


Interest on Lawyer Trust Accounts (IOLTA)

Mandatory IOLTA and You

A 2011 Guide for New Mexico
Lawyers and Law Firms



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New Mexico IOLTA Program
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WHAT IS IOLTA?

IOLTA – Interest on Lawyers’ Trust Accounts – is a method of raising money for charitable purposes, primarily the provision of civil legal services to indigent persons. The establishment of IOLTA in the United States followed changes to federal banking laws passed by Congress in 1980, which allowed some checking accounts to bear interest. IOLTA programs currently operate in 50 states, the District of Columbia, and the U.S. Virgin Islands.

How does it work?

Lawyers often handle money that belongs to clients, such as settlement checks, fees advanced for services not yet performed, or money to pay various court fees. Sometimes the amount of money that an attorney handles for a single client is quite large. In such cases, lawyers deposit the funds into trust accounts, where the funds can earn interest for the client.

Often, however, the amount of money that a lawyer handles for a single client is quite small or held for only a short period of time, and cannot earn interest for the client in excess of the costs incurred to collect that interest. Traditionally, lawyers have placed these deposits into combined, or pooled, trust accounts that contained other nominal or short-term client funds.

Before state laws and Supreme Court rules created IOLTA programs, trust funds pooled in this manner earned no interest. This is because trust accounts typically are checking accounts (to allow easy access to the funds) and, until the early 1980s, checking accounts did not earn interest. In addition, these trust funds earned no interest because it is unethical for attorneys to derive any financial benefit from funds that belong to their clients.

Since the inception of IOLTA, however, attorneys who handle nominal or short-term client funds that cannot earn net income for the client place these funds in a single, pooled, interest-bearing trust account. Banks in turn forward the interest earned on these accounts to the state IOLTA program, which uses the money to fund a variety of charitable causes.

Although IOLTA creates income, nothing else is changed: lawyers satisfy their ethical and fiduciary duty to place client funds in a secure account; there is on-demand access to the client's money; and, as in the past, the client realizes no interest income because the nominal or short-term client funds that are pooled in IOLTA accounts are funds that cannot earn net interest for the client.

Most banks treat IOLTA accounts as Negotiable Order of Withdrawal ("NOW") or other Business Interest Checking accounts. Banking regulations hold that attorneys can set up the accounts as NOW accounts even though the attorney-depositor may be a for-profit corporation, because the interest goes to a not-for-profit charitable entity.

The impact of IOLTA

In 2008, IOLTA grants nationwide totaled \$263.4 million. IOLTA is among the most significant sources of funding for programs that provide civil legal services to the poor, with close to 90 percent of grants awarded by IOLTA programs (\$230.4 million in 2008) supporting legal aid

offices and pro bono programs.

In 2009, IOLTA grants dropped significantly in several states due to a decline in interest rates. The effects of this decline was different in each state, as states have implemented diverse reserve policies and some states have developed alternative sources for funding grants.

IOLTA programs have taken a leading role in funding a number of innovative programs that have had a positive impact on the delivery of legal services to the poor. These include loan repayment assistance programs, state-based legal information Web sites and legal assistance hotlines. IOLTA programs also fund a variety of other activities including: alternative dispute resolution programs, young lawyer special public service projects, victim services programs, court-appointed special advocate (CASA) programs, pro se assistance resources, minority lawyer recruitment initiatives, and law school scholarship programs.

<http://www.abanet.org/legalservices/iolta/ioltback.html>...Updated: 01/20/2010

2010 NEW MEXICO GRANTEES

Advocacy, Inc.—\$30,000 to fund a portion of legal services for court-ordered guardianships and adoptions.

Catholic Charities of Central New Mexico—\$35,000 grant to advocate on behalf of battered immigrants.

Catholic Charities of Las Cruces—\$10,000 grant to advocate on behalf of battered immigrants.

Enlace Comunitario—\$35,000 to offer bilingual, culturally appropriate, free legal services and education for Spanish-speaking victims of domestic violence.

Legal FACs—\$30,000 in IOLTA funding to continue forms clinics and *pro se* web site.

Native American Disability Law Center—\$10,000 to represent the best interests of Navajo children involved in abuse and neglect cases.

New Mexico Center on Law and Poverty—\$87,000 to improve the administration of public assistance, increase access to healthcare, improve protections for poor laborers, and, augment the quantity and quality of civil legal services available to low-income New Mexicans.

Gene Franchini High School Mock Trial—\$10,000 to conduct a six-month educational program that improves students' knowledge, skills and attitudes about the law and the legal system.

Pegasus Legal Services for Children—\$20,000 to fund an education/outreach program for homeless or runaway teens.

Senior Citizens' Law Office—\$40,000 to provide funding for a Health Care Rights Project in Bernalillo, Sandoval, Tarrant and Valencia counties.

MANDATORY IOLTA IN NEW MEXICO

The State Supreme Court of New Mexico, upon the recommendation of its Access to Justice Commission and following a notice and comment period, issued an Order creating Rule 24-109, **effective on January 1, 2009**, which converted New Mexico's then existing opt-out Interest on Lawyer Trust Accounts (IOLTA) program to a mandatory program with a comparability requirement. The Court's leadership in accepting the recommendations ensured that IOLTA will generate the maximum revenue possible to provide increased access to justice for the state's poverty population during these critical economic times.

Mandatory means that all New Mexico attorneys who hold pooled client trust funds must maintain those funds as IOLTA accounts. That is, if you are an attorney engaged in the private practice of law and you receive IOLTA-eligible client funds (those that cannot earn income for the benefit of the client in excess of the costs incurred to secure and distribute that income to the client), then you or the law firm where you work must establish and maintain a pooled IOLTA trust account.

Comparability means that the IOLTA accounts must be held at financial institutions that pay the highest rate of interest or dividends generally available to non-IOLTA customers, when IOLTA accounts meet or exceed the same minimum balance or other eligibility requirements. Most New Mexico financial institutions comply with the comparability requirements of the Rule.

The Center for Civic Values ("CCV") certifies as "eligible" those financial institutions that agree to comply with the comparability and other requirements of the new Rule. If you currently maintain a non-IOLTA pooled client trust account, you are required to enroll in IOLTA or to convert your account to interest-bearing and to maintain the account at an eligible financial institution. If you currently hold an IOLTA pooled client trust account at an institution that is ineligible, you are required to move that account to a CCV-certified financial institution. CCV publishes a list of eligible institutions on its website at www.civicvalues.org.

For those attorneys and law firms that already participate in the IOLTA program, if you review the list of eligible institutions and discover that your bank is not included, then you will need to relocate the trust account to a different institution.

For those attorneys and law firms that hold pooled client trust accounts but do not currently participate in IOLTA, you must complete an *Attorney Notice to Eligible Financial Institution* and take it to an eligible institution, which will convert the existing pooled trust account to an interest-bearing IOLTA account. After the institution has converted the account, a copy of the *Notice*—one for each account—must be submitted to the IOLTA program.

For those attorneys who are exempt from participation in IOLTA (please refer to Rule 24-109), it is not necessary to complete the *Attorney’s Notice to Eligible Financial Institution*, **unless you maintain** a pooled client trust account that contains IOLTA-eligible funds.



A Program of the Center for Civic Values

IOLTA GRANT COMMITTEE

Supreme Court Appointees

Cerianne Mullins-Braun, Esq.

The Hon. John Pope

The Hon. Petra Jimenez Maes

State Bar Appointees

Kim A. Griffith, Esq.

Edward T. O’Leary

Center for Civic Values Appointees

Thomas F. Keleher, Esq.

Kathy Silva

Attorney Notice to Eligible Financial Institution—INSTRUCTIONS

The *Attorney Notice to Eligible Financial Institution* on the opposite page is provided for those attorneys engaged in the private practice of law who receive IOLTA-eligible client funds (those that cannot earn income for the benefit of the client in excess of the costs incurred to secure and distribute that income to the client) AND who do not currently have a pooled client trust account OR who do have a pooled client trust account that is not enrolled in IOLTA. One *Notice* must be completed and submitted for every pooled client trust account maintained by the lawyer/law firm. If you need to enroll in IOLTA or convert your existing pooled trust account:

- ◆ Complete the *Notice*
- ◆ Attach a voided check or deposit ticket to validate the account number
- ◆ Take the *Notice* to an eligible financial institution
- ◆ After the account has been opened (if new), or converted (if existing), send a copy of the *Notice* to CCV at PO Box 2184, Albuquerque, NM 87103-2184
- ◆ Retain a copy for your records

If you are currently exempt from the requirements of Rule 24-109 AND you don't maintain a pooled client trust account, then you are not required to complete and return the *Attorney Notice to Eligible Financial Institution*.

EXEMPTIONS

If you are not in private practice in New Mexico, you are exempt from participation in IOLTA, unless *for any reason* you maintain a pooled client trust account containing IOLTA-eligible funds. You are exempt **ONLY** if:

- ◆ you are a judge, an employee of a local, state, federal or tribal government, corporate counsel, a teacher of law, or are otherwise not engaged in the private practice of law;
- ◆ the nature of your practice is such that you do not hold IOLTA-eligible funds of any client or third person;
- ◆ you do not have an office within the State of New Mexico and you have the client's or third person's permission to hold the funds out of state; or,
- ◆ you have applied for and obtained an exemption from CCV for undue hardship based on the geographic distance between your principal office and the closest eligible financial institution (CCV has established the exemption distance to be one that exceeds 25 miles).



A Program of the Center for Civic Values

**CENTER FOR CIVIC VALUES
NEW MEXICO IOLTA PROGRAM**

PO Box 2184
Albuquerque NM 87103-2184
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Web: civicvalues.org



**CENTER FOR
CIVIC VALUES**
PROVIDING EDUCATION AND RESOURCES
FOR PUBLIC PARTICIPATION IN THE LAW

TAXPAYER IDENTIFICATION NUMBER (TIN) 85-6018573

ATTORNEY NOTICE TO ELIGIBLE FINANCIAL INSTITUTION

I hereby enroll in the Interest on Lawyer Trust Account (IOLTA) program established by the New Mexico Supreme Court. Accordingly, I direct my financial institution to (1) open, if new; *OR*, (2) convert, if existing, my/my firm's pooled client trust account to an to interest bearing IOLTA account in accordance with Rule 24-109 of the Rules Governing the New Mexico Bar.

ATTORNEY INFORMATION

INSTRUCTIONS TO ATTORNEYS: (1) Complete this *Notice*, (2) Attach a voided check or deposit ticket to validate the account number; (3) Take the *Notice* to an eligible financial institution, (4) **After the account has been opened or converted**, send a copy of this *Notice* to the Center for Civic Values at the address above; and, (5) Retain a copy for your records.

Firm Name: _____

Attorney Name: _____

Mailing Address: _____ E-mail: _____

City: _____ State: _____ Zip Code: _____ Telephone: _____

Authorized Signature Lawyer/Law Firm: _____

Additional Account Signer(s): _____

(Attach additional sheets if necessary)

FINANCIAL INSTITUTION INFORMATION

INSTRUCTIONS TO FINANCIAL INSTITUTIONS: The IOLTA account must be established in the name of the attorney or law firm opening or converting this account, with further designation indicating the fact that this is an IOLTA account. The Taxpayer Identification Number (TIN) must be that of the Center for Civic Values (CCV), shown above. CCV is a tax exempt organization and is exempt from backup withholding. No IRS form 1099 is required for IOLTA accounts opened under this program and the financial institution is not subject to penalty for a mismatched TIN when the payee is an exempt organization. The establishment of interest bearing trust accounts by law firms, including professional corporations, under the IOLTA program has been approved by federal regulatory agencies. Interest as computed in accordance with the applicable disclosures for this account must be remitted monthly or quarterly to CCV at PO Box 2184, Albuquerque, NM 87103-2184. If you wish to transmit interest electronically, please call 505.764-9417 or 800-451-1951, ext. 14.

Financial Institution Name: _____

Address: _____ Telephone: _____

By (financial institution representative): _____ Date: _____

Account Name: _____

Account #

**Please attach voided check or
deposit slip here.**
Thank you.

COPIES OF THIS *NOTICE* SHOULD BE FILED BY THE ATTORNEY WITH THE FINANCIAL INSTITUTION AND IOLTA

SECTION 7. TRUST ACCOUNT CERTIFICATION/IOLTA COMPLIANCE FORM

I. ATTORNEY INFORMATION-all attorneys licensed in New Mexico are required to complete in full sections I, II and III. Non-compliance will be reported to the State Supreme Court and may subject the attorney to suspension.

Attorney Name: _____ NM Bar Card # _____
 Firm Name: _____
 Firm Contact: _____ Phone/E-Mail: _____ / _____

Firm administrators may report for the entire firm by completing the information below and enclosing it with a list of the firm's attorneys and their bar card numbers.

II. ATTORNEY TRUST ACCOUNT INFORMATION-if your trust account is NOT in NM, DO NOT provide financial institution information. Instead, select the appropriate exemption below.

I/My firm maintain/maintains the client trust accounts below (please attach a separate page for additional accounts).

Financial Institution Name	Account Name (For TRUST Accounts only)	Account Number	IOLTA (circle one)	
1.			Yes	**No
2.			Yes	**No
3.			Yes	**No
4.			Yes	**No

****If this account contains IOLTA-eligible funds, it MUST be enrolled in the New Mexico IOLTA program at an eligible financial institution (please refer to Rule 24-109). If you circled "no" above, please explain:** _____

OR

- I am exempt because I am a judge, an employee of a local, state, federal or tribal government, corporate counsel or a teacher of law or am otherwise not engaged in the private practice of law; **OR,**
- I am exempt because the nature of my practice is such that I/my firm do/does not hold IOLTA-eligible funds of any client or third person; **OR,**
- I am exempt because I/my firm do/does not have an office within the State of New Mexico, and I/my firm have/has the client's or third person's permission to hold the funds out of state; **OR**
- I am exempt because I/my firm have/has applied for and obtained an exemption from the Center for Civic Values pursuant to Rule 24-109(B)(8)(d).

III. ATTORNEY CERTIFICATION OF TRUST ACCOUNT INFORMATION AND IOLTA COMPLIANCE

By providing the information above, I certify that I am in compliance with Rule 16-115 of the Rules of Professional Conduct, Rule 17-204 of the Rules Governing Discipline and Rule 24-109 of the Rules Governing the New Mexico Bar.

With this signature I certify under penalty of perjury that the above and foregoing information is true and correct.

Signature _____ Date _____

If you have questions about THIS form, contact IOLTA at 505.764.9417 or 800.451.1941, ext. 14, or iolta@civicvalues.org. For general information about the New Mexico IOLTA program please visit civicvalues.org.

If you have questions about other sections of the Dues Form, please contact the State Bar at 505.797.6000.

FREQUENTLY ASKED QUESTIONS

On September 10, 2008, the New Mexico Supreme Court issued an Order approving the recommendation of its Access to Justice Commission to convert New Mexico's IOLTA program from opt-out to mandatory with a comparability requirement. As a result, New Mexico joined 37 other jurisdictions in which attorneys in private practice are required to maintain as IOLTA accounts any and all pooled client trust accounts that contain IOLTA-eligible funds. In addition, New Mexico joins 22 other IOLTA programs that have comparability requirements in their rules. The changes were effective January 1, 2009.

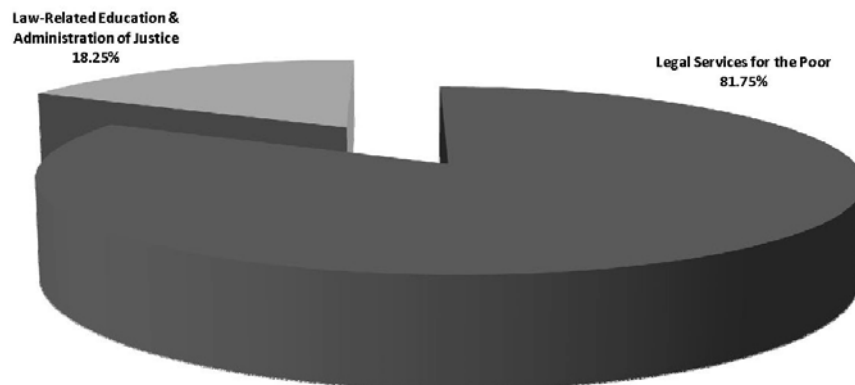
WHY WERE THESE CHANGES ADOPTED?

Ensuring all eligible funds are maintained in IOLTA accounts and that those accounts earn competitive interest rates at eligible financial institutions maximized the revenue available for the charitable purposes of the IOLTA program, which are to provide civil legal services for the poor, legal education for the public and improvements in the administration of justice. More than \$4 million in IOLTA grants has been awarded since the program began, and nearly half a million New Mexicans annually receive services from IOLTA-funded programs.

HOW THE GRANTS ARE AWARDED?

The IOLTA Grant Committee is an independent body comprising one Justice of the State Supreme Court and two lawyers appointed by the Court; one lawyer and one non-lawyer appointed by the State Bar of New Mexico; and, one lawyer and one non-lawyer appointed by CCV. Applications are received in the fall and distributed to the Committee, which then meets to determine its recommendations about which entities should be funded and how much each should receive. Those recommendations are forwarded to the CCV Board of Directors for review, after which they are submitted to the New Mexico Supreme Court for approval. Since the first grants were awarded in 1987, funds have distributed as reflected below (through 2010).

IOLTA Grants-Inception to Date
Total Awarded-\$4,335,818



I'M NOT IN PRIVATE PRACTICE. HOW DOES MANDATORY IOLTA AFFECT ME?

If you are not in private practice and you do not maintain a pooled client trust account in New Mexico, you are “exempt” from participation in IOLTA. You are exempt if (1) you are a judge, an employee of a local, state, federal or tribal government, corporate counsel, a teacher of law, or are otherwise not engaged in the private practice of law; (2) the nature of your practice is such that you do not hold IOLTA-eligible funds of any client or third person; (3) you do not have an office within the State of New Mexico and you have the client’s or third person’s permission to hold the funds out of state; or, (4) you have applied for and obtained an exemption from CCV for undue hardship based on the geographic distance between your principal office and the closest eligible financial institution.

WHAT IF I DON'T HAVE A TRUST ACCOUNT, OR I DO BUT IT'S NOT ENROLLED IN IOLTA?

If you are an attorney engaged in the private practice of law and you receive IOLTA-eligible client funds (those that cannot earn income for the benefit of the client in excess of the costs incurred to secure and distribute that income to the client), then you or the law firm where you work must establish and maintain a pooled IOLTA trust account. In addition, that account must be held at a financial institution certified as eligible by CCV. An list of eligible institutions is available on CCV’s website at civicvalues.org.

WHAT ARE “IOLTA-ELIGIBLE” FUNDS?

Funds of a client or third party are IOLTA-eligible and must be deposited in an IOLTA account unless those funds can earn income for the benefit of the client or third person in excess of the costs incurred to secure and distribute the income to the client or third person.

IF I ALREADY MAINTAIN AN IOLTA ACCOUNT FOR MY POOLED CLIENT TRUST FUNDS, HOW DOES MANDATORY IOLTA AFFECT ME?

If you have more than one pooled client trust account, each must now be enrolled in the IOLTA program, and each must be maintained at a financial institution that has been certified as eligible by CCV.

WHAT IS AN “ELIGIBLE” FINANCIAL INSTITUTION?

Eligible institutions are those that voluntarily offer IOLTA accounts and comply with the requirements of the Rule, including offering the highest rate of interest or dividends generally available from the institution to non-IOLTA customers, when IOLTA accounts met or exceed the same minimum balance or other account eligibility qualifications, if any. Eligible institutions may charge only reasonable fees as defined in the Rule and may not deduct any service charges or fees in excess of the interest or dividends earned from the principal of an IOLTA account, or from the interest, dividends or principal of any other IOLTA account.

HOW DO I KNOW IF MY FINANCIAL INSTITUTION IS ELIGIBLE?

CCV distributes materials to all financial institutions regarding the specific interest rate and other account requirements of Rule 24-109. CCV works with each institution to structure its IOLTA account offerings to ensure they comply with the Rule. Financial institutions are certified as eligible to hold IOLTA accounts upon completion of that process, and then they are included in the list of approved IOLTA depositories maintained on the CCV web site.

WHO PAYS SERVICE CHARGES AND FEES ON IOLTA ACCOUNTS?

The IOLTA rule defines “Reasonable Allowable Fees” that may be charged against the interest earned on IOLTA accounts. Allowable fees are (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) Federal deposit insurance fees, (5) sweep fees and (6) a reasonable IOLTA account administrative fee. Check printing charges, wire transfer fees, bank checks or certified checks, cash management fees, and overdraft costs, if assessed by the financial institution, are the responsibility of the lawyer or law firm maintaining the account and they may deposit their own funds in the IOLTA account sufficient to pay these charges, or make other arrangements with the financial institution to be billed for those expenses.

AM I REQUIRED TO NEGOTIATE SERVICE CHARGES OR INTEREST RATES?

No. CCV negotiates with and determines compliance by financial institutions with IOLTA requirements under the Rules.

DO I NEED NEW CHECKS FOR MY IOLTA ACCOUNT(S)?

If the account is already enrolled in the IOLTA program or if the financial institution converts a non-IOLTA account to an IOLTA that meets all the requirements of the Rules, you may continue to use the same checks.

WHAT ARE THE TAX CONSEQUENCES OF PARTICIPATION IN IOLTA?

There are no tax consequences for attorneys enrolled in the IOLTA program. Financial institutions are instructed to use CCV’s tax identification number (TIN), as reflected on the *Attorney Notice to Eligible Financial Institution*, and not the TIN of the lawyer or law firm. As a result, you should not receive a Form 1099 for interest earned on an IOLTA account.

HOW WILL I KNOW IF I AM COMPLIANT WITH THE NEW RULES?

The *Trust Account Certification/IOLTA Compliance* form that you complete and submit with your payment of annual dues to the State Bar of New Mexico is forwarded to CCV. All information requested on the form is required to be provided by every attorney licensed to practice in the state. If upon CCV’s review, the form is non-compliant (incomplete), you are contacted and so advised. After that, you have 30 days to provide whatever information is requested. Unless you do so and return your form to CCV timely, you will be certified to the Court as non-compliant, and the next communication you receive will be from the Clerk of the Court.

WHAT SHOULD I DO NOW?

IF YOU	THEN
Have an IOLTA account	<ul style="list-style-type: none">◆ Ensure the account is maintained at an eligible financial institution. Visit civicvalues.org to review a list of those institutions that have been certified as eligible by CCV.
Have a non-IOLTA, pooled client trust account	<ul style="list-style-type: none">◆ Complete the <i>Attorney Notice to Eligible Financial Institution</i> contained in this Guide.◆ Take it to your financial institution and instruct that your account be converted to an interest-bearing IOLTA account.◆ Send a copy of the completed <i>Notice</i> to CCV at PO Box 2184, Albuquerque, NM 87103-2184.◆ Ensure that all IOLTA-eligible funds are deposited into your IOLTA account.◆ Report all IOLTA account(s) on the <i>Trust Account Certification/ IOLTA Compliance</i> form (Section 7) of the 2011 State Bar of New Mexico’s annual dues form .
Do not have a pooled client trust account	<ul style="list-style-type: none">◆ Ensure that you are exempt under Section B(8) of Rule 24-109. If you are not exempt, open an IOLTA account at an eligible financial institution (see above).

WHAT IF I HAVE QUESTIONS?

Contact the IOLTA program at by calling CCV at 505.764.9417 or 800.451.1941 (outside Albuquerque), extension 14, or by sending an e-mail to iolta@civicvalues.org.

“Equal justice is a vital part of the bright constellation that guides our political fates and our national life.”

***Thomas Jefferson
Third President
United States of America***

16-115. SAFEKEEPING PROPERTY. (FROM THE RULES OF PROFESSIONAL CONDUCT)

- A. HOLDING ANOTHER’S PROPERTY SEPARATELY.** A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five (5) years after termination of the representation.
- B. CLIENT TRUST ACCOUNT DEPOSITS; DISCRETIONARY.** A lawyer may deposit the lawyer’s own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
- C. CLIENT TRUST ACCOUNT DEPOSITS; MANDATORY.** A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- D. NOTIFICATION OF RECEIPT OF FUNDS OR PROPERTY.** Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- E. SEVERANCE OF INTEREST.** When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMITTEE COMMENTARY

- [1] *For recordkeeping requirements related to trust accounts, see Rule 17-204 NMRA. For specific requirements related to mandatory IOLTA accounts, see Rule 24-109 NMRA.*** A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., Rule 17-204 of the Rules Governing Discipline and ABA Model Financial Recordkeeping Rule.

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- [2] While normally it is impermissible to commingle the lawyer's own funds with client funds, Paragraph B provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds belongs to the lawyer.
- [3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.
- [4] Paragraph E also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.
- [5] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.
- [6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

17-204. REQUIRED RECORDS. (FROM THE RULES GOVERNING DISCIPLINE)

- A. REQUIRED RECORDS.** Every attorney subject to these rules shall maintain complete records of the receipt, deposit, investment and disbursement of all funds, securities and other property received from or on behalf of a client that have at any time come into the attorney's possession, and shall further maintain on a current basis all books and records that will establish the attorney's compliance with Rule 16-115 NMRA of the Rules of Professional Conduct and Rule 24-109 NMRA of the Rules Governing the New Mexico Bar. Accounting records may be maintained in either hard copy or stored on a computer.

In addition to the requirements of Rule 16-115 NMRA and Rule 24-109 NMRA, an attorney shall keep a complete record and report annually on the certificate of compliance the name of each financial institution and each account number of every financial institution in which the attorney maintains funds received from or on behalf of a client. These records shall cover the entire time from receipt to the time of final disposition by the attorney of all such funds, securities and other properties. Attorneys shall preserve all such records for

a period of five (5) years after final disposition of said funds, securities or other properties, or, as to fiduciary or trust records, five (5) years following the termination of the fiduciary or trust relationship.

For purpose of this rule, an attorney is deemed to have the necessary "required records" by maintaining:

- (1)** a record of all deposits into and withdrawals from each trust account, specifically identifying the date, source and description of each item deposited as well as the date, payee and purpose of each disbursement. Deposit slips shall separately identify each item deposited. Trust account disbursement shall be made only by authorized bank transfer or by check payable to a named payee and not to cash. At least one attorney admitted to practice law in this state shall be an authorized signatory on an attorney trust account; but signature authority may be delegated to a nonlawyer, provided, however, such delegation shall not be deemed to relieve the attorney from responsibility for transactions involving the trust account;
- (2)** a separate ledger or account for each separate trust client, containing the information required by Subparagraph (1) of this paragraph. A continuing balance of each individual client trust ledger shall be maintained. The total of the balances of all individual client trust ledgers must equal the beginning balance of all individual client trust accounts, plus the total of all additional amounts received in trust, minus the total of all trust monies disbursed;
- (3)** copies of all retainer and compensation agreements with clients;
- (4)** copies of all statements to clients, which statements shall reflect all transactions on the trust account for the period to which the statements relate;
- (5)** all checkbooks, check stubs, bank statements, cancelled checks and duplicate deposit slips on each trust checking account;
- (6)** copies of invoices and statements received from others and paid out of trust funds;
- (7)** written reconciliations made at least quarterly of the checkbook balance, the bank statement balance and the client trust ledger sheet balances;
- (8)** copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto;
- (9)** Rule 24-109 NMRA of the Rules Governing the New Mexico Bar and copies of reports received from the financial institution in compliance with Paragraph B of Rule 24-109; and
- (10)** for properties other than cash, a separate ledger for each client identifying the date received, the name of the person from whom received, the description of the property (including make, model, serial number and other identifying marks), its location in the attorney's office or other location, the date released by the attorney and to whom released.

B. TRUST ACCOUNT OVERDRAFT NOTIFICATION.

(1) **Definitions.** As used in this paragraph the following definitions apply:

- (a) "financial institution" means any financial institution authorized by federal or state law to do business in New Mexico, the deposits of which are insured by an agency or instrumentality of the federal government.
- (b) "properly payable" means that an instrument presented in the normal course of business is in a form requiring payment under the laws of New Mexico.
- (c) "notice of dishonor" means the notice that a financial institution is required to give under the laws of New Mexico upon presentation of an instrument that the institution dishonors.

(2) **Clearly identified trust accounts required.** Attorneys who practice law in New Mexico shall deposit all funds held in trust in New Mexico in accordance with Rule 16-115 NMRA of the Rules of Professional Conduct and Rule 24-109 NMRA of the Rules Governing the New Mexico Bar in accounts clearly identified as "Attorney Trust Account" or "IOLTA Account" referred to herein as "trust accounts" and shall take all steps necessary to inform the financial institution of the purpose and identity of such accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation whether as trustee, agent, guardian, executor or otherwise. Trust accounts shall be maintained only in financial institutions approved by the Disciplinary Board. Any trust accounts that are IOLTA accounts shall also be maintained in financial institutions approved by the Center for Civic Values under Subparagraph (3) of Paragraph B of Rule 24-109 NMRA.

(3) **Overdraft notification agreement required.** A financial institution shall be approved as a depository for trust accounts if it has filed with the Disciplinary Board an agreement in a form provided by the Disciplinary Board to report to the Office of Disciplinary Counsel whenever any properly payable instrument is presented against a trust account containing insufficient funds, whether or not the instrument is honored. The Supreme Court shall establish rules governing approval and termination of approval status for financial institutions and the Disciplinary Board shall annually publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon thirty (30) days notice in writing to the Supreme Court or the Disciplinary Board.

(4) **Overdraft reports.** The overdraft notification agreement required by Subparagraph (3) of this paragraph shall provide that all reports to the Office of Disciplinary Counsel made by the financial institution shall be in the following format:

- (a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor and should include a copy of the dishonored instrument if such a copy is normally provided to

depositors.

(b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment and the date paid as well as the amount of overdraft created thereby. Such reports shall be made simultaneously with and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored then the report shall be made to the Office of Disciplinary Counsel within five (5) banking days of the date of presentation for payment against insufficient funds.

(5) **Consent by attorneys.** Every attorney practicing or admitted to practice in New Mexico is deemed to consent, as a condition thereof, to the reporting and production requirements mandated by this rule.

(6) **Designation of financial institution as approved depository.** The designation of a financial institution as an approved depository pursuant to this rule shall not constitute a warranty representation or guaranty by the Supreme Court, the Disciplinary Board or the Office of Disciplinary Counsel as to the financial soundness, business practices or other attributes of the financial institution. Approval of a financial institution under this rule means only that the financial institution has agreed to meet the reporting requirements in this paragraph.

(7) **Costs.** Nothing in this rule precludes a financial institution from charging an attorney or a law firm for the reasonable cost of producing all reports and records required by this rule.

C. CERTIFICATE OF COMPLIANCE. On forms provided by the state bar and approved by the Supreme Court, every attorney subject to these rules shall annually submit to the state bar the attorney's Trust Account Certification/IOLTA Compliance form demonstrating compliance with this rule and Rule 24-109 of the Rules Governing the New Mexico Bar. Such form shall include the financial institution name, the account name and the account number of any and all accounts in which client funds are held and shall be submitted to the state bar with the registration statement filed pursuant to Rule 17-202 NMRA. The state bar shall forward the original of each form to the Center for Civic Values. The Center for Civic Values shall maintain each form and shall provide to the Disciplinary Board a copy of any form requested. Whenever the Center for Civic Values shall certify to the Supreme Court that any member of the state bar has failed or refused to comply with the provisions of this paragraph, the clerk of the Supreme Court shall issue a citation to such member requiring the member to show cause before the Court, within fifteen (15) days after service of such citation, why the member should not be suspended from the right to practice in the courts of this state. Service of the citation may be by personal service or by first class mail postage prepaid. The member's compliance with the provisions of this paragraph on or before the return day of such citation shall be deemed sufficient showing of cause and shall serve to discharge the citation.

D. APPLICABILITY OF RULE. This rule shall not apply to any attorney whose entire

compensation derived from the practice of law during the year preceding the filing of any registration statement was received in the attorney's capacity as an employee handling legal matters of a corporation or an agency of the federal, state or local government. Any such attorney shall, in lieu of the required certificate, certify on the same form provided by the clerk that the attorney has not had possession of any funds, securities or other properties of a client.

24-109. TRUST ACCOUNTS; SPECIAL REQUIREMENTS FOR IOLTA TRUST ACCOUNTS. (FROM THE RULES GOVERNING THE NEW MEXICO BAR)

A. IOLTA eligible funds. Funds of a client or third person shall be deemed IOLTA-eligible and shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can earn income for the benefit of the client or third person in excess of the costs incurred to secure and distribute such income to the client or third person. In determining whether a client's or third person's funds can earn income in excess of the costs to secure and distribute such income, the lawyer or law firm shall consider the following factors:

- (1) the amount of interest or dividends that the funds are expected to earn during the period they are expected to be deposited;
- (2) the cost of establishing and administering non-IOLTA accounts for the benefit of clients or third persons, including the costs of the lawyer's services, and the costs of preparing any tax reports required for interest or dividends on earned funds;
- (3) the capability of financial institutions, lawyers or law firms to calculate and pay interest or dividends to individual clients or third persons; and
- (4) any other circumstances that affect the ability of the client's or third-person's funds to earn interest or dividends in excess of the costs to secure such interest or dividends.

The lawyer or law firm shall review its IOLTA account at reasonable intervals to determine whether any changed circumstances require further action with respect to the funds of any client or third person.

B. SPECIAL REQUIREMENTS FOR TRUST ACCOUNTS CONTAINING IOLTA-ELIGIBLE FUNDS.

Except as provided in Subparagraph (8) of this paragraph, a lawyer or law firm shall establish and maintain in compliance with the following provisions one or more interest or dividend bearing trust accounts for the deposit of all IOLTA-eligible funds of clients or third persons. Each such account shall be referred to as an IOLTA account.

- (1) No interest or dividends from an IOLTA account shall be made available to a lawyer or law firm.
- (2) An IOLTA account shall be established with any financial institution authorized by federal or state law to do business in New Mexico, the deposits of which are insured by an agency or instrumentality of the federal government. Funds in each IOLTA account shall be subject to withdrawal upon request and without delay except as permitted by law.

(3) Lawyers may maintain IOLTA accounts only in eligible financial institutions. Eligible financial institutions are those that voluntarily offer IOLTA accounts and comply with the requirements of this rule, including maintaining IOLTA accounts that pay the highest rate of interest or dividends generally available from the institution to its non-IOLTA customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the highest rate of interest or dividends generally available from the institution to its non-IOLTA customers, an eligible financial institution may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting rates of interest or dividends for its 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 whether a financial institution is an eligible financial institution and whether it is meeting the requirements of this rule shall be made by the Center for Civic Values. The Center for Civic Values shall maintain a list of participating eligible financial institutions and shall provide a copy of the list to any lawyer upon request.

(a) An eligible financial institution may satisfy these comparability requirements by electing one of the following options:

- (i)** establish the IOLTA account as the comparable rate product;
- (ii)** pay the comparable rate on the IOLTA checking account in lieu of actually establishing the comparable highest interest rate or dividend product; or
- (iii)** pay an amount on funds that would otherwise qualify for the investment options noted in Subparagraph (c) of Subparagraph (3) of this paragraph equal to fifty-five percent (55%) of the federal funds targeted rate as of the first business day of the month or other IOLTA remitting period, which amount is deemed to be already net of allowable reasonable service charges or fees. This “benchmark yield amount” may be adjusted once per year by the Center for Civic Values, upon ninety (90) days’ written notice to financial institutions participating in the IOLTA program.

(b) IOLTA accounts may be established as:

- (i)** a business checking account with an automated investment feature, such as an overnight investment in repurchase agreements or money market funds invested solely in or fully collateralized by United States government securities, including United States Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States or any agency or instrumentality thereof;
- (ii)** a checking account paying preferred interest rates, such as money market or indexed rates;
- (iii)** a government interest-bearing checking account such as an account used for municipal deposits;

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- (iv) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or
 - (v) any other suitable interest or dividend-bearing deposit account offered by the institution to its non-IOLTA customers.
 - (c) 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. 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, 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 investment, shall have total assets of at least two hundred fifty million dollars (\$250,000,000).
 - (d) Nothing in this rule shall preclude a participating financial institution from paying a higher rate of interest or dividends than described above or electing to waive any service charges or fees on IOLTA accounts.
 - (e) Interest and dividends shall be calculated in accordance with the participating financial institution’s standard practice for non-IOLTA customers.
 - (f) “Allowable reasonable service charges or fees” for IOLTA accounts are defined as per check charges, per deposit charges, a fee in lieu of minimum balances, sweep fees, FDIC insurance fees and a reasonable IOLTA account administrative fee.
 - (g) Allowable reasonable service charges or fees may be deducted from interest or dividends on an IOLTA account only at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No fees or service charges other than allowable reasonable service charges and fees may be assessed against or deducted from the interest or dividends on an IOLTA account. Any fees and service charges other than allowable reasonable service charges and fees shall be the sole responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.
- (4) Lawyers or law firms depositing IOLTA-eligible funds in an IOLTA account pursuant to this paragraph shall direct the financial institution:
- (a) to remit at least quarterly to the Center for Civic Values all interest or dividends, net of any allowable reasonable service charges or fees, computed on the average monthly balance in the account or otherwise computed in accordance with the institution's standard accounting practices, provided that the financial institution may elect to waive any or all such charges or fees;
 - (b) to transmit to the Center for Civic Values with each remittance a report showing the name of the lawyer or law firm on whose behalf the remittance is sent, the amount of remittance attributable to each IOLTA account, the time period
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covered by the report, the IOLTA account number for each account, the rate of interest or dividends remitted, the amount and type of service charges or fees deducted, if any, the average daily account balance of the period for which the report is made, and such other information as may be reasonably required by the Center for Civic Values;

- (c)** to transmit to the depositing lawyer or law firm a statement in accordance with normal procedures for reporting to depositors of the financial institution; and
 - (d)** not to deduct any service charges or fees in excess of the interest or dividends earned during the remitting period from the principal of an IOLTA account or from interest, dividends or principal of any other IOLTA account.
- (5)** The lawyer or law firm may deposit the lawyer's or law firm's own funds in an IOLTA account for the sole purpose of paying service charges or fees on the account or obtaining a waiver thereof, but only in an amount necessary for that purpose.
- (6)** The Center for Civic Values shall hold all funds transmitted to it and shall distribute such funds periodically in accordance with a plan of distribution that shall be prepared at least annually and approved by the Supreme Court of New Mexico for the following public purposes:
 - (a)** to provide legal assistance to the poor;
 - (b)** to provide legal education;
 - (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 Supreme Court of New Mexico from time to time.
- (7)** Every lawyer not exempt from this paragraph shall certify in compliance with Rule 17-204 NMRA that all IOLTA-eligible funds held by the lawyer for the benefit of any client or third-person are deposited in an IOLTA account.
- (8)** A lawyer is exempt from the requirements of this paragraph if:
 - (a)** the lawyer is a judge, an employee of a local, state, federal or tribal government, corporate counsel, or a teacher of law, or is otherwise not engaged in the private practice of law;
 - (b)** the nature of the lawyer's practice is such that the lawyer does not hold IOLTA-eligible funds of any client or third person;
 - (c)** the lawyer does not have an office within the State of New Mexico and has the client's or third person's permission to hold the funds out of state; or
 - (d)** the lawyer has applied for and obtained an exemption from the Center for Civic

Values based on undue hardship for the lawyer based on geographic distance between the lawyer's principal office and the closest financial institution that is participating in the IOLTA program in accordance with criteria and procedures the Center for Civic Values shall establish.

- C. INTEREST OR DIVIDEND-PRODUCING TRUST ACCOUNTS FOR THE BENEFIT OF A CLIENT OR THIRD PERSON.** A lawyer or law firm may establish one or more interest or dividend-bearing trust accounts for the deposit of a client's or third person's funds that are not IOLTA-eligible, the net income from which will be paid to the client or third person.
- D. GOOD-FAITH JUDGMENT.** The determination of whether the funds of a client or third person are IOLTA-eligible in that they can earn income in excess of costs as provided in Paragraph F of this rule shall rest in the sound judgment of the lawyer or law firm, and no lawyer shall be charged with an ethical impropriety based on the good-faith exercise of such judgment.

**“If we are keep our democracy, there must be one
commandment: thou shall not ration justice.”**

Jurist Learned Hand