes of certification on annual registrations by lawyers required in Tennessee Supreme Court Rule 43 and the provisions of Tennessee Supreme Court Rule 8, RPC 1.15 requiring deposit in IOLTA accounts, these amendments shall take effect on January 1, 2010.

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