

ORIGINAL

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08/31/2016

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: AF 09-0688

No. AF 09-0688

IN THE SUPREME COURT
OF THE STATE OF MONTANA

IN RE JOINT PETITION OF THE
MONTANA JUSTICE FOUNDATION
AND THE STATE BAR OF MONTANA
TO REVISE MONTANA RULE OF
PROFESSIONAL CONDUCT 1.18(e)
ADDRESSING IOLTA COMPLIANCE

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

JOINT PETITION AND MEMORANDUM IN SUPPORT OF REVISING RULE
1.18(e) OF THE MONTANA RULES OF PROFESSIONAL CONDUCT

COME NOW the Montana Justice Foundation Board (MJF) and the State Bar of Montana Board of Trustees (SBM) to respectfully petition this Court to revise Rule 1.18(e) of the Montana Rules of Professional Conduct.

Rule 1.18 governs the mandatory Interest on Lawyer Trust Accounts (IOLTA) program. Rule 1.18(e) requires every lawyer or firm to “file an annual certificate of compliance with or exemption from this Rule with the Montana Justice Foundation.” M.R.P.C. 1.18(e). It further provides that “[f]ailure to provide the certification may result in suspension from the practice of law in this state until the lawyer complies with the requirements of this Rule.” *Id.*

In spite of this suggestion in Rule 1.18(e), the Court has not authorized SBM to suspend lawyers from the practice of law for failing to comply with Rule 1.18(e). Without a specific grant of authority, SBM lacks the power to administratively suspend non-reporting lawyers. Although the mandate to file an annual certification is in the ethics rules governing the practice of law, Montana's Office of Disciplinary Counsel does not believe that failure to certify should lead to formal disciplinary action. *See* Letter from Shaun R. Thompson, Chief Disciplinary Counsel, to Christopher L. Manos, Executive Director, State Bar of Montana (March 14, 2016), attached as Exhibit A.

For these reasons, SBM and MJF request that Rule 1.18(e) be amended to authorize SBM to administratively suspend non-reporting lawyers until compliance as envisioned by the Court and required for the optimal functioning of the IOLTA system.

MEMORANDUM IN SUPPORT OF JOINT PETITION

The Montana Constitution “places the governance and control of the practice of law solely with the Supreme Court.” *In re State Bar of Montana for a Dues Increase*, 2001 MT 108, ¶ 19, 305 Mont. 279, 53 P.3d 854 (citing Mont. Const. Art. VII, § 2(3)). The Court has “exclusive authority” to promulgate rules

governing lawyers. *Matter of McCabe*, 168 Mont. 334, 340, 544 P.2d 825, 829 (1975).

In 2016, 82 active members of the Montana state bar failed to provide IOLTA certification as required by Rule 1.18. *See* Exhibit A, Letter from ODC. As the attorneys had not complied with the Montana Rules of Professional Conduct, SBM sent the names of those attorneys to ODC. *Id.* ODC responded by observing that the plain language of Rule 1.18(e) contemplates an administrative suspension from the practice of law rather than a disciplinary action. *Id.* ODC stated it has never before received a grievance against a lawyer for failure to certify and implied, without stating explicitly, that it would not take any disciplinary action against the lawyers. *Id.*

SBM and MJF have invested significant time and resources into ensuring the trust account/ IOLTA program is properly and fairly administered. In many states, the justice foundation that implements and benefits from IOLTA is within the organization of the state bar, while in Montana MJF is a separate non-profit foundation that receives and manages IOLTA funds received from SBM members. SBM and MJF formed an IOLTA Working Group in 2015 for further implementation of a MOU signed in 2010 to ensure cooperation between the two organizations. The Working Group spent several meetings hammering out details

that allow SBM to protect its members' private information while ensuring that MJF has the information it needs to implement the IOLTA program, as required by the Court.

In 2015, SBM and MJF sent at least three notices to all active members of the state bar, informing them of the required certification. Notice was also provided on the State Bar website, Montana Lawyer, Bar briefs and emails to members. Personal contact was also made by State Bar staff on questions dealing with website access and provision of a hard copy form, if requested. Moreover, in 2015, MJF invested in a new software system for IOLTA certification, subject to guidelines developed by the Working Group that both protect members' private information and effect the underlying purpose of the IOLTA program. SBM and MJF notified Montana lawyers via email and postcards of the change, and even extended the certification deadline for lawyers who were having trouble with the transition.

In spite of Petitioners' best efforts, 82 lawyers did not file their IOLTA certification. While the rule suggests those lawyers should be suspended from the practice of law until they file their certification, SBM lacks authority from this Court to implement such a penalty.

Petitioners therefore request the Court to amend Rule 1.18(e) as follows:

“Filings....Failure to provide the certification may result in suspension from the practice of law in this state until the lawyer complies with the requirements of this rule. Such suspension will be effected pursuant to the Rules of the State Bar of Montana.”

As a result of this proposed change, a non-complying lawyer would receive a written notice allowing the lawyer 30 days from the date of the notice to comply. Failure to comply within that 30 days would result in the attorney’s license being suspended, similar to when an attorney fails to pay state bar dues and assessments. A \$50 penalty fee would be assessed once the suspension occurs.

The Montana Justice Foundation Board and State Bar of Montana’s Board of Trustees believe that the amended rule is a key element in the regulation of our profession and unanimously urge amendment to the Rules of Professional Conduct to address the problems experienced in attorneys’ noncompliance with the reporting requirements of Rule 1.18(e).

CONCLUSION

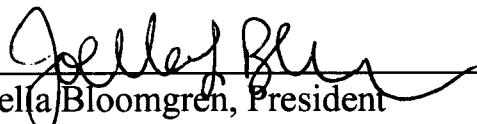
The Montana Justice Foundation Board and Board of Trustees of the State Bar of Montana respectfully request the following relief from the Montana Supreme Court:

1. The Court adopt the proposed changes to the Rules of Professional Conduct, specifically Rule 1.18(e), regarding noncompliance with annual trust account/IOLTA reporting requirements.

2. The Court direct publication of this Petition in *The Montana Lawyer* and provide for comments and a response from the public and Bar before considering the request for amendment.

Respectfully submitted this 31st day of August, 2016.

MONTANA JUSTICE FOUNDATION

By 
Joella Bloomgren, President

STATE BAR OF MONTANA

By 
Matthew B. Thiel, President