

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
12/06/2018
Clerk of the
Appellate Courts

**IN RE: AMENDMENTS TO RULE 43
RULES OF THE TENNESSEE SUPREME COURT**

No. ADM2018-02187

ORDER

The Court is considering amending Tennessee Supreme Court Rule 43, regarding interest on lawyers' trust accounts. The proposed amendments are set out in the attached Appendix to this Order.

The Court hereby publishes the proposed amendments for public comment and solicits written comments from the bench, the bar, and the public. The deadline for submitting written comments is February 4, 2019. Written comments may be emailed to appellatecourtclerk@tncourts.gov or mailed to:

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 43
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

and should reference the docket number set out above.

The Clerk shall provide a copy of this Order, including the Appendix, to LexisNexis and to Thomson Reuters. In addition, this Order, including the Appendix, shall be posted on the Court's website.

It is so ORDERED.

PER CURIAM

APPENDIX

TENN. SUP. CT. R. 43

[New text is indicated by underlining/Deleted text is indicated by striking]

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 and/or NCUA insurance fees or NCUA 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, as a condition of licensure, that all funds in the lawyer's possession that are required pursuant to RPC 1.1 5(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 an electronic form provided by the Board of Professional Responsibility and shall be submitted which will only be available electronically for completion and submission by the lawyer using the Board's Attorney Portal within the time period set forth in Rule 9 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 registered pursuant to Tennessee Supreme Court Rule 7, Section 10.01, 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. As a part of the annual birth month registration process, as provided in Supreme Court Rule 9, the Board of Professional Responsibility shall electronically receive and review a lawyer's certification required by Section 14. In the event a lawyer fails to submit the required certification or should the certification be facially defective, such noncompliance with this Rule will result in the following action:

(a) On or before the 15th day following the date on which the certification required by Section 14 is due, the Board of Professional Responsibility shall electronically serve such lawyer a Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice within 30 days following the ~~mailing~~ emailing of the Notice. 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 the 30th day following the ~~mailing~~ emailing of the Notice, 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 the 30th day following the ~~mailing~~ emailing of the Notice, each lawyer on whom a Notice of Noncompliance is served also shall electronically submit to the Board of Professional Responsibility the lawyer's completed certification. In the event a lawyer fails to timely submit the lawyer certification required by this Rule and payment of the \$100.00 Noncompliance Fee by the 30th day following the ~~mailing~~ emailing of the Notice, 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 the 45th day following the electronic mailing of each month's Notices of Noncompliance, the Board of Professional Responsibility shall:

(i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance for that month's birth month registration cycle and who failed to remedy timely their deficiencies;

(ii) submit the proposed Suspension Order to the Supreme Court; and

(iii) serve a an electronic 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 submit to the Board of Professional Responsibility the lawyer certification required by the Rule 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. ~~Submission of the lawyer certification and 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.~~ reinstatement from suspension under subsection (c). An attorney suspended by this Court who wishes to be reinstated and who has remained suspended for one year or less before the filing of a petition for reinstatement shall file with the Board of Professional Responsibility a petition for reinstatement of the attorney's license to practice law demonstrating that the attorney has filed the required lawyer certification and paid all fees imposed by this section. An attorney suspended by the Court pursuant to Subsection (c) who wishes to be reinstated and who has remained suspended for more than one year before the filing of a petition for reinstatement shall file with the Court a petition for reinstatement of the attorney's license to practice law demonstrating that the attorney has filed the required lawyer certification and paid all fees in compliance with this Rule, or, alternatively, demonstrating that the Suspension Order was entered in error as to the attorney. The petitioner shall serve a copy of the petition upon Disciplinary Counsel, who shall investigate the matter and file an answer to the petition within thirty days. The Court shall review the record and determine whether to grant or deny the petition for reinstatement. If the Court grants the petition, the Reinstatement Order shall provide that the attorney's reinstatement is effective as of the date of the attorney's payment of all penalties imposed or the date of the attorney's filing of the delinquent lawyer certification, or, alternatively, as of the date of entry of the Suspension Order if that Order was entered in error. No lawyer suspended under this Rule 43 may resume practice until reinstated by Order of the Supreme Court.

(e) Upon receipt of the lawyer's electronic certification required by this Rule and payment of all fees imposed, the Board of Professional Responsibility shall forward the lawyer's completed certification to the Tennessee Bar Foundation.

(f) 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,~~ electronically at the ~~preferred email~~ email address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9 and shall be deemed to have been served as of the ~~postmark email date shown on the Certified Mail Receipt.~~

Section 16. Upon its receipt of a lawyer's certification under Section 14 of this Rule, the Tennessee Bar Foundation shall report monthly 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 the 15th day following the date the Tennessee Bar Foundation provides its report to the Board of Professional Responsibility, the Board of Professional Responsibility shall serve each such lawyer a an electronic Notice of Noncompliance requiring the lawyer to remedy any deficiencies identified in the Notice within 30 days. 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 electronically on or before the 30th day following the ~~mailing~~ emailing of the Notice, 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 the 30th day following the ~~mailing~~ emailing of the Notice, 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 electronically 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 the 45th day following the ~~mailing~~ emailing of each month's Notices of Noncompliance, the Board of Professional Responsibility shall:

(i) prepare a proposed Suspension Order listing all lawyers who were issued Notices of Noncompliance for that month's birth month registration cycle and who failed to remedy timely their deficiencies;

(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.

(d) 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.

(e) 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 electronically 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.~~ reinstatement from suspension under subsection (d). ~~Payment~~ Electronic payment of all fees imposed by this section shall be a requirement for compliance with this Rule and for ~~reactivation of a license~~ reinstatement. ~~The Board of Professional Responsibility shall not reactivate the license of any lawyer whose license is suspended pursuant to Supreme Court Rule 9 and shall be deemed to have been served as of the postmark date shown on the Certified Mail Receipt.~~ Upon satisfaction of this condition of reinstatement, and if the lawyer is otherwise eligible for reinstatement, Chief Disciplinary Counsel will recommend to the Supreme Court that the Court reinstate the lawyer's law license. No lawyer suspended under this Rule 43 may resume practice until reinstated by Order of the Supreme Court.

(f) 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,~~ email at the ~~preferred~~ email address shown in the most recent registration statement filed by the lawyer pursuant to Supreme Court Rule 9 and shall be deemed to have been served as of the ~~postmark~~ email date ~~shown on the Certified Mail Receipt.~~

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.