

Be Not Afraid

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We have all heard and we should know that a lawyer in possession of client funds and property is the fiduciary. A lawyer who holds the money of others must safeguard and segregate those assets. This obligation applies to all money and property of clients and nonclients, which come into lawyers' possession during the practice of law. The most common and legally mandated method of segregating funds is with a lawyer's trust account. A trust account is a special checking account and the rules require that it be maintained in an insured account in a financial institution located in the state of Kansas and approved by the disciplinary administrator's office.

Because these funds do not belong to us, we are not allowed to receive interest on the deposits. The ethical rules require that large amounts of money or funds held for a long period of time that earn substantial interest be segregated so the interest can be paid to the owner of the funds. On deposits of small amounts or ones held for short periods of time, lawyers typically maintain a general trust account and pool the deposits with itemization. As a general rule, if the cost of opening and maintaining an account exceeds any interest which would be earned, it is properly placed in a general trust account.

General trust accounts are convenient for lawyers and meet the goal of safekeeping clients' property. However, questions begin to arise about what happens to the interest banks earn on those pooled funds.

IOLTA stands for Interest on Lawyers' Trust Accounts, and the programs were first established in Australia and Canada in the late 1960s. The first U.S. IOLTA program was in Florida and the program in Kansas was approved by the Kansas Supreme Court in 1984. It is a program aimed at funding programs that provide civil legal services for low-income persons with charitable law-related public service projects. Today, every state in the United States operates an IOLTA program. Between 1991 and 2003, IOLTA programs generated more than \$1.5 billion nationally to ensure justice for our country's most vulnerable residents.

There are three types of IOLTA programs. A mandatory program, where all lawyers in the jurisdiction who maintain client trust accounts must maintain an IOLTA account. There are opt-out states. This is the Kansas rule. Under that system a lawyer participates in an IOLTA program unless he or she affirmatively makes a choice not to participate. Finally, there are voluntary programs. Under these programs a lawyer must affirmatively elect to opt in and participate in the IOLTA program.

Now we get to the title of this column. The Kansas Supreme Court is currently considering a request to mandate IOLTA. We should not be afraid of mandatory IOLTA. First and foremost, the rule suggested to the Court for consideration does not mandate IOLTA for everyone. There are safeguards for attorneys whose participation in an IOLTA program would create an undue hardship. The rule under consideration would

ensure that all possible interest earned on these accounts be pooled for the good of our most needy citizens. One must wonder why we are not a mandatory state. Why should we not require that interest earned on accounts be pooled for the needy?

I think the resistance is largely premised in the fierce independence of lawyers. Since the inception of the IOLTA program in Kansas, more than \$3 million have been distributed for civil legal service and assistance to low-income citizens. However, 40 percent of our attorneys do opt out. Why do they opt out? There are several reasons that have been identified in writings. First, there seems to be a misconception that participation in an IOLTA program causes more work or additional accounting. This is not the case. Once you open an IOLTA account, its administration from the lawyers' end is no different than the administration of any other general trust account. It is the bank, not the lawyer that maintains accountability for the interest and remits the interest to the IOLTA account.

There has been a great deal of confusion over the legality of IOLTA programs. This confusion has ended. The U.S. Supreme Court upheld the constitutionality of IOLTA programs. A third reason is a lack of information about the good the program does. Getting that information out is the responsibility of the Kansas Bar Association and the Kansas Bar Foundation, and we are making strides to improve that. We have taken steps to honor the banks that are the largest contributors to the IOLTA program, and it was gratifying to see the expressions on the faces of the bankers we dealt with when they learned about the good that the funds do. We are highlighting IOLTA programs in the *Journal of the Kansas Bar Association* and the number of requests for grants more than doubled last year over the previous year. The Bar staff has done an outstanding job of getting the word out and the number of applicants demonstrates the severity of the need.

While the Supreme Court has been asked to consider a mandatory IOLTA proposal, it is not too late to voluntarily participate. You can go to www.ksbar.org and under the "Kansas Bar Foundation" tab you can learn everything about IOLTA. There is a Notice to Financial Institution form, which can be filled out in a matter of minutes and would instruct your bank to pay the interest on your trust account to the IOLTA program. If your bank does not participate and you would like to get them involved, members of the KBA staff would be happy to work with your banker.

The final reason for mandatory IOLTA is that the proposal before the Court calls for uniformity of interest rates. This will also provide additional assistance to the people who do not have the financial ability to have good access to our courts.

Be not afraid. Stand up for the citizens of Kansas and encourage our Court to change the rule. Our profession does a lot of good, but we can do more. ■