

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: PETITION TO AMEND RULE 8, RPC 1.15 AND RULE 43,
RULES OF THE TENNESSEE SUPREME COURT

FILED
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APPELLATE COURT CLERK
NASHVILLE

No. M2008-02603-SC-RL1-RL.

ORDER

On November 24, 2009, the Tennessee Bar Association, the Tennessee Bar Foundation, the Tennessee Association for Justice, and the Tennessee Alliance for Legal Services jointly filed a petition asking the Court to amend Rule 8, RPC 1.15, and Rule 43 of the Rules of the Supreme Court of Tennessee. The proposed amendments would require all attorneys who hold eligible client funds to participate in the Tennessee Bar Foundation's Interest on Lawyers' Trust Accounts (IOLTA) program. On December 18, 2008, the Court filed an order soliciting written comments on the proposed amendments set out in the exhibits to the Petition; the deadline for submitting comments was February 20, 2009.

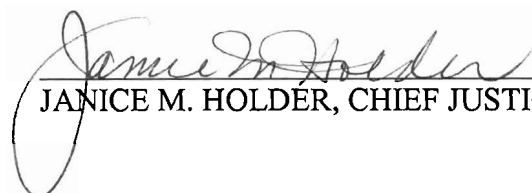
After due consideration of the petition and the written comments submitted regarding the petitioners' proposed amendments, the Court concludes that the petition should be granted. Accordingly, Rule 8, RPC 1.15 is amended as set out in the attached Appendix A, and Rule 43 is amended as set out in the attached Appendix B. For the purposes of implementing amended Rule 8, RPC 1.15 and amended Rule 43, including without limitation the promulgation of regulations, forms and procedures, and the determination of eligible financial institutions, the amended rules shall take effect upon the Supreme Court's filing of this order. However, in order to permit a reasonable period for the implementation of the amended rules, lawyers maintaining pooled accounts pursuant to Rule 8, RPC 1.15 and Rule 43 shall have until January 1, 2010 within which to comply with the provisions of the amended rules. All lawyers shall comply with amended Rule 8, RPC 1.15 and amended Rule 43 on or before January 1, 2010. Prior to that date, lawyers shall comply either with the applicable rules in effect immediately prior to the adoption of the amended rules or with the amended rules.

The Clerk shall provide a copy of this order (including the appendices) to the petitioners, to the Tennessee Bankers Association, and to LexisNexis and Thomson-West. In addition, this order (including the appendices) shall be posted on the Tennessee Supreme Court's website.

The costs associated with this petition are hereby waived.

IT IS SO ORDERED.

FOR THE COURT:


JANICE M. HOLDER, CHIEF JUSTICE

APPENDIX A

AMENDED TENN. SUP. CT. R. 8, RPC 1.15

[Replace the existing Tenn. Sup. Ct. R. 8, RPC 1.15 in its entirety with the following new RPC 1.15:]

Rule 1.15. Safekeeping Property and Funds. — (a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer’s possession in connection with a representation separate from the lawyer’s own property and funds.

(b) Funds belonging to clients or third persons shall be deposited in a separate account maintained in an FDIC member depository institution having a deposit-accepting office located in the state where the lawyer’s office is situated (or elsewhere with the consent of the client or third person) and which participates in the overdraft notification program as required by Supreme Court Rule 9, Section 29.1. A lawyer may deposit the lawyer’s own funds in such an account for the sole purpose of paying financial institution service charges or fees on that account, but only in an amount reasonably necessary for that purpose.

(1) Except as provided by subparagraph (b)(2), interest earned on accounts in which the funds of clients or third persons are deposited, less any deduction for financial institution service charges or fees (other than overdraft charges) and intangible taxes collected with respect to the deposited funds, shall belong to the clients or third persons whose funds are deposited, and the lawyer shall have no right or claim to such interest. Overdraft charges shall not be deducted from accrued interest and shall be the responsibility of the lawyer.

(2) A lawyer shall deposit all funds of clients and third persons that are nominal in amount or expected to be held for a short period of time such that the funds cannot earn income for the benefit of the client or third persons in excess of the costs incurred to secure such income in one or more pooled accounts known as an “Interest On Lawyers’ Trust Account” (“IOLTA”), in accordance with the requirements of Supreme Court Rule 43. A lawyer shall not deposit funds in any account for the purpose of complying with this sub-section unless the account participates in the IOLTA program under Rule 43.

(3) The determination of whether funds are required to be deposited in an IOLTA account pursuant to subparagraph (b)(2) rests in the sound discretion of the lawyer. No charge of ethical impropriety or other breach of professional conduct shall attend a lawyer’s exercise of good faith judgment in making such a determination.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such funds or other property. If a dispute arises between the client and a third person with respect to their

respective interests in the funds or property held by the lawyer, the portion in dispute shall be kept separate and safeguarded by the lawyer until the dispute is resolved.

(d) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests.

Commentary. — [1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Paragraph (b) of this Rule contains the fundamental requirement that a lawyer maintain funds of clients and third parties in a separate trust account. All such accounts, including IOLTA accounts, must be part of the overdraft notification program established under Supreme Court Rule 9, Section 29.1.

[3] Under Supreme Court Rule 43, Tennessee lawyers are obligated to report their compliance with their obligations concerning their IOLTA accounts and the handling of client funds. Tennessee lawyers are required to comply with certain requirements imposed by Rule 43. This Rule requires Tennessee lawyers to establish IOLTA accounts only at eligible financial institutions. Tennessee lawyers may rely upon the list of eligible financial institutions maintained pursuant to Rule 43 in establishing an IOLTA account to comply with subparagraph (b)(2).

[4] A lawyer is also responsible for assuring the payment of any financial institution service charges or fees on such trust accounts. Subparagraph (b)(1) of this Rule makes clear that any interest earned on non-IOLTA trust accounts belongs to the client or third party whose funds generate the interest, and that the interest earned on them may be used by a lawyer to pay bank charges or fees. A detailed accounting of such interest and fees may be necessary to avoid the payment of any client- or matter-specific bank charges or fees (for example, charges for a certified check obtained solely for the benefit of one client) by a client other than the one on whose behalf the charge or fee was incurred.

[5] In determining whether client or third-person funds should be deposited in an IOLTA account or non-IOLTA trust account, a lawyer should take into consideration a number of factors, including the amount of funds to be deposited; the expected duration of the deposit; the rate of interest or yield available from the financial institution where the funds are to be deposited; the service charges, fees, and other costs that are reasonably expected to be associated with the deposit of funds; the cost of establishing and administering a non-IOLTA trust account for the benefit of the client or third person, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to the benefit of a client or third person; the capability of financial institutions or lawyers or law firms to calculate and pay interest to individual clients or third persons; and any other circumstances that are reasonably likely to affect the ability of the client or

third person to earn income, in excess of any service charges, fees, or other costs incurred to secure such income from the funds

[6] Subparagraph (b)(3) expressly recognizes that a lawyer's decision concerning whether funds are required to be deposited in an IOLTA account pursuant to subparagraph (b)(2) is a discretionary one, and provides that a lawyer who makes such a determination in good faith shall not be subject to any disciplinary sanction for this decision. A lawyer or law firm should review the account at reasonable intervals to determine if the amount of the funds or expected duration change the type of account in which funds should be deposited.

[7] In no event may overdraft charges imposed upon a trust account be paid from interest on a trust account.

[8] In order to allow a lawyer to pay appropriate financial institution service charges or fees on a trust account, paragraph (b) of the Rule expressly relaxes the prohibition on commingling lawyer and client funds in a trust account to permit a lawyer to deposit the lawyer's own funds in the trust account for the sole purpose of paying financial institution service charges or fees, but only in an amount reasonably necessary for that very limited purpose. Lawyers should exercise great care in using this limited permission to deposit funds in a trust account, given the cardinal importance of the principle otherwise banning commingling of funds.

[9] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention in a dispute with the client. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[10] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. If not inconsistent with the interests of the client, the lawyer may file an interpleader action concerning funds in dispute between the client and a third party.

[11] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[12] In certain circumstances, Tennessee law governing abandoned property may apply to monies in lawyer trust accounts or other property left in the hands of lawyers and may govern its disposition. See Tenn. Code Ann. §§ 66-29-101 to 66-29-204 (Uniform Disposition of Unclaimed Property Act).

[end of Commentary.]

[The following text shall be published as a *Compiler's Note* to the amended rule:]

Compiler's Note. — By order filed on July __, 2009, the Supreme Court of Tennessee amended Tenn. Sup. Ct. R. 8, RPC 1.15 and Tenn. Sup. Ct. R. 43. The Court's order contained the following transition provision, governing the effective dates of the amended rules:

For the purposes of implementing amended Rule 8, RPC 1.15 and amended Rule 43, including without limitation the promulgation of regulations, forms and procedures, and the determination of eligible financial institutions, the amended rules shall take effect upon the Supreme Court's filing of this order. However, in order to permit a reasonable period for the implementation of the amended rules, lawyers maintaining pooled accounts pursuant to Rule 8, RPC 1.15 and Rule 43 shall have until January 1, 2010 within which to comply with the provisions of the amended rules. All lawyers shall comply with amended Rule 8, RPC 1.15 and amended Rule 43 on or before January 1, 2010. Prior to that date, lawyers shall comply either with the applicable rules in effect immediately prior to the adoption of the amended rules or with the amended rules.

[End of Appendix A.]

APPENDIX B

AMENDED TENN. SUP. CT. R. 43

[Replace the existing Tenn. Sup. Ct. R. 43 in its entirety with the following new Tenn. Sup. Ct. R. 43:]

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:

Section 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.

Section 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.

Section 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.

Section 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.

Section 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.

Section 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).

Section 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.

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

Section 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.

Section 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.

Section 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.

Section 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.

Section 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.

Section 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, in-house 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.

Section 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.

Section 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.

Section 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.

[End of amended Rule 43.]

[The following Transition Provision shall be published as a *Compiler's Note* to the amended rule:]

Compiler's Note. — By order filed on July __, 2009, the Supreme Court of Tennessee amended Tenn. Sup. Ct. R. 8, RPC 1.15 and Tenn. Sup. Ct. R. 43. The Court's order contained the following transition provision governing the effective dates of the amended rules:

For the purposes of implementing amended Rule 8, RPC 1.15 and amended Rule 43, including without limitation the promulgation of regulations, forms and procedures, and the determination of eligible financial institutions, the amended rules shall take effect upon the Supreme Court's filing of this order. However, in order to permit a reasonable period for the implementation of the amended rules, lawyers maintaining pooled accounts pursuant to Rule 8, RPC 1.15 and Rule 43 shall have until January 1, 2010 within which to comply with the provisions of the amended rules. All lawyers shall comply with amended Rule 8, RPC 1.15 and amended Rule 43 on or before January 1, 2010. Prior to that date, lawyers shall comply either with the applicable rules in effect immediately prior to the adoption of the amended rules or with the amended rules.

[End of Appendix B.]