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

RESPONSE AND BRIEF OF THE
NATIONAL ASSOCIATION OF IOLTA PROGRAMS, INC.

The National Association of IOLTA Programs, Inc. supports the Petition of the Florida Bar Foundation for modification of the Florida Interest on Trust Accounts Program.

The National Association of IOLTA Programs, Inc. requests this Court to grant the Petition of the Florida Bar Foundation and amend the rules regulating the Florida Bar as set forth in the Petition.

Granting of the Petition of The Florida Bar Foundation will result in the conversion of the Florida Interest on Trust Accounts Program to a comprehensive program in which all lawyers trust accounts will earn interest.

BACKGROUND

The concept of utilizing interest on trust monies held by lawyers on behalf of clients originated in the Australian State of Victoria in 1963. Thereafter, it was adopted in the Canadian Province of British Columbia in 1968.

Florida's Interest on Trust Accounts Program was adopted by this Court in 1978. In Re: Matter of Interest on Trust Accounts, 356 So.2d 799 (Fla.1978).

After obtaining a tax ruling, regulatory approvals and a supplemental opinion of this Court [402 So.2nd 398 (Fla.1981] Florida's program became operational on September 1, 1981. Florida's program was the first in the United States.

Interest on trust account programs now exist in all of the States of Australia, all of the Provinces and territories of Canada, forty eight of the fifty United States and the District of Columbia. All of the Australian and Canadian programs are

comprehensive. Ten states of the United States have comprehensive programs.

A comprehensive IOLTA program is one in which all trust funds held by lawyers are required to be placed in interest bearing accounts. If sufficient interest can be generated to benefit the client, the funds are placed in a separate account for the benefit of the client. If the funds are nominal in amount or held for a short term, the funds are placed in a pooled account with interest going to the Foundation for legal aid, and improvement of the administration of justice. Comprehensive programs produce several times the revenue of voluntary programs because of broader participation.

The National Association of IOLTA Programs, Inc. is the national organization formed in 1987 to extend, advance and improve IOLTA programs in the United States. Forty one of the forty nine United States jurisdictions having IOLTA programs are members at the present time. The purposes of the National Association of IOLTA Programs, Inc. are accomplished by twice yearly meetings, participation in the ABA Clearing House on IOLTA and exchange of information with its members and other interested persons and organizations. As a result, the National Association of IOLTA Programs has particular knowledge and expertise in the development and improvement of IOLTA programs. National Association of IOLTA Programs offers this information and expertise to the Court through this Response and Brief.

The National Association of IOLTA Programs, Inc. has adopted as its official policy American Bar Association Resolution 101 recommending the conversion of all IOLTA programs to comprehensive programs. This Response and Brief are filed pursuant to that policy.

The Response and Brief supply the Court with additional pertinent information, particularly in the possession of National Association of IOLTA Programs, Inc., and to provide additional material not available to the petitioner at the time of filing its Petition or available to the Court or other Respondents.

I

NEEDS

IOLTA funds are used primarily to supplement provision of civil legal services to the poor. This is true across the country. Federal funding has been reduced in terms of real dollars due to frozen appropriations and effects of inflation over the last eight years. Reduced interest rates and stagnant enrollment in voluntary programs, particularly in large states such as Florida, have reduced the ability of IOLTA programs to adequately supplement legal services programs. Florida's explosive growth has further increased the need by increasing the poor population to be served..

Two jurisdictions, Maryland and Massachusetts, recently conducted legal needs studies to determine the level of legal needs of the poor and their access to legal services. All of these jurisdictions are IOLTA jurisdictions.

The results were shocking, even to those who have long labored in the legal services area.

The Maryland survey found the following:

> "Less than 20% of Maryland's low-income population with critical civil legal problems were being served by existing legal aid or voluntary private attorney efforts.
>
> Defendants contested less than 10% of the landlord-tenant, debt collection, and related civil cases before the Maryland District Court, generally without assistance of legal counsel.
>
> The minority of persons represented by legal counsel in contested administrative claims were ore successful than persons appearing without representation.
>
> While legal services programs had cut back on important public information and "out reach" programs because of inadequate resources, many low-income persons did not understand their legal rights or know how to obtain legal assistance.
>
> The report demonstrates that because of major cuts in federal support, less resources existed on a per capita basis after adjustments for inflation to provide civil legal assistance to Maryland's poor in 1987 than in 1980."

"Action Plan Findings and Recommendations", December 17, 1987

Among the most significant recommendation of the Maryland plan was the adoption of comprehensive IOLTA in Maryland, presently a voluntary state. Legislation is presently pending.

The Massachusetts legal needs assessment found that only fifteen per cent of the legal needs of the poor were being served in that jurisdiction. In particular, the Massachusetts survey found pressing needs in the area of housing, public benefits, consumer claims, and domestic and family relations.

Moreover, several groups of persons have specific and specialized needs which are not being met. They are persons who are disabled, mentally ill, immigrants, elderly, children and minorities. Massachusetts Legal Services Plan for Action, November 19, 1987.

As a result of the survey, the Massachusetts Bar Association, the Boston Bar Association and the Massachusetts Legal Assistance Corporation jointly recommend that legal services funding be increased to meet these needs. This is to be accomplished, in part, by converting Massachusetts IOLTA Program from voluntary to comprehensive. A Petition for Conversion has been drafted. It is expected to be filed with the Supreme Judicial Court of Massachusetts in September.

A similar study is under way in New York where a comprehensive IOLTA plan is well on its way to adoption. The House of Delegates of the New York State Bar Association endorsed a comprehensive plan in April, 1988.

In each case the unmet needs are significant. Increased funding for legal services to meet the needs is required. Conversion to comprehensive IOLTA is a partial solution.

II

EFFECT OF CONVERSION

At the time of the filing of the Petition of Florida Bar Foundation on July 1, 1988, Illinois figures comparing its first year of operation under comprehensive IOLTA were not yet available. Thus, they were not included in the Affidavit of Ruth Ann Schmitt, Composite Exhibit B, attached to the Petition.

Those figures are now available and reflect the tremendous potential for increased income to be obtained by conversion from voluntary IOLTA program to a comprehensive IOLTA

program. Illinois experience is:

Revenues	Fiscal Year Ended June 30, 1987	Fiscal Year Ended June 30, 1988
	573,753	2,722,253

A Supplemental Affidavit from Ms. Schmitt, who is also a member of the Board of Directors of NAIP, in support of these figures will be submitted under separate cover. In her Supplemental Affidavit Ms. Schmitt also addresses the positive effects of conversion on banking relations, attorney relations and administrative costs resulting from conversion.

While Illinois was the first IOLTA plan to convert from voluntary to comprehensive, the Canadian experience was similar. The conversion of the British Columbia program from voluntary to comprehensive in 1973 resulted in the following increased revenues.

1972	1974
$254,000	$1,105,000

III

RESPONSE TO THE PARADE OF HORRIBLES

While no responses are in hand the objections raised in Florida and reflected at 402 So.2d 389 (Fla. 1981) are the same as raised in other jurisdictions. They have been raised again with members of the Board of Governors of The Florida Bar in connection with this Petition. This Response reflects the resolution of these provisions in other IOLTA jurisdictions.

1. Burden of additional record keeping.

Experience with IOLTA programs nationwide, as well as in Florida, shows that there is no additional administrative burden on lawyers in administering an IOLTA account. The tax number is the Foundation's and the bank does the remittance and recordkeeping. The bank is paid for its additional costs by service charges deducted from the interest earned.

Individual client trust accounts presumably generate enough interest to pay administrative costs, which may be deducted by the lawyer as well as the bank. Otherwise the funds would be in the comingled IOLTA account. The scrivener of this response has been an IOLTA participant since September 1, 1981 and can personally attest that there is no additional administrative duty or burden on the lawyer. Conversion to a comprehensive program will not change this.

2. Deprive clients of earnings on their money.

By definition, the nominal or short term amounts are not capable of earning interest for the client net of costs. This is the basis for the rejection of the constitutional "taking"argument. Cone v. The Florida Bar, 819 F.2d 1002 Cert. Den 108 S.G. 268, 98 L.Ed.2d 225 (1987).

3. Adversary effect the public image of the legal profession.

This has not been the case. On the contrary, editorial comment and public applause for the bar and the courts has been the result and has been almost universally favorable. To date, as of April 1988, over 149 Million Dollars has been generated by IOLTA programs in the United States. Over 113 Million Dollars has been granted out. IOLTA Update, ABA/IOLTA Clearing House, Spring, 1988. The effect has got to be positive for civil legal and the administration of justice.

4. Absence of specific guidelines.

The Florida Court has given only considerations as does the amended rule. Several jurisdictions have interest thresholds and guideline tables. A lawyer or firm can adopt them. The rule exonerates the lawyer from disciplinary proceedings.

5. Create disciplinary problems.

Not so. Most programs follow Florida's lead in exonerating the attorney from disciplinary consequences of his good faith exercise of judgment as to whether funds should, be included in the program. There is no reported case in any state of a disciplinary problem arising from IOLTA program participation or administration.

6. Adverse effect on professional liability insurance premiums.

This too has been laid to rest by the constitutional decision in Florida, Cone v. The Florida Bar, supra. There is no professional liability exposure. Thus, there has been no effect on premiums.

7. Unfair discrimination because incorporated firms cannot have NOW accounts.

This question was resolved by a ruling obtained by The Florida Bar Foundation from the U. S. Comptroller of the Currency. This ruling provides that since the interest is the property belongs to the Foundation, that any firm incorporated or otherwise can maintain a NOW account for IOLTA purposes. This ruling is still in effect and IOLTA programs across the country use it and rely on it.

8. Require attorneys monitor financial institution reporting requirements.

Inasmuch as the Foundation's tax identification number is submitted to the financial institution, the institution remits directly to the Foundation and reports the interest paid to the Foundation to the Internal Revenue Service. The attorney or law firm receives copies of these two items. The financial institution thus satisfies these minimal reporting requirements.

9. Mandates contributions from attorneys because their fees may be a part of the funds in the pooled trust account.

Since the attorney has control of the account, he or she can withdraw the fees when earned. Unearned fees are like other client deposits--subject to the exercise of the attorney's discretion as to whether they should be in the account.

10. Interference with attorney-client relationships as to the use of account earnings.

Again, by definition, only short term or nominal funds which cannot earn net interest for the benefit of the client are placed in the pooled IOLTA account. Therefore, there is no "property" for the client to decide to allocate or direct. Cone v. The Florida Bar, supra.

11. Interference with attorney-bank relations.

All banks in the Federal Reserve system have NOW accounts. Comprehensive programs help attorney-bank relations because all attorneys and all banks are treated the same. All trust accounts must be interest bearing. This is supported by the Affidavits as attached as Composite Exhibit B to the Petition of The Florida Bar Foundation in this case.

12. Is an unconstitutional taking of interest client's funds.

This matter has been resolved in Cone v. The Florida Bar, supra. See also Carrol v. State Bar of California, 166 CAL.App.3d 1193, 213 CAL Reptr. (CAL.App.4 Dis.) Cert Den. Sub. Nom. Chapman v. State Bar of California, 474 U.S. 848 (1985).

13. Increase client demands for interest bearing accounts.

If so, so be it. Attorneys are fiduciaries. They may benefit personally. As any other trustee they may be reimbursed for administrative costs. Lawyers fiduciary duties with regard to trust funds are clarified and made more specific by the proposed modification.

14. Discourage placing funds in attorneys trust accounts.

There is no reported example of this but clients have always had the choice of disposition of their funds.

IV

BANKING RELATIONS

Some opponents of comprehensive IOLTA programs have suggested that requiring all trust accounts to be in interest bearing form constitutes a tax on the banks and ultimately on the clients. This position reflects a lack of understanding of the way in which IOLTA programs operate nationwide. In every jurisdiction which has adopted an IOLTA program, banks are now entitled to deduct from the interest earned on the co-mingled account their actual and normal service charges. The interest remitted to the bank is net of these charges. In the event the

service charges exceed the interest earned, the IOLTA programs reimburse the banks for the excess on a quarterly or annual basis. Of course, the banks loan these funds to their customers, just as they do other interest bearing deposits. Therefore, it cannot be said that the comprehensive IOLTA program results in a tax on the banks or their customers.

Conversion to a comprehensive IOLTA program assists relations between banks and attorneys. First it eliminates resistance to doing things a new way by maintaining inclusion in the program. Illinois reports that its experience with conversion has "solved almost all of our banking problems".

Finally, the comprehensive program eliminates discrimination by banks among attorney clients by treating all trust accounts the same, that is requiring them to bear interest. This eliminates the discriminatory practice of granting special considerations such as free checks, immediate credit of funds, preferential loan rates and other perquisites to customers who maintain interest-free trust balances.

CONCLUSION

Therefore, the National Association of IOLTA Programs, Inc. requests the Court to grant the Petition of the Florida Bar Foundation for modification of the Florida program and amend the rules regulating the Florida Bar as set forth in the Petition of the Florida Bar Foundation.

I HEREBY CERTIFY that a copy of the foregoing has been delivered by mail to THE FLORIDA BAR, Florida Bar Center, Tallahassee, Florida 32301; FLORIDA LEGAL SERVICES, Sun Federal Place, 345 South Magnolia Drive, Suite A-27, Tallahassee, Florida 32301 and FLORIDA BAR FOUNDATION, 880 North Orange Avenue, Suite 102, Orlando, Florida 32801-1023 this 31st day of August, 1988.

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