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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ARIZONA SUPREME COURT RULE 43 REGARDING LAWYERS' TRUST ACCOUNTS	Supreme Court No. _____ **Petition to Amend Arizona Supreme Court Rule 43 Regarding Lawyers' Trust Accounts**

Introduction

Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona petitions the Court to amend Rule 43, Ariz. R. Sup. Ct., which deals with lawyers' trust accounts, as set forth in Appendix A (redlined version) and Appendix B (unmarked version) hereto.

The proposed amendment deals only with Rule 43(f) and Rule 43(g), which, among other requirements, delineate the types of trust accounts lawyers may use, the concept of authorized financial institutions, and payment to the Arizona Foundation for Legal Services & Education ("Foundation") of interest on pooled accounts via the Interest on Lawyers Trust Accounts ("IOLTA") program.

Although the proposed amendment completely reorganizes and rewrites (f) and (g) into one more linear and cohesive provision, it adopts the existing significant concepts, such as participation in IOLTA, preference for IOLTA accounts, payment of IOLTA interest to the Foundation, and the need for participating financial institutions to be authorized.

In addition, it introduces several significant new concepts, including the certification and decertification processes for financial institutions to be authorized to host IOLTA accounts for lawyers. Because lawyers and their clients would be seriously disrupted by lawyers abruptly having to change IOLTA banks, the proposal includes a timeline and procedure under which lawyers would be notified that their financial institutions may be decertified and, if that happens, given ample time to move accounts. The State Bar would be responsible for handling the regulatory aspects of these new processes, with the Court having authority to terminate the authorized status of any non-compliant financial institution.

In addition to the new processes, the proposal clarifies the relationship between the State Bar and the Foundation in dealing with the regulatory aspects of IOLTA accounts, IOLTA interest, and lawyers' relationships with financial institutions, and also itemizes the contents of the terms – in a "participation certification" – under which the Foundation and the State Bar interact with financial institutions. The participation certification takes the place of the "rules and regulations" noted in the existing rule.

The proposal also implicitly recognizes that individual lawyers generally should not have the burden of ensuring that their financial institutions appropriately calculate and promptly pay IOLTA interest. Instead, the State Bar, as the representative of its members, should assume that burden via the participation certification.

History

In November 2009, then-State Bar President Ray Hanna established a Board of Governors ad hoc committee, chaired by Amelia Craig Cramer (now State Bar First Vice President), to address problems involving IOLTA and the relationship

between the State Bar and the Foundation regarding IOLTA. The committee later expanded to include Foundation representatives.[1]

President Hanna formed the committee to address a contentious situation that had arisen concerning the contents of a revised "participation agreement" the Foundation had asked financial institutions to sign in 2009 (for the 2009-10 year) in order to be eligible to hold IOLTA accounts. Some financial institutions and the Arizona Bankers Association found the terms of that participation agreement unacceptable. In May 2009, the Bankers Association submitted a written complaint about the matter to the State Bar Board of Governors.

The State Bar thereafter became involved with the negotiations between the financial institutions and the Foundation but ultimately had to notify its members in summer 2009 that some institutions might choose not to continue to participate in IOLTA. Had that occurred, many lawyers would have had to move their IOLTA accounts to other participating financial institutions. This understandably generated much angst among the State Bar membership.

Eventually, all financial institutions signed the Foundation's 2009-10 participation agreement. They all signed last year (for 2010-11), as well. By then, the document had been renamed "participation certification" and had been approved by the State Bar officers, in addition to the Foundation, before circulation.

Proposed Changes in General

The committee concluded that the problems that had arisen resulted from a variety of deficiencies in Rules 43(f) and (g): a lack of clarity about the

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[1] Appointed ad-hoc committee members included State Bar representatives (Ms. Cramer; current President Alan Bayham; former President Ed Novak; and board member Lisa Loo) and Foundation representatives (President George Lyons and Arizona Court of Appeals Judge Larry Winthrop, the Foundation's immediate past president). Staff representatives included State Bar Executive Director/CEO John Phelps, Foundation Executive Director Kevin Ruegg, and State Bar senior staff.

decertification or termination process for previously approved financial institutions; lack of specificity regarding the interest that financial institutions should have to pay on IOLTA accounts; lack of restrictions regarding the amount of administrative fee financial institutions could charge for IOLTA accounts; lack of a process and timeline for lawyers to be notified of potential decertification of financial institutions; and lack of a process by which lawyers would be directed to move their accounts out of a decertified financial institution, if and when necessary.

The committee reviewed the terms of the Foundation's participation agreement and researched how Arizona's IOLTA rule compared with the rules in other states. The committee also reviewed workflow and communications between the State Bar and the Foundation pertaining to IOLTA.

The committee concluded that changes in two major areas needed to be made to ensure that the problems from 2009 did not reoccur.

First, the committee produced a written memorandum of understanding between the State Bar and the Foundation setting forth the IOLTA information to be shared and how the two organizations will coordinate and collaborate to handle their joint IOLTA-related responsibilities.

Second, the committee concluded that Rule 43 – specifically provisions (f) and (g) – needs to be amended in several respects, namely to:

- Recognize that only the Court, through the State Bar, can impose IOLTA-related obligations on members and that those demands must be made on State Bar members because the State Bar cannot control the banks;
- Give more concise direction to lawyers about the types of client trust accounts they may maintain;

- Clarify that the Foundation is the third-party beneficiary of IOLTA funds and operates vis-à-vis the banks in coordination and collaboration with the State Bar;
- Establish a means for ensuring that IOLTA accounts earn fair rates of interest or dividends;
- Establish a way to ensure that the fees withheld by the financial institutions for administering the IOLTA accounts are reasonable and not excessive;
- Import into the rule itself the various requirements that now are informally part of the participation certification; and
- Provide mechanisms for the State Bar to take action against an authorized financial institution that does not comply with the duties in the rule or participation certification and to decertify a financial institution that fails to enter into a renewal participation agreement by the deadline established. These mechanisms should include ample notice to members and the Supreme Court as well as ample notice to the financial institution with a cure period.

The proposed amendment achieves all those goals to avoid a repeat of the 2009 problems and to not only make trust-account management easier for our members, but also to ensure that the Foundation receives all appropriate interest and dividends generated by IOLTA accounts.

Specific Proposed Changes

As generally discussed above, the proposed amendment incorporates many concepts and obligations already existing in Rules 43(f) and (g) but makes significant additions and changes. This section-by-section account describes the

proposal and explains whether the concept or specific language is new or comes from the existing Rules 43(f) and (g):

Proposed Rule 43(f)(1) directs lawyers to hold funds in connection with client representation in one of three types of accounts: IOLTA account; separate account in which interest or dividends are paid to the client; or a pooled account in which interest or dividends are paid to the clients and the lawyer provides subaccounting. *Source*: This uses the more expansive definition of the affected funds in Rule 43(a), rather than the current and less comprehensive phrase "client funds." The definitions of the three possible accounts already exist in Rules 43(f)(2)(A) and (f)(3).

Proposed Rule 43(f)(2):

- Describes the factors a lawyer should consider when choosing among the three types of funds itemized in (f)(1). *Source*: Existing Rule 43(f)(4).
- Provides that an IOLTA account should be used if interest does not cover the costs of maintaining a separate account. *Source*: Existing Rule 43(f)(2).
- No disciplinary matter solely based on good-faith choice of account. *Source*: Existing Rule 43(f)(4).

Proposed Rule 43(f)(3):

- Requires all client trust accounts to be held at a newly defined "regulated financial institution." *Source*: Definition is new and intended to ensure the safety of client trust-account funds, including requiring FDIC insurance, among other protections.
- Directs that funds shall be invested in the higher returns of four different types of accounts. *Source*: Existing Rule 43(f)(1) states that

the funds in client trust accounts must be invested "to the extent practicable in the higher return" of a smaller selection of accounts.

- Clarifies that service charges on all client trust accounts must be reasonable. *Source*: Existing Rule 43(f)(2).
- Requires that the lawyer direct the financial institution to "immediately" report to the State Bar any insufficient-funds transactions, regardless of cause, and clarifies the types of reportable transactions. *Source*: Existing Rule 43(g), which directs that the financial institution must agree to this requirement to host client trust accounts, but does not define the types of reportable transactions nor include the time element.
- Gives directions to lawyers who may have accounts at financial institutions that cease to operate. *Source*: New.

Proposed Rule 43(f)(4)(A):

- Specifies that IOLTA accounts must be at "authorized regulated financial institutions," defined as regulated financial institutions that have signed a "participation certification" with the State Bar and Foundation. *Source*: Existing Rule 43(g) already uses the concept of an "authorized" financial institution that must agree to comply with rules and regulations created by the State Bar and the Foundation.
- Delineates the contents of the participation certification:
    - (f)(4)(A)(i): Definition of a reasonable charge. *Source*: New. The existing participation certification being used by the Foundation already includes a definition.
    - (f)(4)(A)(ii): Interest or dividends remitted at least quarterly to the Foundation. *Source*: Existing Rule 43(f)(5).

- (f)(4)(A)(iii): Financial institutions must transmit a statement containing certain information to the Foundation, with a "similar" report to the member who opened the account. *Source*: Existing Rule 43(f)(5). That rule specifies that the financial institution send a "copy" of the report to the member. Those reports, however, may include other members' IOLTA information. Financial institutions should be allowed to send only member-specific information to each member.
- (f)(4)(A)(iv): Direct financial institutions to provide documents in response to a subpoena duces tecum for records of a lawyer's IOLTA account. *Source*: New in rule, but part of the existing participation certification being used by the Foundation.
- (f)(4)(A)(v): Terms apply to all branches of the financial institution. *Source*: Part of existing Rule 43(g).
- (f)(4)(A)(vi): Financial institution may charge lawyer for the reasonable cost of preparing reports required under the rule. *Source*: Existing Rule 43(f)(2).
- (f)(4)(A)(vii): Financial institution may cancel with 30 days' notice. *Source*: Existing Rule 43(g) but adds Foundation to notice requirement.
- (f)(4)(A)(viii): Financial institutions must be given 30 days' notice before the participation certification is cancelled or revoked. *Source*: New.
- (f)(4)(A)(ix): Annual renewal period. *Source*: Existing Rule 43(g).

- (f)(4)(A)(x): Participation certification continues while the financial institution is seeking reauthorization. *Source*: New.

Proposed Rule 43(f)(4)(b): Creates a mechanism for dealing with authorized regulated financial institutions that do not sign new participation certifications by July 1, with Court to appoint a mediator; members to be notified that their financial institution has failed to sign a participation certification; and the Court to issue an order decertifying, if necessary. *Source*: New.

Proposed Rule 43(f)(4)(C): State Bar and Foundation to list authorized financial institutions' status on a website. *Source*: Existing Rule 43(f).

Proposed Rule 43(f)(5): Creates a mechanism for dealing with authorized regulated financial institutions that fail to comply with the duties in this section, with the State Bar notifying the institution of its failure and giving a cure period; if not cured part way through the cure period, then the State Bar would advise certain members and the Court; if not cured at all, then the State Bar would send additional notices and ask the Court to terminate the financial institution's status. *Source*: New.

Proposed Rule 43(f)(6): Directs interest or dividends on IOLTA accounts to the Foundation; lists purposes for which the funds may be used. *Source*: Existing Rule 42(f)(2).

Proposed Rule 43(f)(7)(A): Lawyers admitted to practice in this state consent to the rule requirements. *Source*: Existing Rule 43(f)(1).

Proposed Rule 43(f)(7)(B): Lawyers admitted to practice in this state must provide information about client trust accounts on their dues statements. *Source*: New, although the State Bar already asks for this information on the yearly dues statements.

Rule 43(g): Because these changes incorporate the provisions of Rule 43(g), that section may be reserved for future use.

Conclusion

The State Bar believes that the proposed amendments to Rule 43 correct the deficiencies identified by its committee. Of those deficiencies, the most important is creating mechanisms that will alleviate concerns that State Bar members and their clients will be seriously disrupted by having to change from financial institutions that either do not sign future participation certifications or do not comply with their terms after signing. All of these changes will benefit members, the legal profession and the Foundation.

For the above reasons, the State Bar respectfully requests that the Court approve these proposed amendments to Rule 43.

RESPECTFULLY SUBMITTED this 10th day of January, 2011.

John A. Furlong
General Counsel

Electronic copy filed with the Clerk
of the Supreme Court of Arizona
this 10th day of January, 2011.

By: Kathleen A. Lundgren

APPENDIX A

(f) ~~Pooled Trust Account; Separate Client Trust Account.~~ Establishment of trust accounts; State Bar oversight

~~1. Each trust account shall be at a regulated financial institution on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation and, at the direction of the lawyer, invested to the extent practicable in the higher earning return of either:~~

~~A. An interest-bearing account insured by an agency of the United States government; or~~

~~B. United States Treasury obligations and repurchase agreements fully collateralized by such obligations, in the form of securities of, or other interests in, any no-load, open-end, management-type investment company, the shares of which may be redeemed on demand or readily sold, that is registered under the provisions of the Investment Company Act of 1940, as amended (54 Stat. 789; 15 U.S.C. § 80a-1 through 80a-64), that is rated in either of the highest two rating categories of a nationally recognized statistical rating organization, and that operates as a money market fund pursuant to the Investment Company Regulation § 270.2a-7, as amended, through a regulated~~

~~financial institution's pooled agency account if appropriate, if both of the following are true:~~

~~(i) The portfolio of the investment company is limited to United States Treasury obligations and repurchase agreements fully collateralized by United States Treasury obligations.~~

~~(ii) The investment company takes delivery of the collateral for any repurchase agreement either directly or through an authorized custodian.~~

~~A trust account shall be invested in a money market fund as described in subsection 1.B. above only if the dividend rate, net of all reasonable fees, exceeds the interest, net of all reasonable fees, that could be earned in an account described under subsection 1.A., as above.~~

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

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

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

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

~~2. A lawyer or law firm receiving client funds shall maintain a pooled interest-bearing or dividend-earning trust account for deposit of client funds unless the funds are expected to earn net income for the client in excess of the costs incurred to secure such income. The interest or dividends accruing on this account, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, shall be paid by the financial institution or investment company to the Arizona Foundation for Legal Services and Education, and shall be used solely for the following purposes: to pay the actual administrative costs of~~

~~this interest or earnings on lawyers' trust accounts (IOLTA) program; to fund programs designed to assist in the delivery of legal services to the poor; to support law-related education programs designed to teach young people, educators and other adults about the law, the legal process and the legal system; to fund studies or programs designed to improve the administration of justice; and to maintain a reasonable reserve therefor.~~

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

   A. the amount of funds to be deposited;

   B. the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

   C. the rates of interest or yield at financial institutions where the funds are to be deposited;

   D. the cost of establishing and administering a separate non-IOLTA account for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

   E. the capability of financial institutions to calculate and pay income to individual clients; and

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

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

~~3. All client funds shall be deposited in an account as specified in subsection 2 above unless they are deposited in:~~

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

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

~~investment company in connection with the account, to the client.~~

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

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

   B. The deposited funds shall be invested in the higher earning return of:

      i. an interest-bearing checking account;

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

iii. a sweep account which is a money-market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or

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

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

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

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

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

4. In determining whether to use an account as specified in subsection 2 or an account as specified in subsection 3, a lawyer or law firm shall take into consideration the following factors:

A. the amount of funds to be deposited;

B. the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;

C. the rates of interest or yield at financial institutions where the funds are to be deposited;

D. the cost of establishing and administering a separate non-IOLTA account for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;

E. the capability of financial institutions to calculate and pay income to individual clients; and

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

No disciplinary matter shall be pursued by the state bar against any lawyer or law firm solely by reason of the making of a good faith determination of the appropriate account in which to deposit or invest client funds.

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

   A. The participation certification must:

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

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

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

dividends earned, and the charges imposed against the interest remitted. A similar report on each separate account must be remitted to the lawyer or law firm opening said trust account.

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

v. Provide that the terms apply to all branches of the regulated financial institution holding Arizona IOLTA accounts.

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

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

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

ix. Provide for an annual approval period.

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

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

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

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

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

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

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

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

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

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

~~5. Lawyers or law firms depositing client funds in accounts as specified in subsection 2 above shall direct the depository institution or investment company:~~

~~A. To remit interest or dividends, net of any reasonable service or other charges or fees imposed by the institution or company in connection with the account, as computed in accordance with the institution's or~~

~~company's standard accounting practice, at least quarterly, to the Arizona Foundation for Legal Services and Education, such institution or company being permitted to remit the interest and dividends on all such accounts to the Arizona Foundation for Legal Services and Education in one payment; and~~

~~B. To transmit with each remittance to the Arizona Foundation for Legal Services and Education a statement showing the name of the lawyer or law firm on whose account the remittance is sent, the rate of interest applied or the dividends earned, and any service or other charges and fees imposed, with a copy of such statement to be transmitted to the lawyer or law firm. The manner of statement shall be determined by the Foundation.~~

5. Noncompliance

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

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

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

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

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

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

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

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

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

ii. Notify all members of the removal.

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

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

(a) Have 90 days to transfer their accounts to an authorized financial institution.

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

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

6. Interest or dividends on accounts specified in section (f)(1)(A)

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

B. The Foundation shall use the interest or dividends solely to:

i. Support programs designed to assist in the delivery of legal services to the poor; law-related education programs designed to teach young people, educators and other adults

about the law, the legal process and the legal system.

ii. Fund studies or programs designed to improve the administration of justice.

iii. Maintain a reasonable reserve; and

iv. Pay the actual costs of administering this rule and the activities set forth above.

7. Additional obligations of lawyers

A. All lawyers admitted to practice in this state shall, as a condition thereof, consent to the reporting and production requirements set forth in this rule.

B. All lawyers admitted to practice in this state must provide information requested by the State Bar on the annual dues statement regarding any and all client trust accounts they maintain.

(g) ~~Authorized Financial Institutions.~~ ~~The State Bar and the Foundation shall establish regulations governing approval and termination of approval status for financial institutions, and shall annually publish a list of approved financial institutions. A financial institution shall be approved as a depository for lawyer or law firm trust accounts only if the institution annually files with the State Bar, on the provided form, an agreement to comply with the rules and regulations. The agreement shall include the duty of the institution to report to the chief bar counsel~~

~~in the event that any properly payable instrument is presented against a lawyer trust account containing insufficient funds, regardless of whether the instrument is honored or not. The manner of report shall be determined by the State Bar. No lawyer or law firm trust account shall be maintained in a financial institution in Arizona that does not agree to make such reports. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days advance written notice to the State Bar.~~ **Reserved**

~~1. All lawyers admitted to practice in this state shall, as a condition thereof, consent to the reporting and production requirements set forth in this rule.~~

~~2. Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.~~

Appendix B

(f) Establishment of trust accounts; State Bar oversight

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

    A. A pooled interest-bearing or dividend-earning trust account ("IOLTA account") on which the interest or dividends accrue for the benefit of the Arizona Foundation for Legal Services and Education ("Foundation").
    B. A separate interest-bearing or dividend-earning trust account for the particular client or client's matter on which the interest or dividends, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, will be paid to the client.
    C. A pooled interest-bearing or dividend-earning trust account, with subaccounting provided by the lawyer or the law firm, which will provide for computation of interest or dividends earned by each client's funds and the payment thereof, net of any reasonable service or other charges or fees imposed by the financial institution or investment company in connection with the account, to the client.

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

    A. the amount of funds to be deposited;
    B. the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
    C. the rates of interest or yield at financial institutions where the funds are to be deposited;
    D. the cost of establishing and administering a separate non-IOLTA account for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any tax reports required for income accruing to the client's benefit;
    E. the capability of financial institutions to calculate and pay income to individual clients; and
    F. any other circumstances that affect the ability of the client's funds to earn a net return for the client.

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

good-faith determination of the appropriate account in which to deposit or invest client funds.

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

    A. Withdrawals or transfers must be able to be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.
    B. The deposited funds shall be invested in the higher earning return of:
        i. an interest-bearing checking account;
        ii. a money-market deposit account with or tied to checking;
        iii. a sweep account which is a money-market fund or daily (overnight) financial institution repurchase agreement invested solely in or fully collateralized by U.S. Government Securities; or
        iv. an open-end money-market fund solely invested in or fully collateralized by U.S. Government Securities.

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

investment must have total assets of at least $250,000,000. "U.S. Government Securities" refers to U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof.

C. All service charges to the account are reasonable, related to the cost of maintaining the account and computed in accordance with the financial institution's standard accounting practices.
D. The financial institution sends notification immediately to the State Bar chief bar counsel of any properly payable instrument that is presented for payment against a client trust account containing insufficient funds, uncollectible funds, or a negative available balance, regardless of whether the financial institution honors the instrument. All occurrences shall be reported to the State Bar regardless of the cause.

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

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

A. The participation certification must:
   i. Define a reasonable charge for managing IOLTA accounts, which may include fees for reporting and recordkeeping.
   ii. Direct that interest or dividends, net of any reasonable service charges or fees, be remitted at least quarterly to the Foundation.

iii. Provide that the financial institution transmit, with each remittance to the Foundation, a statement, as directed by the Foundation, showing information including the name of the lawyer or law firm on whose account the remittance is sent, the period for the remittance submitted, the account number, the account status, the rate of interest applied or the dividends earned, and the charges imposed against the interest remitted. A similar report on each separate account must be remitted to the lawyer or law firm opening said trust account.

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

v. Provide that the terms apply to all branches of the regulated financial institution holding Arizona IOLTA accounts.

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

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

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

ix. Provide for an annual approval period.

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

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

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

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

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

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

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

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

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

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

5. Noncompliance

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

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

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

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

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

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

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

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

i. Assure removal of the institution from the list of authorized financial institutions and
ii. Notify all members of the removal.

F. Upon receiving the notice provided for in section (f)(5)(E):
i. Members who maintain trust accounts at the de-authorized financial institution shall:
(a) Have 90 days to transfer their accounts to an authorized financial institution.
(b) By the end of 90 days, notify the State Bar that their trust accounts have been transferred and provide pertinent account information.
ii. Members who continue to maintain trust accounts at the de-authorized financial institution more than 90 days after notice or who fail to tell the State Bar that they have done so shall be referred to the State Bar Lawyer Regulation Office.

6. Interest or dividends on accounts specified in section (f)(1)(A)

A. Interest or dividends generated on accounts specified in section (f)(1)(A) shall be paid by the financial institution or investment company to the Foundation.
B. The Foundation shall use the interest or dividends solely to:
i. Support programs designed to assist in the delivery of legal services to the poor and law-related education programs designed to teach young people, educators and other adults about the law, the legal process and the legal system.
ii. Fund studies or programs designed to improve the administration of justice.
iii. Maintain a reasonable reserve; and
iv. Pay the actual costs of administering this rule and the activities set forth above.

7. Additional obligations of lawyers
A. All lawyers admitted to practice in this state shall, as a condition thereof, consent to the reporting and production requirements set forth in this rule.
B. All lawyers admitted to practice in this state must provide information requested by the State Bar on the annual dues statement regarding any and all client trust accounts they maintain.

(g) Reserved.