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December 13, 2013

Barbara Berenson, Senior Attorney
SJC Standing Advisory Committee on the Rules of Professional Conduct
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

RE: Comments on Selected Proposed Revisions to the Rules

Dear Ms. Berenson:

On behalf of the IOLTA Committee I want to congratulate the Standing Advisory Committee on its comprehensive review of the Massachusetts Rules of Professional Conduct. After several meetings, the IOLTA Committee has decided to limit our comments to two of the proposed revisions.

1. Proposal to amend the rule regarding "flat fees"

"Flat" or "fixed" fees have been common in personal legal services for years. It appears now that, in bidding for business from prospective clients, law firms may be offering flat or fixed fees for larger pieces of business than in the past. The proposal is apparently offered to clarify how such fees should be handled.

For many years, the Committee's written guidance on the treatment of such fees has been to put them in IOLTA accounts or individual trust accounts, because, until the work is done, the client has a right to change attorneys and receive a refund of some or all of the fee. If it is ethical to have a client waive this right at all, it should be set forth in the fee agreement which is now required to be in writing pursuant to the amendment of Rule 1.5(b)(1) earlier this year. Given the proposal to modify Comment 2, and the increasing use of such flat fees, it is probably a good idea to clarify the rule.

Below is the Standing Committee's recommendation for Comment 2, with new matter in bold:

[2.] Legal fees and expenses paid in advance that are to be applied as compensation for services subsequently rendered or for expenses subsequently incurred are trust property and are required by paragraphs (b)(1) and (b)(3) to be deposited to a trust account. These fees and expenses can be withdrawn by a lawyer only as fees are earned or expenses incurred. **The Rule does not require flat fees to be deposited to a trust account, but a flat fee that is deposited to a trust account is subject to all the provisions of this Rule, including**

(b)(2) and (d)(2). A flat fee is a fixed fee that an attorney charges for all legal services in a particular matter, or for a particular discrete component of legal services, whether relatively simple and of short duration, or complex and protracted.

The IOLTA Committee also proposes to amend Comment 2, but by adding the matter in *italics* instead of the Standing Committee's amendment.

[2.] Legal fees and expenses paid in advance that are to be applied as compensation for services subsequently rendered or for expenses subsequently incurred are trust property and are required by paragraphs (b)(1) and (b)(3) to be deposited to a trust account. These fees and expenses can be withdrawn by a lawyer only as fees are earned or expenses incurred. *Whether a "flat fee" or "fixed fee" is required to be deposited to a trust account depends upon the facts of the fee agreement. If a client retains the right to discharge the attorney and obtain a refund of a portion of the fee, such a fee is required to be deposited in a trust account until earned. See Smith v. Binder, 20 Mass. App.Ct. 21 (1985). On the other hand, if the fee is paid as a retainer to secure the attorney's agreement to be bound to the client rather than available for possible employment by others whose interests may be adverse to the client, the payment is earned when paid and the fee is not required to be deposited in a trust account. See Blair v. Columbian Fireproofing Co., 191 Mass. 333 (1906).*

2. Documenting the Creation of a Trust Account

The creation of Rule 1.15 (e) (3) as proposed below by the Standing Committee requires an attorney to provide written notice to the bank that a trust account is being opened, whether it is an IOLTA account or an individual trust account (interest to the client). This proposed Rule was added to provide notice to the bank for the opening up of individual trust accounts not IOLTA accounts. The bank already receives notice of each new IOLTA account and all IOLTA accounts are trust accounts. There's no need for this new notice form to mention IOLTA at all. By including IOLTA on the form, unnecessary confusion will be fostered.

Below in bold is the Standing Committee's recommendation proposed addition to Rule 1.15(e):

Rule 1.15 (e) (3). For each trust account opened, the lawyer shall submit written notice to the bank or other depository in which the trust account is maintained confirming to the depository that the account will hold trust funds within the meaning of the Rule. The lawyer shall retain a copy executed by the bank and the lawyer

for the lawyer's own records. The notice shall identify the bank, account, and type of account, whether pooled, with interest paid to the IOLTA Committee (IOLTA account), or individual account with interest paid to the client or third person on whose behalf the trust property is held. For purposes of the Rule, one notice is sufficient for a master or umbrella account with individual subaccounts.

The IOLTA Committee proposes that the new rule proposed by the Standing Committee be amended by substituting the material set forth in *italics* below for the third and fourth sentences of the Standing Committee's proposal. The IOLTA Committee also suggests a modification of the final phrase of the proposed rule.

For each trust account opened, the lawyer shall submit written notice to the bank or other depository in which the trust account is maintained confirming to the depository that the account will hold trust funds within the meaning of this rule. The lawyer shall retain a copy executed by the bank and the lawyer for the lawyer's own records. *For IOLTA Accounts, the notice shall be made in a form and manner prescribed by the IOLTA Committee. For other trust accounts, the notice shall include the name and address of the financial institution; account number; account title; date opened; and the fact that the account is an individual trust account with interest paid to the client or third person on whose behalf the trust property is held. For the purpose of this rule, only one notice shall be required for master or umbrella accounts with individual subaccounts.*

The Standing Advisory Committee proposed the following new Comment 7 to explain the proposed new Rule 1.15(e)(3):

[7] Paragraph (e)(3) requires attorneys to provide a written notice to the bank or other depository when opening any account that is a trust account within the meaning of this Rule, regardless of whether the account is an IOLTA account or an individual trust account. The notice must be acknowledged in writing by the bank and an executed copy retained for the lawyer's own records. See the IOLTA Guidelines for the forms to be used for IOLTA accounts. Forms for notice to a bank when opening an individual (i.e., non-IOLTA) trust account may be obtained online from the website of the Board of Bar Overseers. The use of these forms shall not prevent the use of other forms consistent with this Rule.

The IOLTA Committee proposes the following amendment to the proposed Comment 7 (in *italics*):

Paragraph (e)(3) requires attorneys to provide a written notice to the bank or other depository when opening any account that is a trust account within the meaning of this Rule, regardless of whether the account is an IOLTA account or an individual trust account. The notice must be acknowledged in writing by the bank and an executed copy retained for the lawyer's own records.

Forms for opening an IOLTA account (called an Attorney's Notice of Enrollment) can be found on the IOLTA Committee website or by contacting the Committee directly. See the IOLTA Guidelines for additional procedures to be used when opening IOLTA accounts.

Forms for notice to a bank when opening an individual (non-IOLTA) trust account may be obtained online from the website of the Board of Bar Overseers. The use of these (non-IOLTA) forms shall not prevent the use of other forms consistent with this Rule.

We appreciate the opportunity to comment. If you have any questions or need any additional information, please do not hesitate to call.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard A. Soden".

Richard A. Soden, Chair
IOLTA Committee

Cc: IOLTA Committee
Jayne Tyrrell