IOLTA (Interest on Lawyers Trust Accounts) Program Questions & Answers

Background

Many Indiana lawyers maintain trust accounts in which funds are held on behalf of clients for distribution at a later date. In some cases, these fund balances are large and are held for long periods of time, but, more than likely, the balances are small and/ or are held for a short period of time. Traditionally, it has not been permissible for these types of short term or nominal balance trust accounts to earn interest.

In 1998, the Indiana Supreme Court amended Rule of Professional Conduct 1.15, thereby creating the Interest on Lawyer Trust Account (IOLTA) program in Indiana. In 2005, the Indiana Supreme Court further amended Rule 1.15, requiring attorneys to convert all trust accounts containing deposits that are of short duration and/or of a relatively small balance so that they could not earn income for the client in excess of the costs incurred to secure the income into IOLTA accounts. The resulting interest is paid to the Indiana Bar Foundation to be distributed for charitable purposes as delineated in Rule 1.15. The funds will be used primarily to support pro bono civil legal services for persons of limited means. Other distributions could include:

- the establishment of pro bono programs;
- to provide for equal access to civil justice to persons of limited means;
- to provide law-related education programs for the public;
- to assist in research about the legal system;
- to improve the administration of justice; and
- to fund other public service programs specifically approved by the Indiana Supreme Court.

Q: What Is IOLTA?

A: IOLTA is a relatively recent addition to the legal profession, and an even more recent addition to Indiana. IOLTA requires attorneys to place typically commingled nominal and/or short-term client trust funds that could not earn income for the client in excess of the costs incurred to secure such income into interest bearing trust accounts.

ATTACHMENT F

Financial institutions periodically remit the interest earned on these funds to a designated administrative body, which in Indiana is the Indiana Bar Foundation.

Q: How will money collected under IOLTA be spent?

A: A component of the IOLTA Program is the establishment of an approved pro bono program in each of Indiana's 14 judicial districts. In some areas, local bar associations have established programs. These may serve as the bases for those districts' plans. Funding from IOLTA helps develop these pro bono legal service programs for the poor. Each district funds programs tailored to meet the specific needs of the district. The Indiana Pro Bono Commission, created by the Indiana Supreme Court as a program of the Indiana Bar Foundation, serves to coordinate the efforts of the state's pro bono programs.

The local programs serve as liaisons between the lawyers providing pro bono services and the indigent individuals that need those services. Lawyers will continue to provide legal services to their pro bono clients, as in the past, but IOLTA funds streamline this process, by providing for such things as litigation costs, mediation costs, on-line legal research costs, and other services based on the special needs of the district, enabling services to be delivered more efficiently and helping to permit pro bono attorneys to focus on providing legal services, rather than some of the other issues which may arise in pro bono representation.

Q: Is the IOLTA program unique to Indiana ?

A: No, Indiana was the last state to adopt an IOLTA program. T he programs range from VOLUNTARY (which gives an attorney a choice to participate), to OPT-OUT to UNIVERSAL (mandatory). Indiana began with the opt-out program but now follows a Universal program. As a result of the 2003 United States Supreme Court decision upholding mandatory IOLTA programs, several other states are also converting their programs from opt-out to universal.

Q: How does Indiana 's Universal program work?

A: The program requires lawyers that hold Indiana client funds in trust accounts to convert their "pooled" nominal and/or

short term non-interest bearing client trust accounts into interest-bearing IOLTA accounts. Under the current Universal program, lawyers are unable to "opt-out", or formally decline to do this, as they were able to do in previous years. The current rule requires that any client funds held in trust by lawyers must earn interest for either the client if it is possible for the funds to earn income net of the fees and expenses associated with the account, or alternatively, the funds must be placed into an IOLTA account to earn interest for the IOLTA program.

Q: Do other states have universal programs?

A: More than half of the states have universal programs, and that number is expected to increase.

Q: Specifically, what must lawyers do to comply with the IOLTA Program?

A: Each August, an attorney will receive his or her Annual Registration Fee form from the Clerk of the Indiana Supreme Court. The attorney must fully complete the appropriate section on this form to indicate whether he or she has an active IOLTA account, or is exempt from participating.

For large (more than ten attorneys) law firms that are participating in IOLTA, a separate sheet may be attached to the firm's fee forms indicating the name of the bank holding the firm's IOLTA account and the name of the trust account at the bank, instead of completing this information on each individual fee form.

Lawyers that wish to enroll in the program need only complete a *Notice to Financial Institution Form* . This form is available from the Foundation upon request, or at the Foundation's web site (www.inbf.org/Pages/iolta_forms.html). Upon completion of the form, attorneys should send the form to the Foundation, rather than directly to the bank. The Foundation will forward the completed form to a designated individual at the attorney's bank.

Provisions are made either to open a new IOLTA account or convert an existing trust account to an IOLTA account. In the case of a new IOLTA account, to streamline the process, an attorney may wish to go to his or her local bank

and establish a non-interest bearing account for conversion, prior to completing the Notice form. All IOLTA accounts must be federally insured interest bearing negotiable order of withdrawal ("NOW") accounts or comparable demand deposit accounts.

Q: If I already maintain an IOLTA account does the new universal program affect me?

A: Generally speaking if you or your firm already maintains an IOLTA account in Indiana, then you will not be required to do much more in order to comply. The only additional things you may need to do involve IOLTA accounts which are affiliated with multiple attorneys as is common at many law firms. If you are affiliated with a law firm or other organization that maintains IOLTA accounts, you will now need to enclose a list of those attorneys affiliated with the firm's or organization's IOLTA accounts with your annual attorney registration statement from the Clerk of the Indiana Supreme Court. This will ensure that compliance with the IOLTA rule can be accurately recorded. In addition, you will need to ensure that all client funds held in trust earn interest for either the client if it is possible for the funds to earn income net of the fees and expenses associated with the account, or alternatively, the funds must be placed into an IOLTA account to earn interest for the IOLTA program.

Q: What happens if an attorney refuses to comply with the universal program?

A: The Indiana Bar Foundation will confirm that each attorney has correctly completed his or her annual registration fee form and is either matched with an existing IOLTA account or is exempt from participating in the IOLTA program. The Foundation has been directed to provide the Disciplinary Commission of the Indiana Supreme Court the names of those attorneys who do not fall into one of those two categories.

Q: What if I do not have a commingled non interest-bearing client trust account?

A: Lawyers who do not hold client finds in trust are exempt from the provisions of this Rule. Those lawyers simply signify this on their Annual Registration Fee forms by

checking the appropriate box(es).

Q: How will the universal IOLTA Program affect current trust fund practices?

A: This program will impose no new burdens upon lawyers. Lawyers have always exercised their discretion in determining whether a client's trust deposit was of sufficient size or duration to justify placement in a separate interest-bearing account, with the interest payable to the client. Lawyers will retain this discretion and continue to make these fiduciary decisions under the IOLTA Program. The lawyer's determination of whether a client's funds are nominal or short term so that they could not earn income in excess of costs rests in the sound judgment of the lawyer or law firm, and no lawyer will be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

Q: May lawyers still deposit individual client funds into accounts which pay interest that can be passed on to the client?

A: Yes. In fact, lawyers are expected to establish separate, interest-bearing accounts for individual client's funds when the sum is large enough and/or the duration is long enough to justify the cost of opening, administering and closing the account. Any interest accrued becomes the property of the client. If clients request their money be placed in a separate trust account, the lawyer is ethically bound to fulfill the clients' request. If the client funds are not large enough or the duration is not long enough to earn income net of the costs associated with the account, then the funds must be placed into an IOLTA account.

Q: Will there be a lot of lawyer time and money involved in participating in IOLTA?

A: Minimal administrative time and no money. The mechanics of converting to an IOLTA account are simple. All the attorney or law firm must do is complete a Notice to Financial Institution form and forward the form to the Foundation. There is no change to the operation of the trust account, and the firm is no longer responsible for regular administrative expenses on the account.

Q: What is the status of the U.S. Supreme Court review of IOLTA?

A: In March, 2003, the United States Supreme Court ruled 5 to 4 in favor of the constitutionality of mandatory IOLTA programs. The Court indicated that the taking of client property is constitutional if the taking is used for public purposes, and if the affected individuals are compensated appropriately. The Court ruled that IOLTA is clearly beneficial to the public good, in that hundreds of millions of IOLTA dollars each year are targeted for legal service programs throughout the country. Further, interest is earned on IOLTA accounts simply because they are IOLTA accounts; without IOLTA, these trust funds would be incapable of earning any net interest. Therefore, the affected clients lose nothing. The Court concluded that, as such, IOLTA programs throughout the country should proceed as they did prior to its ruling.

Q: Who notifies the banks?

A: The Indiana Bar Foundation notifies the lawyer's bank of the lawyer's intent to participate in IOLTA. In order to establish an IOLTA account, a lawyer or law firm should forward a copy of the *Notice to Financial Institution Form* to the Foundation, which will, in turn, forward a copy to the appropriate financial institution. This form specifically authorizes the financial institution to disclose to the Foundation necessary information necessary for the IOLTA account to be established, including, but not limited to, information designated by Indiana Rules of Professional Conduct Rule 1.15.

Q: How will my local bank learn about IOLTA?

A: At this point in time, most banks throughout Indiana are familiar with IOLTA. The Foundation will encourage banks not currently participating in the program to participate, especially if the Foundation has on hand completed Notice to Financial Institution forms to forward to the bank upon the bank's agreement to participate. The Foundation will distribute materials to these banking centers so that lawyers and law firms who ask questions can be assisted. These

lawyers and the Foundation shall remain confidential. (Rule 1.15 (f) (10). The Foundation may release only a compilation of data from such statements, which does not include any identifying information.

If you have any further questions about the IOLTA program please contact the Indiana Bar Foundation office at (317) 269-2415 or (800) 279-8772.

Last Updated Februay 16, 2005

ATTACHMENT F

NEW JERSEY ADVISORY OPINION 454, 105 N.J.L.J. 441 (May 15, 1980)

Attorney's Trust Account--Immediate Drawing Upon Depositing Client's Check

We are asked whether it is ethical for an attorney to deposit funds belonging to a client in the attorney's trust account and to make immediate disbursement from this fund on behalf of the client. This practice usually arises in the context of a title closing, but there are, of course, many other circumstances in which this procedure is followed.

Rule 1:21-6(a)(1) and *DR*9-102 require than an attorney maintain a separate account for funds of his clients entrusted to his care. He must maintain an appropriate book in which the funds belonging to each client are separately identified. It goes without saying that the funds deposited for a particular client must be used for the benefit of that client and for no other purpose. Many attorneys have substantial sums in their trust account at all times, sums which belong to several clients. Some part of these monies are "collected funds," *i.e.*, funds which represent checks deposited in the account which have had ample time to clear and have thus been properly credited to the attorney's trust account. Depending usually on the distance the drawee bank is from the attorney's bank, it may take from five to ten business days for a check to clear, or from one to two calendar weeks. It is obvious, therefore, that a check drawn on the attorney's trust account for client A the same day client A's check is deposited in this account is drawn on funds which belong to other clients of the attorney.

We are aware of the fact that the foregoing practice is one of long standing in probably universal use not only in New Jersey but elsewhere. We also believe that most attorneys who follow this practice do so only where the checks involved are bank, cashier's or certified checks. Because this procedure is so widespread in title closings, to condemn it as unethical may lead to severe disruption in the handing of title closings and other matters. We suggest first, however, that there are other ways to handle these closings, none of which is entirely satisfactory. Three possibilities come to mind: (1) escrow closings in which no funds are disbursed and no closing completed until all funds have cleared; (2) pre-arrangement by the attorneys involved so that the necessary closing figures are known far enough in advance for the parties to provide funds in such a manner as to obviate the necessity of using the trust account (undoubtedly this would require cooperation of the bank-mortgagee which may be asked to provide mortgage funds in several checks); (3) establishment of an account by the attorney of his own funds which can be used to accommodate a client when there is no other solution. Recognizing the problems which would arise were the present practice disapproved in its entirety, it is our opinion that where one of the foregoing solutions is not feasible, the use of bank certified or cashier's checks should be permitted to avoid disruptions in title closings and in the interest of accommodating all clients. Such checks are the obligations of the bank and not simply of a private party. Drawing immediately upon their deposit entails a minimal risk.

The practice which is sanctioned by this opinion has the effect of drawing on unsegregated trust funds of all clients for the benefit of a particular client whose matter is closing. The reduction thus resulting in available trust funds is eliminated shortly thereafter when the bank, certified or cashier's check clears. The justification for what would otherwise be an unauthorized invasion of trust funds consists of the almost non-existent risk that such bank, certified or cashier's checks will not clear along with the overriding commercial need of all clients that such a practice be continued. Because the practice is so well known and widespread, it is fair to assume that clients have implicitly consented to the negligible risk involved in drawing against such

checks which have not yet cleared. Of course, any client who explicitly requests that trust funds deposited for his benefit not be subjected to the practice is entitled to have his funds segregated. A consequence of such segregation would be that that client, if involved in a transaction where closing depends upon the issuance of trust checks that have not yet cleared, would have to make special arrangements similar to one of those suggested earlier in this opinion. In other words, a client who does not want to take the negligible risks involved in the unsegregated fund will not receive the substantial benefit of the practice discussed in this opinion. Approval of the practice referred to herein is limited strictly to real estate or commercial closing transactions representing the consummation of an agreement resulting in transfers of property or interests in property whether they be real estate, personal property or a combination of both, including sales of businesses where it is either essentially or commercially desirable that trustee checks be issued against certified, bank or cashier's checks that have not cleared. Drawing on trust funds for other purposes, such as the disbursement of the settlement proceeds of a negligence case, regardless of whether certified, cashier's or bank checks have been deposited but have not yet cleared, is not proper.

We wish to make it clear that the practice we are approving relates only to the use of bank, cashier's or certified checks. We consider the practice of drawing against personal checks to cover miscellaneous items at closing or for any other purpose, regardless of the amount, to be unethical. While these amounts may be small in relation to the size of some trust accounts, the checks creates a substantial risk of loss of trust funds deposited in the account for other clients, a risk not in any way justified by necessities of the situation. Accordingly, such practice is disapproved.

AMENDMENT TO NEW JERSEY ADVISORY OPINION 454,
114 N.J.L.J. 110 (August 2, 1984)

The Advisory Committee on Professional Ethics has received numerous inquiries concerning its holding in the above matter because the use of checks of savings and loan associations, state or federally-chartered, in connection with real estate or commercial closing transactions was not sanctioned. After careful review of the problems which have arisen because of this exclusion, the Committee has decided that the use of such checks should be approved. Therefore, the first sentence of the last paragraph of *Opinion* 454 is expanded to read as follows:

> We wish to make it clear that the practice we are approving relates only to the use of bank, savings and loan (state or federal), cashiers' or certified checks.

TRUST FUNDS RECEIPTS JOURNAL						
MONTH OF: September 1995						
DATE		SOURCE OF FUNDS	MATTER	FILE #	AMOUNT	DEPOSIT
SEP	1	Freds Insurance Co. (Settlement)	Hurt vs. Poor	94-217	$30,000.00	$30,000.00
	2	John and Mary Doe (Deposit)	Doe to Jones	95-312	$5,000.00	
	2	Debtors-R-Us, Inc. (Collection)	Acme vs. Debtors	95-256	$1,500.00	$6,500.00
	19	Hoosier National Bank (cert. ck.)	Buyer from Seller	95-314	$60,000.00	
	19	Earls Mortgage Co. (Cert.Ck.)	Buyer from Seller	95-314	$40,000.00	
	19	Susan Buyer (Cert. Ck.)	Buyer from Seller	95-314	$10,000.00	$110,000.00
	30	John Spouse (Retainer)	Spouse vs. Spouse	95-163	$2,000.00	$2,000.00
		TOTALS			$148,500.00	$148,500.00

ATTACHMENT H

CLIENT TRUST LEDGER						
Client:		Susan Buyer		File #:	88-314	
Address:		125 East Maple Street		Matter Type:	Real Estate	
		Hoosiertown, IN 46555				
Bs. Phn:		(317) 555-5555				
Hm. Phn:		(317) 555-1234				
DATE						
1995		EXPLANATION OF TRANSACTION	CK #	CHARGES	RECEIPTS	BALANCE
SEP	19	Hoosier National Bank (cert. ck.)			$60,000.00	$60,000.00
	19	Earls Mortgage Co. (cert. ck.)			$40,000.00	$100,000.00
	19	Susan Buyer (cert. ck.)			$10,000.00	$110,000.00
	20	White River Savings & Loan - Mtg. Payoff	815	$50,000.00		$60,000.00
	20	Jack and Jill Seller - Proceeds	816	$52,400.00		$7,600.00
	20	Hill and Dale Realty Co. - Commission	817	$7,000.00		$600.00
	20	Joe Lawyer – Fee	818	$600.00		$0.00

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TRUST FUNDS DISBURSEMENTS JOURNAL							
MONTH OF: September 1995							
DATE		CK #	PAYEE	PURPOSE	MATTER	FILE #	AMOUNT
SEP	12	806	John Hurt	Settlement	Hurt vs. Poor	94-217	$20,000.00
	12	810	Joe Lawyer	Fee	Hurt vs. Poor	94-217	$10,000.00
	13	811	-VOID-				----------
	14	812	Acme Office Supply	Proceeds	Debtors-R-Us, Inc.	95-256	$1,050.00
	14	813	Joe Lawyer	Fee	Debtors-R-Us, Inc.	95-256	$450.00
	15	------	Void Check #507 (2/12/88)		Maya Co.	94-322	($400.00)
	16	814	Aztec Corp.	Replace Ck.#507	Maya Co.	94-322	$400.00
	20	815	White River Svngs & Ln	Mortgage Payoff	Buyer from Seller	95-314	$50,000.00
	20	816	Jack and Jill Seller	Proceeds	Buyer from Seller	95-314	$52,400.00
	20	817	Hill and Dale Realty	Commission	Buyer from Seller	95-314	$7,000.00
	20	818	Joe Lawyer	Fee	Buyer from Seller	95-314	$600.00
	30	------	Bank Svc. Charges		Attorney Funds		$50.00
		TOTALS					$141,550.00

ATTACHMENT J

TRUST LEDGER CONTROL SHEET			
CONTROL			
1995			
TRUST FUNDS			
MONTH	RECEIVED	DISBURSED	BALANCE
Balance Forward			$45,200.00
JAN	$87,000.00	$126,500.00	$5,700.00
FEB	$322,000.00	$290,000.00	$37,700.00
MAR	$95,500.00	$121,500.00	$11,700.00
APR	$52,500.00	$55,650.00	$8,550.00
MAY	$78,900.00	$75,050.00	$12,400.00
JUN	$45,000.00	$50,550.00	$6,850.00
JUL	$125,000.00	$130,050.00	$1,800.00
AUG	$57,000.00	$55,750.00	$3,050.00
SEP	$148,500.00	$141,550.00	$10,000.00
OCT			
NOV			
DEC			

ATTACHMENT K

SCHEDULE OF CLIENTS' TRUST BALANCES REFLECTED IN CLIENTS' TRUST LEDGER AS OF THE MONTH ENDED SEPTEMBER 30, 1995 AND RECONCILIATION WITH TRUST FUNDS ON DEPOSIT PER BANK STATEMENT						
NAME OF CLIENT						BALANCE
Smithville Credit Association						$450.00
Frederick Client						$1,995.00
John and Mary Doe						$5,000.00
Acme Office Supply						$455.00
John Spouse						$2,000.00
Attorney Funds (bank charges)						$100.00
*Total Per Clients' Ledgers						$10,000.00
	Add: Outstanding Checks					$500.00
	Less: Deposits in Transit					$2,000.00
Balance Per Bank Statement						$8,500.00
*This amount should agree with the checkbook balance and trust ledger control sheet						

ATTACHMENT L

REASONS FOR CLOSURE OF TRUST ACCOUNT OVERDRAFT INQUIRIES
JULY 1, 1997 THROUGH JUNE 30, 2006

Reasons for Closure:

Reason	Count
Bank Error	137
Disbursement From Trust Before Funds Deposited Into Trust	87
Referral for Disciplinary Investigation	76
Law Office Math or Record-Keeping Error	68
Disbursement From Trust Before Deposited Funds Collected	61
Inadvertent Deposit of Trust Funds to Non-Trust Account	45
Deposit of Trust Funds to Wrong Trust Account	33
Overdraft Due to Bank Charges Assessed Against Account	29
Overdraft Due to Refused Deposit for Bad Endorsement	26
Inadvertent Disbursement of Operating Obligation from Trust	16
Non-Trust Account Inadvertently Misidentified As Trust Account	11
Death, Disbarment or Resignation of Lawyer	5

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financial institutions will also be encouraged to designate one IOLTA contact person who will serve as the liaison between that financial institution and the Foundation.

Q: I have a long-standing relationship with a bank that refuses to participate in IOLTA. Must I change to a bank that is participating?

A: It is the current policy of the Foundation that if after repeated efforts, the Foundation fails to enroll a bank to participate in IOLTA, lawyers and law firms that have a relationship with that bank will be exempted from participation. The lawyers should advise the Foundation of this situation in writing. We encourage lawyers to voluntarily consider switching to a participating bank and enrolling in the IOLTA program.

Q: It is extremely impractical for me to establish an IOLTA account. What should I do?

A: Describe your situation to the Indiana Bar Foundation in writing. Exemptions from participation may be granted, depending on the situation.

Q: Who pays the service charges or fees for the IOLTA account?

A: Monthly bank service charges are paid from the interest earned by the IOLTA account, ordinarily up to the amount of interest earned on that account. The majority of banks currently waive all fees in excess of interest earned. In the event that the banks bill the Foundation for fees in excess of interest earned on an account, the Foundation may affirmatively exempt that account from participating. Under no circumstances should the account principal be changed by IOLTA involvement, nor should the lawyer be billed for regular IOLTA-produced expenses. The attorney will still be responsible for any transactional fees associated with their IOLTA account.

Q: Must attorneys have new checks printed for IOLTA accounts?

A: No. Attorneys may continue to use their checks as they did prior to converting the account into an IOLTA account.

Q: Which banks may lawyers use?

A: Any bank that participates in the Trust Account Overdraft Notification Program required under the Indiana Rules of Professional Conduct may be used. All banks with at least one IOLTA account are approved for trust account overdraft reporting. Please contact the Foundation if you are unsure as to whether or not your bank qualifies.

Q: Must lawyers negotiate fees and charges on IOLTA accounts with the bank?

A: The Indiana Bar Foundation or its designees handles interest rate and fee discussions with the bank.

Q: Which tax identification number is used?

A: The financial institution is instructed to use the tax identification number of the Foundation, not the tax identification number of the lawyer or law firm. As such, the lawyer or law firm should never receive a 1099 form for IOLTA interest. This method of account identification will allow the earned interest to be recorded annually in the name of the Foundation and not in the name of the lawyer/law firm. The name on the account, however, is to be that of the lawyer or law firm.

Q: What about 1099 forms?

A: Financial institutions have been notified that the Foundation is a not-for-profit corporation, exempt from federal income tax. As a result, no 1099 forms are required for the IOLTA accounts and no W-9 form mailing is required. The financial institutions have been advised that rulings have been obtained by the Foundation from the appropriate federal regulatory agencies authorizing "NOW" or similar type accounts to be used for IOLTA accounts.

Q: Will data on individual IOLTA accounts be made public?

A: No. The information contained in financial statements to