FORMAL OPINION NO. 116

INTEREST ON LAWYER TRUST ACCOUNT (IOLTA)

Now that the Interest on Lawyer Trust Accounts (IOLTA) program is being implemented by the Idaho Law Foundation, we have been asked to interpret the term "short term or nominal in amount" as it is used in DR 9-102 (D) and which reads:

DR 9-102 Preserving Identity of Funds and Property of a Client.

D. A lawyer may elect to create and maintain an interest-bearing trust account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:

1. No earnings from such an account shall be made available to a lawyer or firm.

2. The account shall include all clients' funds which are nominal in amount or to be held for a short period of time.

3. An interest-bearing trust account may be established with any bank or savings and loan association authorized by federal or state law to do business in Idaho and insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.

4. The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

5. Lawyers or law firms electing to deposit client funds in a trust savings account established pursuant to this subsection shall direct the depository institution:

   a. To remit interest on dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the Idaho Law Foundation, Inc.;

   b. To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm or whom the remittance is sent and the rate of interest applied; and

   c. To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of

interest applied, and the average account balance of the period for which the report is made.

Under trust principles, the lawyer has always had the discretion to determine whether or not monies would be placed into an interest-bearing account. There comes a point where the attorney would be negligent if he failed to invest the funds and obtain a return of monies for the client. The traditional attorney/client relationship does not compel the attorneys either to invest client funds or to advise clients to make their funds productive. In re I.O.T.A., 402 So.2d 389, 394 (Fla. 1981). Where a sum is so small or is to be held for such a short period that an insignificant amount of interest would be generated through investments, then the attorney has no fiduciary duty to invest those monies. According to trust law, the general rule is that a trustee ordinarily has a duty to invest trust funds so that they will be productive of income. See, II. A. Scott, The Law of Trusts, Secs. 181, 1463 (3d Ed. 1967 and 1981 Supp.). The general rule, however, is qualified in two important ways:

1. The trustee may take reasonable time to seek proper investments; and

2. Where under all the circumstances it appears the trustee was not under a duty to invest trust money, but merely to safeguard it, he is not liable for interest for his failure to invest it.

Other states have included "safe harbor" provisions in their IOLTA rules. Maryland undertook a study of office overhead considering five issues:

1. Securing client Social Security number;

2. Opening passbook account;

3. Accounting for interest on law firm's books;

4. Furnishing 1099's at year-end; and

5. Accounting for funds and issuing a check if the account is closed.

Maryland found it "economically self-defeating to open an individual account unles it were reasonably expected that a minimum of $50.00 of interest would be generated." California's legislatively created program defines the term:

> "Trust funds are nominal in amount or are held for a short period of time and must be placed in an interest bearing trust account . . ., if it is not practical to segregate them to earn income for the benefit of the client in light of the income the funds could earn or the cost involved in earning or accounting for any such income."

Both of these states appear to base their definitions upon the idea that the attorney would have to open individual accounts for each client in order to put them at interest. Minnesota's guideline takes a different attack:

> "(D) In determining whether to use the account specified in subdivision (B) (pooled account) or an account specified in subdivision (C) (interest to client; pooled account with subaccountng procedure), a lawyer shall take into consideration the following factors:

"1. The amount of interest which the funds would earn during the period they are expected to be deposited;

"2. The cost of establishing and administering the account, including the cost of the lawyer's services; and

"3. The capability of financial institutions described in subdivision (A) to calculate and pay interest to individual clients."

Minnesota's rule specifically speaks of pooled (comingled) accounts with subaccounting procedures. This is a function that financial institutions have undertaken for a number of years with investment portfolios and there appears to be no reason why the same could not be done for a pooled trust account.

The recurring theme in all interpretations of these terms is the practicality of paying interest to the client - that is, there is so little money or it will only be held for a day or two that administrative costs would be larger than the interest earned on the sum. Since the lawyer or his firm is not entitled to any of the interest earned on the income, unless the client agrees in writing that he may do so, and it is allegedly impractical to pay interest to an individual client, the monies are sought to be used for charitable purposes related to the legal profession through the Idaho Law Foundation.

The rule, as adopted in Idaho, leaves to the attorneys good faith discretion for the decision of when to place monies in an interest bearing account or a comingled noninterest bearing account.

Caveat: This opinion merely construes the phrase "short term or nominal in amount". No comment concerning the principles generally underlying the interest on lawyer trust account concept.

DATED this 28th day of June, 1984.

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