IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,671

MATTER OF INTEREST ON TRUST ACCOUNTS: A PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR	PETITION OF THE FLORIDA BAR FOUNDATION FOR MODIFICATION OF THE INTEREST ON TRUST ACCOUNTS PROGRAM

WILLIAMS, PARKER, HARRISON, DIETZ & GETZEN
COMMENT ON THE FLORIDA BAR FOUNDATION PETITION

Pursuant to the Official Notice published in the August 1, 1988, edition of The Florida Bar News, Williams, Parker, Harrison, Dietz & Getzen, a Professional Association comprised of active members of The Florida Bar, files this comment regarding the petition of The Florida Bar Foundation, Inc. (the "Foundation"), to amend Rule 5-1.1(d) of the Rules Regulating The Florida Bar (the Rules) (Case No. 72-671).

I. Introduction

The Foundation petition seeks to make mandatory the Interest on Trust Accounts ("IOTA") program. This comment is not intended as an objection to the petition. Rather, it assumes the Court will adopt a mandatory IOTA program. The purpose of this comment is to suggest further modifications to the Rules that will promote a workable IOTA program. These modifications are attached as Appendix 1 (the "Williams Parker Proposal").

II. General Clarifications Needed in Chapter 5

Rules 5-1.1(a) and (b), as published in the Rules Regulating The Florida Bar, 494 So.2d 977, 1079 (Fla. 1986), contain typographical errors referencing the reader to an inapplicable rule, namely rule 4-1.5. Each reference should be to rule 4-

1.15. The Williams Parker Proposal corrects these references and should be adopted to this extent regardless of whether the Court approves the Foundation petition.

A second clarification needed in chapter 5 of the Rules concerns trust funds received by lawyers from third parties who are not necessarily clients. Rule 4-1.15 provides that "[a] lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation" (emphasis added). In chapter 5, however, repeated reference is made to "client funds" only. The Foundation petition likewise refers to "client funds" without mention of third party funds.

Since lawyers often receive funds from third parties who are not clients but whose monies should nonetheless be placed in trust, the references to funds of "clients" in chapter 5 should be expanded to include funds of "third parties."[1] The Williams Parker Proposal addresses this concern by inserting the phrase "or third party (parties)" wherever appropriate in chapter 5.

III. Practical Suggestions for Interest-Bearing Accounts

The Williams Parker Proposal focuses on certain practical aspects of a mandatory IOTA program. The Foundation petition does not address sufficiently Internal Revenue Service requirements for opening an interest-bearing trust account. All financial institutions maintaining interest-bearing accounts must report to the IRS the interest earned on each account and the U.S. taxpayer identification number of the beneficiary of the

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[1]An exception is the first paragraph of rule 5-1.1 concerning the application of client trust funds to the payment of attorney fees. Presumably attorney fees would not be payable by non-client third parties.

account. As a result, all institutions require a taxpayer identification number before opening an interest-bearing account. Under IRS Revenue Ruling 65-203 (see Appendix 2), the taxpayer identification number for an interest-bearing trust account should be that of the client or third party--not that of the attorney. (Logic also dictates this result, to avoid interest on the account being reported to the IRS as income attributable to the attorney.) Accordingly, an attorney opening an interest-bearing account for the benefit of a client or third party should first receive the appropriate taxpayer identification number. The number generally is furnished to a financial institution on IRS Form W-9, "Payer's Request for Taxpayer Identification Number" (See Appendix 3).[2]

Under the Foundation petition, failure of a client or third party to provide his taxpayer identification number requires the attorney either to use the attorney's own taxpayer identification number or to place the funds in the account paying interest to the Foundation. The first alternative does not comport with IRS Revenue Ruling 65-203. The second alternative would violate the prohibition against placing funds in the Foundation account that are neither nominal nor short term. (See letter of the Foundation president in the August 15, 1988, edition of The Florida Bar News.)

The Williams Parker Proposal addresses this dilemma in two ways. First, as a condition to opening an interest-bearing account for client or third party funds, the attorney must be

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[2]If the account is opened for an alien, a taxpayer identification number is not required. This situation is handled by furnishing to the financial institution IRS Form W-8, "Certificate of Foreign Status" (See Appendix 4).

furnished with such information and documentation as may be needed to comply with Internal Revenue Service requirements for the reporting of interest earned on such funds. (Rule 5-1.1(d)(2)b, App. 1.) This language is intentionally broad to accommodate future changes in IRS requirements. Second, provision is made for a non-interest-bearing trust account for funds that do not qualify for deposit into the Foundation account and for which no client or third party taxpayer identification number is furnished. (Rule 5-1.1(d)(2)(5), App. 1.)

The Williams Parker proposal goes a step further by requiring, as a condition to opening an interest-bearing account for a client or third party, that the client or third party request an interest-bearing account. (Rule 5-1.1(d)(2)b, App. 1.) The Foundation petition incorrectly assumes that clients and third parties will always wish for their funds to earn interest. Although this may generally be true, provision should be made for occasions when the client or third party does not desire an interest-bearing account. Under the Williams Parker Proposal, funds which are neither nominal in amount nor held for a short period of time are placed in an individual client or third party account only upon specific request by the client or third party and upon furnishing the necessary information for opening the account. Otherwise, the funds are placed in the non-interest-bearing account.[3]

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[3]The Williams Parker Proposal assumes that it is reasonable for an attorney not to have a duty to place client or third party funds in an interest-bearing account in the absence of the client's or third party's specific request. This approach makes administration of the IOTA Program less burdensome to the attorney. If the Court determines that an attorney should be required to place qualified client or third party funds in an interest-bearing account except where the client or third party

IV. Transfers Between Accounts

The Williams Parker Proposal provides for transfers of client and third party funds between the non-interest-bearing trust account and the individual interest-bearing accounts. (Rule 5-1.1(d)(6), App. 1.) This provision is included for several reasons, which may be illustrated by the following example:

Suppose an attorney receives a $100,000 earnest money deposit from a third party purchaser to be held in trust for six months with interest being paid to the purchaser. Suppose the purchaser initially fails to provide his taxpayer identification number, but does so several weeks later. Under the Williams Parker Proposal, the $100,000 should be deposited initially in the non-interest-bearing trust account. Within a reasonably short period of time after receiving the purchaser's taxpayer identification number, the attorney should transfer the $100,000 from the non-interest-bearing account to an interest-bearing account for the purchaser.

Suppose now that the attorney is closing the transaction and must disburse checks to various parties at the closing. Suppose the attorney's firm has a computerized accounting system with computer-generated checks. Although the attorney probably received a consumer-style check book upon opening the purchaser's interest-bearing account, the attorney does not want to use these checks at the closing for two reasons. First, manually writing the checks is less efficient than utilizing the firm's computer-generated checks. Second, checks issued through the firm's

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has instructed the attorney to the contrary, appropriate changes to the text of the Williams Parker Proposal should be made.

computer are automatically posted to the firm's general trust account ledger in accordance with the accounting requirements of Rule 5-1.2. The logical procedure is to transfer the purchaser's funds from the individual interest-bearing account to the general non-interest-bearing account at or shortly before closing. The checks for closing then can be computer generated and automatically posted to the firm's trust account ledger.

This scenario illustrates the need for a provision authorizing transfer of funds between accounts. Rule 5-1.1(d)(6) set forth in App. 1 satisfies this need.

V. Summary

It is hoped that the Foundation will support the Williams Parker Proposal as a refinement of the Foundation's petition. Whether or not such support is forthcoming, the Court should consider the issues raised by this comment and whether the Williams Parker Proposal fairly and properly resolves such issues.

Respectfully submitted,
Williams, Parker, Harrison,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished to John F. Harkness, Jr., Esquire, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and to William O. E. Henry, Esquire, President, The Florida Bar Foundation, 880 North Orange Avenue, Suite 102, Orlando, Florida 32801-1023, by U.S. mail this 31st day of August 1988.

Williams, Parker, Harrison,
Dietz & Getzen

By: _____
J. Michael Hartenstine