

In Re **Rhode Island Bar Foundation and  
Rhode Island Bar Association**

M.P. No.: 08-227

**Proposed Changes to Rule of Professional Conduct 1.15**

**AMENDED PETITION**

The Rhode Island Bar Foundation (Bar Foundation) and the Rhode Island Bar Association (Bar Association) petition this Honorable Court to change Rule 1.15 of the Rules of Professional Conduct (1) to require that all attorneys who hold eligible client funds participate in the Bar Foundation's Interest On Lawyers Trust Accounts (IOLTA) program, *i.e.*, to make IOLTA mandatory, and (2) to require that the financial institutions in which attorneys deposit IOLTA-eligible client funds pay a rate of interest or dividend that is not less than the rate of interest or dividend those institutions pay to their equivalent non-IOLTA customers, *i.e.*, rate parity. The grounds for this petition are the following:

1. The Bar Foundation is an entity that is separate from the Bar Association and is a non-profit charitable foundation whose directors and fellows are members of the Rhode Island bar. The mission of the Bar Foundation is to foster and maintain the honor and integrity of the profession of law and to study, improve and facilitate the administration of justice in Rhode Island, as well as promote the study of law and to promote high standards of legal education.

2. The Bar Association is an integrated, unified Bar Association that represents the interests of all attorneys admitted to practice law in the State of Rhode Island. Attorneys who are admitted to practice law in Rhode Island are also members of the Bar Association.

3. The Bar Foundation's IOLTA program makes significant grants in four main areas:

- (i) providing legal services to the poor in Rhode Island;
- (ii) improving delivery of legal services;
- (iii) promoting knowledge and awareness of the law; and
- (iv) improving the administration of justice.

In 2007, the Bar Foundation IOLTA program awarded \$1,679,326 to grant recipients in these four areas.

4. Attorney and law firm participation in the IOLTA program accounts for the Bar Foundation's most significant source of revenue. The IOLTA program provides funding that is critical to maintaining and improving access to the justice system in the State of Rhode Island.

5. Current Rule of Professional Conduct 1.15(h) does not require Rhode Island attorneys or law firms to establish IOLTA accounts. Consequently, Rhode Island is what is known as an "opt-out" state. That is, attorneys and law firms may choose not to participate in IOLTA.

6. Current Rule of Professional Conduct 1.15(f) addresses what are commonly known as IOLTA accounts and Rule 1.15(f)(1)-(4) describes the nature of these IOLTA accounts. Current Rule 1.15(f)(5) states: "The rate of interest payable on any interest-bearing trust account [IOLTA] shall not be less than the rate paid by the depository institution *on similar accounts.*" (emphasis added) The italicized language "similar accounts" is not defined in the rules; however, the Bar Association and Bar Foundation believe that the rule is meant to prohibit discriminatory treatment of IOLTA accounts.

7. Based on information that the Bar Association and Bar Foundation have received, and the research and investigation they have conducted, it appears that despite the language of current Rule 1.15(f)(5), various banks and financial institutions in Rhode Island (including

Rhode Island based banks as well as national banks with Rhode Island branches) presently discriminate against IOLTA accounts; that is, they pay less interest on IOLTA accounts than the highest interest or dividend generally paid by the bank or financial institution to its non-IOLTA customers, even when the IOLTA account meets the same minimum balance or other eligibility qualifications. For this reason, IOLTA accounts do not receive as high a rate of interest as the Bar Association and Bar Foundation believe they should receive, nor do receive the non-discriminatory treatment that the Bar Association and Bar Foundation believe is contemplated by Rule 1.15(f)(5).

8. Based on information and belief, including information and data obtained from the American Bar Association, the majority of states are now mandatory IOLTA states and, therefore, they do not allow either “opt out” of IOLTA or voluntary participation in IOLTA. In February 2008, the Nevada Supreme Court approved an amendment to the state’s IOLTA rule converting the IOLTA program from “opt out” to mandatory status. The new rule became effective May 1, 2008. On September 10, 2008, New Mexico also changed its rules to require mandatory IOLTA effective January 1, 2009. As a result of these changes, thirty-eight states have adopted mandatory IOLTA. Two states are voluntary IOLTA states; that is, attorneys must affirmatively choose to participate in IOLTA. A chart listing the states that are mandatory, opt-out and voluntary with respect to IOLTA, is attached as **Exhibit 1**.

9. Many states also require parity or comparable treatment by financial institutions with respect to IOLTA accounts such that the institutions may pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to non-IOLTA customers. In such states, rate parity results in substantially higher rates of interest being paid by financial institutions on their customers’ IOLTA accounts than what is presently being paid by

Rhode Island banks and financial institutions on their customers' IOLTA accounts. For example, on information and belief, banks and financial institutions in Massachusetts, as well as those in some other New England states, pay substantially higher interest rates on IOLTA accounts than their Rhode Island counterparts even if the bank or financial institution in each state is part of the same regional or national bank or financial institution. On July 1, 2008, IOLTA interest rate comparability provisions became effective in Hawaii. These comparability provisions require Hawaii attorneys to place their IOLTA accounts at a financial institution that pays IOLTA accounts the highest interest rate of interest or dividend generally available at the financial institution to other, non-IOLTA customers when the IOLTA account meets the same minimum balance or other requirements, *i.e.*, what the Bar Association and Bar Foundation believe is intended by current Rule 1.15(f)(5), but which in practice does not occur in Rhode Island. On September 4, 2008, the Pennsylvania Supreme Court issued an order amending its Rule of Professional Conduct 1.5 and Rule of Disciplinary Enforcement 221 to fully implement IOLTA rate parity. And on September 10, 2008, the Supreme Court of New Mexico changed its rules to require mandatory IOLTA and interest rate parity, effective January 1, 2009. As a result of these various rule changes, there are now 23 states that have amended their IOLTA rules, regulations, or statutes to include comparability or parity provisions. A listing of the states requiring rate parity is attached as **Exhibit 2**.

10. The Bar Foundation and Bar Association reasonably believe that if the rule changes requested by this Petition are made to require non-exempt attorneys to establish IOLTA accounts and to prohibit attorneys and law firms from establishing IOLTA accounts in financial institutions that discriminate against IOLTA accounts, then the amount of IOLTA funds ultimately paid by financial institutions in Rhode Island on IOLTA accounts would increase

substantially. Accordingly, this change would likely result in substantially more money being awarded by the Bar Foundation in its IOLTA grants than is currently the case. In this way, more funding would be available to assist in providing legal services to those in need.

11. As a result of the economic downturn, substantially decreased numbers of real estate transactions, the fact that attorneys and law firms may opt-out of IOLTA and the increased need for legal services in Rhode Island, there is now a substantial difference between IOLTA funds available to distribute to grantees, and amounts needed to support the needs of IOLTA grantees and their programs.

12. The Board of Directors of the Bar Foundation and the House of Delegates of the Bar Association have approved a proposed rule change that would make IOLTA mandatory (as is now required by 38 states) and that would establish IOLTA account rate parity (as is required by 23 states).

13. Consistent with the actions of the Board of Directors of the Bar Foundation and the House of Delegates of the Bar Association, the Bar Foundation and the Bar Association petition this Court for rule changes that would make IOLTA participation for non-exempt attorneys mandatory, thus deleting current Rule 1.15(h), which now allows lawyers or law firms to opt-out of IOLTA, and deleting current Rule 1.15(f)(5) and replacing the language of Rule 1.15(f)(5) as follows:

The rate of interest payable on any IOLTA account shall not be less than the highest interest rate or dividend available from the financial institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Lawyers or law firms making such deposits shall direct the depository institution: [continue with Rule 1.15(f)(5) (i), (ii) and 1.15(g)]

14. The Bar Foundation and Bar Association also request that Rule 1.15(f)(3) be changed to correct what appears to be a scrivener's error and to clarify, consistent with the

original orders from this Court with respect to former DR9-102(3), which established rules relating to IOLTA accounts, that notification to clients whose funds are deposited in IOLTA accounts shall *not* be necessary. The current version of Rule 1.15(f), (g) and (h) is attached as **Exhibit 3** and the proposed change to these Rules is attached as **Exhibit 4**. The original orders from this Court with respect to former Supreme Court Rule 47, Canon 9, DR9-102(3) IOLTA accounts are attached as **Exhibit 5**.

15. In accordance with the original Petition filed, the Bar Foundation and the Bar Association gave notice of the Petition and hearing to all financial institutions presently participating in the IOLTA program, and gave notice of the Petition and hearing to Bar Association members. Public comment closed on November 10, 2008 and a hearing on the original Petition was held on November 13, 2008.

16. On November 21, 2008, the Federal Insurance Deposit Corporation (FDIC) changed its rules with respect to the Temporary Liquidity Guaranty Program (TLGP) to include IOLTA accounts as non-interest bearing transaction accounts for purposes of unlimited FDIC protection for deposit accounts. *See* C.F.R. Part 370 Final Rule and relevant page from FDIC TLGP final rule amending the definition of a noninterest-bearing transaction account to include IOLTA accounts, attached as **Exhibit 6**.

WHEREFORE, the Bar Foundation and the Bar Association respectfully request that this Court grant this Amended Petition *instanter*, and in doing so, allow attorneys ninety (90) days from the Order granting the Amended Petition to comply with the Rule changes.

Dated: December 2, 2008

RHODE ISLAND BAR FOUNDATION

By: \_\_\_\_\_  
John A. Tarantino (Bar #2586)  
Adler Pollock & Sheehan P.C.  
One Citizens Plaza, 8<sup>th</sup> Floor  
Providence, RI 02903  
Tel: (401) 274-7200  
Fax: (401) 351-4607  
E-mail: [jtarantino@apslaw.com](mailto:jtarantino@apslaw.com)

John A. Tarantino  
President, Rhode Island Bar Foundation  
115 Cedar Street  
Providence, RI 02903

- and -

RHODE ISLAND BAR ASSOCIATION

By: \_\_\_\_\_  
Richard A. Pacia (Bar #2348)  
Richard A. Pacia Law Associates, LLC  
50 Power Road, Suite 200  
Pawtucket, RI 02860  
Tel: (401) 728-1600  
Fax: (401) 365-1145  
E-mail: [richard@pacialawassociates.com](mailto:richard@pacialawassociates.com)

Richard A. Pacia  
President, Rhode Island Bar Association  
115 Cedar Street  
Providence, RI 02903

**Exhibit 1**

<b>Mandatory</b>	<b>Opt-Out</b>	<b>Voluntary</b>
Alabama	Alaska	South Dakota
Arizona	Delaware	Virgin Islands
Arkansas	District of Columbia	
California	Idaho	
Colorado	Kansas	
Connecticut	Kentucky	
Florida	Nebraska	
Georgia	New Hampshire	
Hawaii	Rhode Island	
Illinois	Tennessee	
Indiana	Virginia	
Iowa	Wyoming	
Louisiana		
Maine		
Maryland		
Massachusetts		
Michigan		
Minnesota		
Missouri		
Mississippi		
Montana		
Nevada		
New Jersey		
New Mexico		
New York		
North Carolina		
North Dakota		
Ohio		
Oklahoma		
Oregon		
Pennsylvania		
South Carolina		
Texas		
Utah		
Vermont		
Washington		
West Virginia		
Wisconsin		



**Exhibit 2**

**States That Require IOLTA Rate Parity**

Alabama  
Arkansas  
California  
Connecticut  
Florida  
Hawaii  
Illinois  
Indiana  
Louisiana  
Maryland  
Massachusetts  
Maine  
Michigan  
Minnesota  
Mississippi  
Missouri  
New Jersey  
New Mexico  
New York  
Ohio  
Pennsylvania  
Texas  
Utah

### **Exhibit 3**

#### **Current Version of Rule 1.15(f), (g), (h) and (i)**

(f) A lawyer or law firm shall, subject to paragraph (h) of this Rule, deposit clients' funds, which are nominal in amount or to be held for a short period of time, in one or more interest bearing trust accounts in accordance with the following provisions:

- (1) Earnings from such accounts shall not be available to a lawyer or law firm.
- (2) Whether clients' funds are nominal in amount or to be held for a short period of time shall be determined solely by each attorney or law firm.
- (3) Notification to clients whose funds are deposited in interest bearing trust accounts shall be necessary.
- (4) Such interest bearing trust accounts may be established with any financial institution authorized by federal or state law to do business in Rhode Island, the deposits in which are insured by insurance entities regulated by the United States and/or the State of Rhode Island or any agency or instrumentality thereof. Funds deposited in such accounts shall be available for withdrawal immediately upon demand.
- (5) The rate of interest payable on any interest bearing trust account shall not be less than the rate paid by the depository institution on similar deposits. Lawyers or law firms making such deposits shall direct the depository institution:
  - (i) To remit interest or dividends on such deposits, net of any service or fees, at least quarterly, to the Rhode Island Bar Foundation (the "Foundation").
  - (ii) To transmit to the Foundation and the depositor with each remittance statements showing the name of the depositor, the amount remitted, and the rate(s) at which the interest was computed.

(g) Interest paid to the Foundation shall be used for any of the following purposes: providing legal services to the poor of Rhode Island; improving the delivery of legal services; promoting knowledge and awareness of the law; improving the administration of justice; and for the reasonable costs of administration of interest earned on clients' trust accounts under this Rule.

(h) A lawyer or law firm may elect not to deposit clients' funds in an interest bearing account as authorized in paragraph (f) of this Rule by notifying the Clerk of the Supreme Court in writing of such election during the month of January in each year.

(i) Nothing in this Rule shall preclude a lawyer or law firm from depositing any funds of a client other than those funds described in paragraph (f) of this Rule in an interest bearing account and accounting for the interest to such client.

## Exhibit 4

### **Proposed Changes to Rule 1.15(f), (g), (h) and (i)**

(f) A lawyer or law firm shall, ~~subject to paragraph (h) of this Rule,~~ deposit clients' funds, which are nominal in amount or to be held for a short period of time, in one or more interest bearing trust accounts in accordance with the following provisions. For purposes of this rule, such accounts are referred to as Interest on Lawyers' Trust Accounts (IOLTA):

(1) Earnings from such IOLTA accounts shall not be available to a lawyer or law firm.

(2) Whether clients' funds are nominal in amount or to be held for a short period of time shall be determined solely by each attorney or law firm.

(3) Notification to clients whose funds are deposited in ~~interest bearing trust~~ IOLTA accounts shall not be necessary.

(4) Such ~~interest bearing trust~~ IOLTA accounts may be established with any financial institution authorized by federal or state law to do business in Rhode Island, the deposits in which are insured by insurance entities regulated by the United States and/or the State of Rhode Island or any agency or instrumentality thereof. Funds deposited in such accounts shall be available for withdrawal immediately upon demand.

Deleted:

~~(5) The rate of interest payable on any interest bearing trust account shall not be less than the rate paid by the depository institution on similar deposits. Lawyers or law firms making such deposits shall direct the depository institution:~~

(5) The rate of interest payable on any IOLTA account shall not be less than the highest interest rate or dividend available from the financial institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Lawyers or law firms making such deposits shall direct the depository institution:

(i) To remit interest or dividends on such deposits, net of any service or fees, at least quarterly, to the Rhode Island Bar Foundation (the "Foundation").

(ii) To transmit to the Foundation and the depositor with each remittance statements showing the name of the depositor, the amount remitted, and the rate(s) at which the interest was computed.

(g) Interest paid to the Foundation shall be used for any of the following purposes: providing legal services to the poor of Rhode Island; improving the delivery of legal services; promoting knowledge and awareness of the law; improving the administration of justice; and for the reasonable costs of administration of ~~interest earned on clients' trust~~ IOLTA accounts under this Rule.

~~(h) A lawyer or law firm may elect not to deposit clients' funds in an interest bearing account as authorized in paragraph (f) of this Rule by notifying the Clerk of the Supreme Court in writing of such election during the month of January in each year.~~

(h) Nothing in this Rule shall preclude a lawyer or law firm from depositing any funds of a client other than those funds described in paragraph (f) of this Rule in an interest bearing account and accounting for the interest to such client.

Deleted: (i)

**Exhibit 5**

**Exhibit 5**

Formatted: Centered

Formatted: Font: Bold, Underline