

Minutes of the Meeting
Rules Committee
December 14, 2009

On Monday, December 14, 2009, the Rules Committee met in the Attorneys' Conference Room from 2:00 p.m. to 5:07 p.m.

Members in attendance were:

HON. PETER T. ZARELLA, CHAIR
HON. BARBARA N. BELLIS
HON. JACK W. FISCHER
HON. LESLIE I. OLEAR
HON. ANTONIO C. ROBAINA
HON. JANE S. SCHOLL
HON. MICHAEL R. SHELDON
HON. CARL E. TAYLOR

Judge Thomas J. Corradino was not in attendance at this meeting. Also in attendance were Carl E. Testo, Counsel to the Rules Committee, Attorneys Denise K. Poncini and Joseph Del Ciampo of the Judicial Branch's Legal Services Unit.

Agenda

1. The members of the Committee who were present for the November 24, 2009, meeting unanimously approved the minutes of that meeting. Judge Bellis abstained.
2. At its meeting on October 19, 2009, the Rules Committee considered a proposal by Attorney Denise K. Poncini to amend Rule 1.15 of the Rules of Professional Conduct to adopt provisions of Section 6 of P.A. 09-152 concerning IOLTA. The Committee tabled the proposal at that meeting and asked that the legislative history of the act be submitted to them for review in connection with the safe harbor provision.

After discussion, the Committee made a further revision to the proposal and unanimously voted to submit to public hearing the revisions to Rule 1.15 of the Rules of Professional Conduct as set forth in Appendix A attached hereto.
3. At its meeting on October 19, 2009, the Committee considered letters from Attorney Franklin Drazen, Director of the Connecticut Chapter of Elder Law Attorneys, and Lori Barbee, Executive Director of the National Elder Law Foundation, requesting that Rule 7.4A(d) of the Rules of Professional Conduct be amended to include "Elder Law" as a field of law in which attorneys may be certified as specialists in this state, and a letter from Attorney Marilyn Denny

concerning this. At that meeting the Committee referred the proposal to Attorney Judith Hoberman for a report from the Elder Law Section of the Connecticut Bar Association.

At this meeting, Justice Zarella reported to the Committee that he was advised by Attorney Hoberman that the next meeting of the Elder Law Section will be in January.

4. The Committee continued its consideration of a proposal by Attorney David Stamm, then Administrative Director of the Bar Examining Committee, to amend the rules concerning fitness to practice law; a report submitted by Attorney Anne Dranginis, Chair of the Bar Examining Committee, containing recommended Practice Book revisions implementing Attorney Stamm's proposal; and proposals and other materials submitted by John Bauer, a Clinical Professor of Law at the University of Connecticut School of Law, concerning this matter.

After discussion, the Committee unanimously approved the Rhode Island definition of "fitness to practice law" and asked the undersigned to incorporate this definition into the proposed revisions to these rules and to submit the draft for consideration at a future meeting.

5. The Committee considered proposals submitted by Attorney Livia Barndollar, then President of the Connecticut Bar Association, to amend Rule 5.5 of the Rules of Professional Conduct and Practice Book Section 2-15A to permit authorized house counsel to provide pro bono services to non-profit organizations.

After consideration, the Committee unanimously agreed to put the matter off the agenda at this time.

6. The Committee considered a proposal by Attorney James H. Lee to amend Sec. 2-64 concerning the procedure by which attorneys are appointed trustees to close the law practices of deceased attorneys, and comments thereon from the CBA Task Force on Attorney Trust Accounts, Chief Disciplinary Counsel Mark Dubois, Statewide Bar Counsel Michael Bowler, and Attorney Richard S. Fisher.

After discussion, the Committee unanimously agreed to put the matter off the agenda at this time.

7. The Committee considered a proposed revision to the Code of Judicial Conduct submitted by Justice Barry R. Schaller, on behalf of the Judicial Code Committee and various comments concerning this proposal.

The Committee agreed to continue its consideration of this matter at a meeting to be held at 10:00 a.m. on January 22, 2010.

8. The Committee considered a proposed new rule submitted by Justice C. Ian McLachlan and Attorney Nancy A. Porter to adopt provisions of Section 1 of Public Act 08-67 concerning the protection of family violence victims in family relations matters.

After discussion, the Committee made further revisions to the proposal and unanimously voted to submit to public hearing proposed new Section 5-11 as set forth in Appendix B attached hereto.

9. The Committee considered a proposed new rule, submitted by an ad hoc committee composed of Justices Zarella and McLachlan and Judges Keller, Olear and Sheldon, establishing a pilot program to increase public access to juvenile proceedings in connection with Section 5 of P.A. 09-194, and materials forwarded by Judge Barbara Quinn, Chief Court Administrator, on behalf of the Juvenile Access Pilot Program Advisory Board, concerning the proposal.

After discussion, it was agreed that Justice Zarella and Judges Olear and Sheldon will meet with Judge Quinn and other representatives of the Juvenile Access Pilot Program Advisory Board to discuss issues concerning this proposal.

10. The Committee considered the Connecticut Bar Association's proposed changes to the American Bar Association's (ABA) revisions to Rules 3.8 and 4.2 of the Rules of Professional Conduct; comments received by the Rules Committee and testimony given at the May 22, 2006, public hearing concerning these proposals; minutes of the meeting of the Criminal Practice Commission concerning Rules 3.8 and 4.2; and a letter from Hon. Barbara Kerr Howe, Chair of the ABA Center for Professional Responsibility Policy Implementation Committee, and Robert Mundheim, Chair ABA Standing Committee on Ethics and Professional Responsibility, concerning recent amendments to Rules 1.0, 1.10 and 3.8 of the ABA Model Rules of Professional Conduct.

After discussion, the Committee unanimously agreed to put the matter off the agenda at this time.

11. The Committee tabled consideration of proposed revisions to the Code of Evidence submitted by Judge Thomas A. Bishop, Chair of the Evidence Oversight Committee.

12. The Committee tabled comments from Attorney Kate W. Haakonsen with regard to Section 4-7 concerning personal identifying information.

13. The Committee did not reach agenda items 4-13 through 4-16 at this meeting.

Respectfully submitted,



Carl E. Testo
Counsel to the Rules Committee

CET:pt
Attachment

APPENDIX A (12-14-09 mins)

Rule 1.15. Safekeeping Property

(a) As used in this rule, the terms below shall have the following meanings:

(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee.

(2) An "eligible institution" means (i) a bank or savings and loan association authorized by federal or state law to do business in Connecticut, the deposits of which are insured by an agency of the federal government, or (ii) an open-end investment company registered with the federal Securities and Exchange Commission and authorized by federal or state law to do business in Connecticut. In addition, an eligible institution shall meet the requirements set forth in subsection (g) (3) below. The determination of whether or not an institution is an eligible institution shall be made by the organization designated by the judges of the superior court to administer the program pursuant to subsection (g) (4) below, subject to the dispute resolution process provided in subsection (g) (4) (E) below.

(3) "Interest- or dividend-bearing account" means (i) an interest-bearing checking account, or (ii) an investment product which is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund. A daily financial institution repurchase agreement must be fully collateralized by U.S. 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 must be invested solely in U.S. Government Securities or repurchase agreements fully collateralized by U.S. Government Securities, must hold itself out as a "moneymarket fund" as that term is defined by federal statutes and regulations under the Investment Company Act of 1940 and, at the time of the investment, must have total assets of at least \$250,000,000.

(4) "IOLTA account" means an interest- or dividend-bearing account established by a lawyer or law firm for clients' funds at an eligible institution from which funds may be withdrawn upon request by the depositor without delay. An IOLTA account shall include only client or third person funds, except as permitted by subsection (g) (6) below. The determination of whether or not an interest- or dividend-bearing account meets the requirements of an IOLTA account shall be made by the organization designated by the

judges of the superior court to administer the program pursuant to subsection (g) (4) below.

(5) "Non-IOLTA account" means an interest or dividend-bearing account, other than an IOLTA account, from which funds may be withdrawn upon request by the depositor without delay.

(b) 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 seven years after termination of the representation.

(c) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purposes of paying bank service charges on that account or obtaining a waiver of fees and service charges on the account, but only in an amount necessary for those purposes.

(d) Absent a written agreement with the client otherwise, 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.

(e) 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 or third person, 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.

(f) 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.

(g) Notwithstanding subsections (b), (c), (d), (e) and (f), lawyers and law firms shall participate in the statutory program for the use of interest earned on lawyers' clients' funds accounts to provide funding for the delivery of legal services to the poor by nonprofit corporations whose principal purpose is providing legal services to the poor and for law school scholarships based on financial need. Lawyers and law firms shall place a client's or

third person's funds in an IOLTA account if [(i) such funds are less than \$10,000 in amount or are expected to be held for a period of not more than sixty business days, or (ii)] the lawyer or law firm determines, in good faith, that the funds cannot earn income for the client in excess of the costs incurred to secure such income. For the purpose of making this good faith determination of whether a client's funds cannot earn income for the client in excess of the costs incurred to secure such income, the lawyer or law firm shall consider the following factors: (1) The amount of the funds to be deposited; (2) the expected duration of the deposit, including the likelihood of delay in resolving the relevant transaction, proceeding or matter for which the funds are held; (3) the rates of interest, dividends or yield at eligible institutions where the funds are to be deposited; (4) the costs associated with establishing and administering interest-bearing accounts or other appropriate investments for the benefit of the client, including service charges, minimum balance requirements or fees imposed by the eligible institutions; (5) the costs of the services of the lawyer or law firm in connection with establishing and maintaining the account or other appropriate investments; (6) the costs of preparing any tax reports required for income earned on the funds in the account or other appropriate investments; and (7) any other circumstances that affect the capability of the funds to earn income for the client in excess of the costs incurred to secure such income. No lawyer shall be subject to discipline for determining in good faith to deposit funds in the interest earned on lawyers' clients' funds account in accordance with this subsection. An IOLTA account may only be established at an eligible institution that meets the following requirements:

(1) No earnings from the IOLTA account shall be made available to a lawyer or law firm.

(2) Lawyers or law firms depositing a client's or third person's funds in an IOLTA account shall direct the depository institution:

(A) To remit interest or dividends, net of allowable reasonable fees, if any, on the average monthly balance in the account, or as otherwise computed in accordance with the institution's standard accounting practices, at least quarterly, to the organization designated by the judges of the superior court to administer this statutory program;

(B) To transmit to the organization administering the program with each remittance a report that identifies the name of the lawyer or law firm for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of

fees and service charges deducted, if any, and the average account balance for the period for which the report is made and such other information as is reasonably required by such organization; and

(C) To transmit to the depositing lawyer or law firm at the same time a report in accordance with the institution's normal procedures for reporting to its depositors.

(3) Participation by banks, savings and loan associations, and investment companies in the IOLTA program is voluntary. An eligible institution that elects to offer and maintain IOLTA accounts shall meet the following requirements:

(A) The eligible institution shall pay no less on its IOLTA accounts than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets or exceeds the same minimum balance or other eligibility qualifications on its non-IOLTA accounts, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an eligible institution may consider, in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers, provided that such factors do not discriminate between IOLTA accounts and non-IOLTA accounts and that these factors do not include the fact that the account is an IOLTA account. The eligible institution may offer, and the lawyer or law firm may request, a sweep account that provides a mechanism for the overnight investment of balances in the IOLTA account in an interest- or dividend-bearing account that is a daily financial institution repurchase agreement or a moneymarket fund. Nothing in this rule shall preclude an eligible institution from paying a higher interest rate or dividend than described above or electing to waive any fees and service charges on an IOLTA account. An eligible institution may choose to pay the higher interest or dividend rate on an IOLTA account in lieu of establishing it as a higher rate product.

(B) Interest and dividends shall be calculated in accordance with the eligible institution's standard practices for non-IOLTA customers.

(C) Allowable reasonable fees are the only fees and service charges that may be deducted by an eligible institution from interest earned on an IOLTA account. Allowable reasonable 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 fees may be assessed against the accrued interest or dividends on an IOLTA account. Any fees and

service charges other than allowable reasonable fees shall be the sole responsibility of, and may only be charged to, the lawyer or law firm maintaining the IOLTA account. Fees and service charges in excess of the interest or dividends earned on one IOLTA account for any period shall not be taken from interest or dividends earned on any other IOLTA account or accounts or from the principal of any IOLTA account.

(4) The judges of the superior court, upon recommendation of the chief court administrator, shall designate an organization qualified under Sec. 501 (c) (3) of the Internal Revenue Code, or any subsequent corresponding Internal Revenue Code of the United States, as from time to time amended, to administer the program. The chief court administrator shall cause to be printed in the Connecticut Law Journal an appropriate announcement identifying the designated organization. The organization administering the program shall comply with the following:

(A) Each June mail to each judge of the superior court and to each lawyer or law firm participating in the program a detailed annual report of all funds disbursed under the program including the amount disbursed to each recipient of funds;

(B) Each June submit the following in detail to the chief court administrator for approval and comment by the Executive Committee of the superior court: (i) its proposed goals and objectives for the program; (ii) the procedures it has established to avoid discrimination in the awarding of grants; (iii) information regarding the insurance and fidelity bond it has procured; (iv) a description of the recommendations and advice it has received from the Advisory Panel established by General Statutes § 51-81c and the action it has taken to implement such recommendations and advice; (v) the method it utilizes to allocate between the two uses of funds provided for in § 51-81c and the frequency with which it disburses funds for such purposes; (vi) the procedures it has established to monitor grantees to ensure that any limitations or restrictions on the use of the granted funds have been observed by the grantees, such procedures to include the receipt of annual audits of each grantee showing compliance with grant awards and setting forth quantifiable levels of services that each grantee has provided with grant funds; (vii) the procedures it has established to ensure that no funds that have been awarded to grantees are used for lobbying purposes; and (viii) the procedures it has established to segregate funds to be disbursed under the program from other funds of the organization;

(C) Allow the judicial branch access to its books and records upon reasonable notice;

(D) Submit to audits by the judicial branch; and

(E) Provide for a dispute resolution process for resolving disputes as to whether a bank, savings and loan association, or open-end investment company is an eligible institution within the meaning of this rule.

(5) Before an organization may be designated to administer this program, it shall file with the chief court administrator, and the judges of the superior court shall have approved, a resolution of the board of directors of such an organization which includes provisions:

(A) Establishing that all funds the organization might receive pursuant to subsection (g) (2) (A) above will be exclusively devoted to providing funding for the delivery of legal services to the poor by nonprofit corporations whose principal purpose is providing legal services to the poor and for law school scholarships based on financial need and to the collection, management and distribution of such funds;

(B) Establishing that all interest and dividends earned on such funds, less allowable reasonable fees, if any, shall be used exclusively for such purposes;

(C) Establishing and describing the methods the organization will utilize to implement and administer the program and to allocate funds to be disbursed under the program, the frequency with which the funds will be disbursed by the organization for such purposes, and the segregation of such funds from other funds of the organization;

(D) Establishing that the organization shall consult with and receive recommendations from the Advisory Panel established by General Statutes § 51-81c regarding the implementation and administration of the program, including the method of allocation and the allocation of funds to be disbursed under such program;

(E) Establishing that the organization shall comply with the requirements of this Rule; and

(F) Establishing that said resolution will not be amended, and the facts and undertakings set forth in it will not be altered, until the same shall have been approved by the judges of the superior court and ninety days have elapsed after publication by the chief court administrator of the notice of such approval in the Connecticut Law Journal.

(6) Nothing in this subsection (g) shall prevent a lawyer or law firm from depositing a client's or third person's funds, regardless of the amount of such funds or the period for which such funds are expected to be held, in a separate non-IOLTA account established on

behalf of and for the benefit of the client or third person. Such an account shall be established as:

(A) A separate clients' funds account for the particular client or third person on which the interest or dividends will be paid to the client or third person; or

(B) A pooled clients' funds account with subaccounting by the bank, savings and loan association or investment company or by the lawyer or law firm, which provides for the computation of interest or dividends earned by each client's or third person's funds and the payment thereof to the client or third person.

COMMENTARY: 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 practices and comply with the requirements of Practice Book Section 2-27.

While normally it is impermissible to commingle the lawyer's own funds with client funds, subsection (c) 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 are the lawyer's.

Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the clients' funds account 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.

Subsection (f) also recognizes that third parties, such as a client's creditor who has a lien on funds recovered in a personal injury action, may have lawful claims against specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases 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.

The word "interests" as used in subsection (f) includes, but is not limited to, the following: a valid judgment concerning disposition of the property; a valid statutory or judgment lien, or other lien recognized by law, against the property; a letter of protection or similar obligation that is both (a) directly related to the property held by the lawyer, and (b) an obligation specifically entered into to aid the lawyer in obtaining the property; or a written assignment, signed by the client, conveying an interest in the funds or other property to another person or entity.

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. 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.

[Subsection (g) requires lawyers and law firms to participate in the statutory IOLTA program and provides that client's or third person's funds shall be deposited in an IOLTA account if (i) such funds are less than \$10,000 in amount or are expected to be held for a period of not more than sixty business days, or (ii) the lawyer or law firm determines that the funds cannot earn income in excess of the costs incurred to secure such income. In determining whether a client's or third person's funds cannot earn income in excess of the costs incurred to secure such income, the lawyer or law firm may consider the following factors:

- (1) The amount of the funds to be deposited;
- (2) The expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held;
- (3) The rates of interest or yield at financial institutions where the funds are to be deposited;
- (4) The cost of establishing and administering non-IOLTA accounts for the client's or third person's benefit, including service charges, the costs of the lawyer's or law firm's

services, and the costs of preparing any tax reports required for income accruing to the client or third person;

(5) The capability of financial institutions, lawyers or law firms to calculate and pay income to clients or third persons; and

(6) Any other circumstances that affect the ability of the client's or third person's funds to earn a net return for the client or third person.]

Subsection (g) requires lawyers and law firms to participate in the statutory IOLTA program. The lawyer or law firm should review its IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third person.

AMENDMENT NOTES: The above changes adopt the provisions of Public Act 09-152, Section 6, which amended General Statutes § 51-81c.

APPENDIX B (12-14-09 mins)

(NEW) Sec. 5-11. Testimony of Party or Child in Family Relations Matter When Protective Order, Restraining Order or Standing Criminal Restraining Order Issued on Behalf of Party or Child

(a) In any court proceeding in a family relations matter, as defined in section 46b-1 of the general statutes, or in any proceeding pursuant to section 46b-38c, the court may, except as otherwise required by law and within available resources, upon motion of any party, order that the testimony of a party or a child who is a subject of the proceeding be taken outside the physical presence of any other party if a protective order, restraining order or standing criminal restraining order has been issued on behalf of the party or child, and the other party is subject to the protective order or restraining order. Such order may provide for the use of alternative means to obtain the testimony of any party or child, including, but not limited to, the use of a secure video connection for the purpose of conducting hearings by videoconference. Such testimony may be taken outside the courtroom or at another location inside or outside the state. The court shall provide for the administration of an oath to such party or child prior to the taking of such testimony as required by law.

(b) Nothing in this section shall be construed to limit any party's right to cross-examine a witness whose testimony is taken pursuant to an order under subsection (a) hereof.

(c) An order under this section may remain in effect during the pendency of the proceedings in the family relations matter.

COMMENTARY: The above section adopts the provisions of Section 1 of Public Act 08-67 (codified as C.G.S. § 46b-15c), which expands the circumstances under which a person may testify outside the courtroom and permits the use of videoconferencing to provide such testimony.

In all cases in which a court orders testimony to be taken pursuant to this section, the manner in which and the means whereby the testimony is taken must be consistent with the right to confrontation guaranteed by the federal and state constitutions. U.S. Const., amends VI, XIV; Conn. Const., art. I, 8. The federal and state confrontation clauses provide a criminal defendant with two protections: "the right physically to face those who testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987). See also, State v. Jarzbek, 204 Conn. 683, (1987).

Subsection (b) expressly protects a party's right to cross-examination.