

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE PROPOSED)	NOTICE OF SPECIAL
AMENDMENT OF THE APPENDIX TO)	RULES HEARING
SDCL CHAPTER 16-18; SOUTH DAKOTA)	
RULES OF PROFESSIONAL CONDUCT)	NO. 133
CLIENT-LAWYER RELATIONSHIP)	
1.15 SAFEKEEPING PROPERTY)	

Petition for the amendment of existing section of the South Dakota Codified Laws having been filed with the Court, and the Court having determined that the proposed amendment should be noticed for hearing, now therefore,

NOTICE IS HEREBY GIVEN THAT ON OCTOBER 3, 2016, at 12:00 P.M., C.S.T., at the Courtroom of the Supreme Court in the Johnson Fine Arts Center, Main Theatre, Northern State University, Aberdeen, South Dakota, the Court will consider the following:

1. Proposed Amendment of the APPENDIX TO SDCL CHAPTER 16-18

SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT

CLIENT-LAWYER RELATIONSHIP.

Rule 1.15. Safekeeping Property

(A) 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 party. 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 years after termination of the representation. 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. A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

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(B) Upon receiving funds or other property in which a client or third party has an interest, a lawyer shall promptly notify the client or third party. 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 party any funds or other property that the client or third party is entitled to receive and, upon request by the client or third party, shall promptly render a full accounting regarding such property.

(C) 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.

(D) Preserving Identity of Funds and Property of Client.

(1) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay bank charges may be deposited therein.

(ii) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) A lawyer shall:

(i) Promptly notify a client of the receipt of his funds, securities, or other properties.

(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(iii) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to his client regarding them.

(iv) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(3) A lawyer ~~may elect to~~ shall create and maintain an interest-bearing account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:

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(i) No earnings from such an account shall be made available to a lawyer or firm.

(ii) The account shall include all clients' funds which are nominal in amount or to be held for a short period of time.

(iii) An interest-bearing trust account ~~may~~ shall be established with any bank authorized by federal or state law to do business in South Dakota and insured by the Federal Deposit Insurance Corporation. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

(iv) The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors unless reduced to offset bank administrative costs. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

(4) Lawyers or law firms depositing client funds in a trust savings account shall direct the depository institution:

(i) To remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the South Dakota Bar Foundation;

(ii) To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and

(iii) To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.

(E) Considerations

(1) ~~This is a voluntary program based upon the willing participation by~~ This is a mandatory program for lawyers and law firms, whether proprietorships, partnerships or professional corporations or other business organization for the practice of law who hold clients' or third party's funds. ~~or~~

(2) The program shall apply to all clients ~~of the electing, participating attorneys or firms~~ whose funds on deposit are either nominal in amount or to be held for a short period of time.

(3) The following principles shall apply to clients' funds which are held by lawyers and law firms:

(i) No earnings from the funds may be made available to any lawyer or law firm.

(ii) Upon request of the client, earnings may be made available to the client whenever possible upon deposited funds which

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are neither nominal in amount nor are to be held for a short period of time; however, traditional attorney-client relationships do not compel attorneys to either invest clients' funds or to advise clients to make their funds productive.

(iii) Clients' funds which are nominal in amount or to be held for a short period of time shall be retained in an interest-bearing checking or savings trust account, with the interest (net of any service charge or fees) made payable to the South Dakota Bar Foundation.

(iv) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm. Such judgment is not subject to review. In making this determination the lawyer or law firm may consider the cost of establishing, maintaining and accounting for an individual client interest bearing trust account against the anticipated interest which would accrue to the benefit of the client.

(v) ~~Notification of clients whose funds are nominal in amount or to be held for a short period of time is unnecessary for lawyers and law firms who choose to participate in the program. This is not to suggest that many attorneys will not want to notify their clients of their participation in the program in some fashion. There is no impropriety in an attorney or firm advising all clients of their willingness to advance the administration of justice in South Dakota beyond their individual abilities in conjunction with other public-spirited members of their profession. Participation in the program will involve no more than a firm desire to participate, coupled with the attorney's or firm's communication of that desire to an authorized financial institution. That communication should contain only an expression of the attorney's or firm's desire to participate in the program and, if the institution has not already received appropriate notification, advice regarding the Internal Revenue Service's approval of the taxability of earned interest or dividends to the Foundation.~~

(4) The following principles shall apply to those clients' funds held in individual trust accounts established by lawyers or law firms ~~who elect NOT to participate~~ not participating in the program:

(i) No earnings from the funds may be made available to any lawyer or law firm.

(ii) Upon request of a client, earnings may be made available to client whenever possible on deposited funds which are neither nominal in amount nor to be held for a short period of time; however, traditional attorney-client relationships do not compel attorneys either to invest clients' funds or to advise clients to make their funds productive.

(iii) Clients' funds which are nominal in amount or to be held for short periods of time, and for which individual income generation and allocation is not arranged with a financial

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institution, must be retained in a noninterest-bearing, demand trust account.

(iv) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm.

(5) Interest paid to the South Dakota Bar Foundation will be used for the following purposes:

- (i) To help prevent crime;
- (ii) To facilitate and improve the delivery of civil and criminal legal services and the administration of justice;
- (iii) To encourage law-related education in the schools (K-12);

(iv) To encourage law-related education of adults including seminars and programs for charitable, civic and senior citizens groups;

(v) To give the general public information about how the courts and lawyers function; and

(vi) To issue publications educating the public about the United States legal system.

(6) Nonresident attorneys licensed to practice in South Dakota who comply with applicable IOLTA requirements in the state wherein they maintain their office are exempt from paragraph (3).

(7) A lawyer or law firm may petition the Supreme Court for a one-year exemption from mandatory participation in IOLTA upon the following grounds:

(i) The expected interest to be earned on the trust account is likely to be exceeded by bank charges imposed for participating in IOLTA; and

(ii) There is no reasonable alternative bank available to the lawyer or law firm whereby the likely interest to be earned would exceed bank charges for participating in IOLTA; or

(iii) Upon convincing grounds satisfactory to the Supreme Court for an exemption.

(iv) A petition for exemption may be filed in subsequent years if the petitioning lawyer or law firm meets the requirements of sections 7 (a), and 7 (b) or section 7 (c).

(v) The petition shall include documents establishing the grounds for exemption.

(vi) The petition for exemption shall be submitted to the Clerk of the Supreme Court. A copy of the petition shall be mailed to the State Bar of South Dakota.

Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and two copies thereof filed

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with the clerk of the Supreme Court no later than September 16, 2016.

Subsequent to the hearing, the Court may reject or adopt the proposed rule or any rule germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by publication of this notice in the September 2016, State Bar Newsletter and at

<http://ujs.sd.gov/SupremeCourt/ruleshearing.aspx> and
<http://www.statebarofsouthdakota.com/p/do/si/topic=193>.

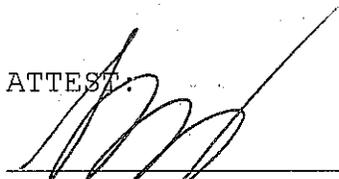
DATED at Pierre, South Dakota this 8th day of August, 2016.

BY THE COURT:



David Gilbertson, Chief Justice

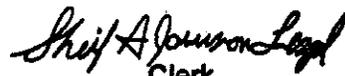
ATTEST:



Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

AUG - 8 2016


Clerk