

MAINE BAR ASSOCIATION SOLO AND SMALL FIRM SYMPOSIUM

QUICK TIPS PANEL

THE IOLTA PROGRAM, LIABILITY INSURANCE, AND CHOICE OF BUSINESS ENTITY
PRESENTATION BY KIM NEWBY (JURISN.COM)

A. INTEREST ON LAWYERS TRUST ACCOUNTS (IOLTA) PROGRAM

- 1. According to Maine Bar Rule 3.6(e), when an attorney receives money from a client that is designated as client funds (in contrast to amounts paid to the attorney for services already rendered) then the attorney is not allowed to mix these funds with his own, nor earn interest on them.**
 - a. Client funds that are likely to earn interest (e.g., large sums that will be held for a period of time) must be managed so that any interest earned will go to the client.
 - b. Client funds that are unlikely to earn interest must be placed in *either*:
 - i. non-interest bearing accounts (reported annually to the Board of Overseers), or
 - ii. a Maine IOLTA account.

- 2. The IOLTA program pools funds in a special interest-bearing account, paying any interest earned to the Maine Bar Foundation instead of the attorney.**
 - a. The Maine Bar Foundation (www.mbf.org) is a non-profit organization devoted to supporting the delivery of legal aid, pro bono activities, and projects to improve the administration of justice. Nearly all of the Foundation's funds (96%) are obtained through the IOLTA program.
 - b. According to the Maine Bar Foundation, most of Maine's eligible attorneys (95%) participate in the IOLTA program.

- 3. To set up an IOLTA account, complete the attached form. Send copies to the Maine Bar Foundation and a participating bank or credit union.**
 - a. About 40 financial institutions throughout the state offer IOLTA accounts.
 - b. Opening and maintaining an IOLTA account is free of charge.

- 4. Maine Bar Rule 3.6(e) provides the details on handling client funds.**

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MAINE BAR RULES: 3.6 CONDUCT DURING REPRESENTATION

- (e) Preserving Identity of Funds and Property.
 - (1) All funds of clients paid to a lawyer or law firm, other than retainers and advances for costs and expenses, shall be deposited in one or more identifiable accounts maintained in the state in which the law office is situated at a financial institution authorized to do business in such state. No funds belonging to the lawyer or law firm shall be deposited therein except as follows:
 - (i) Funds reasonably sufficient to pay institutional service charges may be deposited therein; and
 - (ii) Funds belonging in part to a client and in part presently or potentially to a 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 that 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 the client's 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 possession of the lawyer and render prompt and appropriate accounts to the client regarding them; and
 - (iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.
 - (3) Unless the client directs otherwise, when a lawyer or law firm reasonably expects that client funds will earn net interest, as defined in paragraph (7) of this subdivision, such funds shall be deposited in a client trust account that may be either
 - (i) A separate, insured, interest-bearing account for the particular client or client's matter, the net interest on which will be paid or credited to the client; or
 - (ii) A pooled, insured, interest-bearing account with subaccounting by the financial institution or the lawyer or law firm, which will provide for computation of the interest earned by each client's funds and the payment or crediting of each client's net interest to the client.
 - (4) Unless a lawyer practicing alone, or a law firm, has made an annual election, or holds United States government funds, as provided in paragraph (5) of this subdivision, all funds of any client held by the lawyer or law firm that the lawyer or law firm reasonably and in good faith expects will not earn net interest as defined in paragraph (7) of this subdivision shall be deposited in one or more pooled, insured, interest-bearing accounts, each of which shall be subject to the following conditions:
 - (i) The financial institution in which the account is established shall be authorized to do business in Maine and shall be insured by either the Federal Deposit Insurance Corporation or the National Credit Union Administration Share Insurance Fund.
 - (ii) Funds deposited in the account shall be subject to withdrawal upon request and without delay.
 - (iii) The lawyer or law firm shall file with the Board of Overseers of the Bar an order directing the financial institution to remit any net interest that may accrue on the account to the Maine Bar Foundation, a nonprofit corporation incorporated under the

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- laws of the State of Maine that has in force a determination letter from the Internal Revenue Service that it qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 as from time to time amended. Such an order shall be filed by July 31, 1994, for any account maintained by the lawyer or law firm under this paragraph (4) as of July 1, 1994, and within 30 days after the subsequent opening of any account that is to be maintained hereunder.
- (iv) No interest on the account shall be paid to the lawyer or law firm, and the lawyer or law firm shall not receive any direct or indirect pecuniary benefit by reason of the remittance of interest in accordance with subparagraph (iii).
 - (v) The lawyer or law firm shall give the public notice, by a prominently displayed sign or other reasonable means, of the lawyer's or firm's standing practice to use such an account and that the Maine Bar Foundation is the recipient of the net interest therefrom.
- (5) A lawyer practicing alone, or a law firm, may elect to deposit all client funds that are reasonably and in good faith not expected to earn net interest, as defined in paragraph (7) of this subdivision, in one or more insured, non-interest bearing accounts, instead of in the interest-bearing account or accounts required by paragraph (4) of this subdivision. Such election shall be effective only upon written notice to the Board of Overseers of the Bar given not later than July 31, 1994, and thereafter annually in conjunction with the filing of the list of trust accounts required by Rule 6(a)(2). A lawyer practicing alone, or a law firm, holding funds of the United States government that by law may not earn interest shall deposit those funds in one or more insured, non-interest bearing accounts, whether or not the lawyer or firm has made the election provided by this paragraph for other client funds.
- (6) If the circumstances on which a lawyer or law firm has based a determination to deposit client funds in an account under either paragraph (4) or paragraph (5) of this subdivision change, so that net interest may reasonably be expected to be earned on such funds, the lawyer or law firm shall transfer the principal amount originally deposited to the appropriate account established under paragraph (3) of this subdivision.
- (7) For purposes of this rule, the term "net interest" means the net of interest earned on a particular amount of one client's funds over the administrative costs allocable to that amount. In estimating the gross amount of interest to be earned, the lawyer or law firm shall consider the principal amount involved; available interest rates; and the time the funds are likely to be held, taking into account the likelihood of delay in any relevant proceeding or transaction.
- (8) For purposes of this rule, the term "administrative costs" means that portion of the following costs properly allocable to a particular amount of one client's funds paid to a lawyer or law firm:
- (i) Financial institutional service charges for opening, maintaining, or closing an account, or accounting for the deposit and withdrawal of funds and payment of interest.
 - (ii) Reasonable charges of the lawyer or law firm for opening, maintaining or closing an account; accounting for the deposit and withdrawal of funds and payment of interest; and obtaining information and preparing or forwarding any returns or reports that may be required by a revenue taxing agency as to the interest earned on a client's funds.

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B. PROFESSIONAL LIABILITY INSURANCE

- 1. Maine does not require an attorney to carry or report professional liability insurance.**
 - a. Insurance is valuable protection.
 - b. Even small firms with few clients benefit from malpractice insurance. It just takes one client to make a claim.

- 2. Liability for professional services is *not* conferred with limited liability business entities.**
 - a. A limited liability business model protects against general business claims.
 - b. Professional liability insurance protects against malpractice claims.

- 3. Professional liability resources are readily available.**
 - a. The Lawyers Professional Liability section of the ABA website (www.abanet.org/legalservices/lpl/home.html) has information on procuring insurance, including tips and checklists for reviewing policies and quotations.
 - b. Policies vary by practice type and size. Researching policy language is important.

- 4. Obtain quotations from at least three companies located both locally and nationally.**
 - a. Obtain several quotations per company based upon different deductibles and policy limits.
 - b. Negotiation is allowed. Speak with representatives about particular policy clauses that are unclear or inappropriate.

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C. CHOICE OF ENTITY: LIMITED LIABILITY ENTITIES, GENERAL PARTNERSHIPS, AND SOLO PRACTICES

1. Limited Liability Entities

- a. In Maine, licensed professionals (such as attorneys) may establish limited liability entities in the form of:
 - i. corporations (legal entities created by one or more owners who will have limited liability for the business's debts)
 - ii. limited liability partnerships (general partnerships that elect to limit personal liability for their partners)
 - iii. limited liability companies (entities that combine characteristics of corporations, with limited personal liability, and partnerships, which assess profits and losses at the individual level)
- b. These professional service entities are governed generally by Title 13, Chapter 22-A of the Maine Revised Statutes, which concerns professional service corporations.
- c. These forms of business must be registered with the Maine Bureau of Corporations (www.state.me.us/sos/cec/corp/corp.htm).
- d. Such entities are more costly to set up and maintain than general partnerships or sole proprietorships due to state requirements entailing administrative fees and formalities such as annual reporting and record keeping.
- e. Although these are separate legal entities, taxation may occur at the entity or individual levels, depending upon which entity type is chosen.
- f. "Limited liability" has a specific meaning in the context of professional service entities:
 - i. attorneys will have limited personal liability for the entity's general debts and obligations

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- ii. limited liability entities *do not* protect an attorney from claims made in connection with the attorney's own professional legal services: an attorney will be liable for claims made concerning services directly performed or supervised by the attorney

2. General Partnerships

- a. A partnership requires two or more lawyers.
- b. Maine does not require state-level registration of general partnerships, although local municipalities may have separate registration requirements.
- c. Partners should execute a written partnership agreement that:
 - i. defines partners' respective rights and responsibilities, and
 - ii. clarifies key business and operational terms and conditions (e.g., management of the partnership, partner withdrawal, partnership termination, and profit distribution).
- d. Unlike limited liability entities, general partnerships are not separate legal entities. As a result, each partner may be exposed to unlimited personal liability for claims against the partnership.
- e. There is no separate taxpaying entity. Tax on general partnerships is based on each partner's proportion of partnership income.
 - i. partners report their income on their individual tax returns
 - ii. income is subject to self employment tax but also is eligible for use in a self employment pension
 - iii. in most cases, partners must make quarterly payments of their estimated tax liability at both state and federal levels
 - iv. general partnerships must file an annual information return (Form 1065) that reports each partner's share of profits or losses

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3. Sole Proprietorships

- a. This is a firm owned by an individual.
- b. Maine does not require state-level registration of sole proprietorships.
 - i. local municipalities may have separate registration requirements
 - ii. local business permits may be required for firms operated under a name that is different from the sole proprietor's name ("doing business as")
- c. Unlike limited liability entities, sole proprietorships are not separate legal entities. As a result, the attorney assumes unlimited liability for all debts and obligations of the practice.
- d. There is no separate taxpaying entity. Tax on sole proprietorships is calculated from the attorney's individual tax return.
 - i. income is subject to self employment tax but is also eligible for use in a self employment pension
 - ii. in most cases, sole proprietors must make quarterly payments of their estimated tax liability at both state and federal levels
 - iii. sole proprietors are eligible for certain tax benefits based on business expenses (such as office supplies, medical insurance, transportation, business meals, and home office equipment costs)