

## Supreme Court Decision Provokes Review of IOLTA Accounts

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The United States Supreme Court's decision in *Phillips v. Washington Legal Foundation*, 66 U.S.L.W. 4468 (U.S. June 15, 1998), has generated a volatile mix of speculation, panic, and concern over the future of funding for legal services to the poor and the manner in which lawyers operate their trust accounts. Simply stated, *Phillips* holds that clients have a Fifth Amendment property right to the interest earned on funds held in lawyer trust accounts.

The Lawyers Trust Account Board (LTAB) has already issued a press release indicating that it has begun the process of reviewing *Phillips* to determine the impact on Minnesota's IOLTA funds. In the meantime, the Director offers the following dispassionate reminders regarding lawyers' responsibilities when handling client funds.

**Trust account options.** The vast majority of Minnesota lawyers maintain a single trust account for depositing their clients' funds. This account, pursuant to Rule 1.15(d), Minnesota Rules of Professional Conduct (MRPC), allows lawyers to deposit funds of multiple clients into one account as long as the funds are nominal in amount or expected to be held for a short period of time. This is useful to both the client and the lawyer because the cost of setting up separate accounts for each client would far exceed the amount of interest each client could earn. With the cooperation of financial institutions, these nominal amounts of interest are aggregated and forwarded to LTAB. The funds are subsequently divided into grants to organizations that provide legal services to the poor.

In evaluating *Phillips*, lawyers should realize that they have always had the option of maintaining trust accounts outside of the IOLTA program and that in some circumstances they may be ethically required to do so. Rule 1.15(e), MRPC, provides two options to serve these purposes. Whether driven by a lawyer's political philosophies or for other reasons, a lawyer may choose to maintain a pooled interest-bearing trust account for which interest will be paid not to IOLTA but to the lawyer's clients. It was no less true before *Phillips* than it is now that if a client's funds may earn interest in excess of transaction costs, that interest belongs to the client.

But typically the transaction costs, including the lawyer's time to perform the necessary subaccounting, far exceed the interest earned. Also, because the interest is not designated for a charitable purpose, banks have no incentive to waive their service fees. Indeed, the Director is not aware of any lawyers who use this type of trust account.

Similarly, it has also always been the case that if a lawyer expects to hold client funds for a long period of time or to hold a large denomination of client funds, the lawyer must open a separate interest-bearing trust

account for that client. See Rule 1.15(e)(1), MRPC. Minnesota's rule is quite explicit in directing lawyers to take into consideration the amount of interest the lawyer expects the client's funds to earn, "the cost of establishing and administering the account, including the cost of a lawyer's services," and the capacity of the bank to accommodate the lawyer's requests. See Rule 1.15(f), MRPC. A lawyer who fails to open such an account when appropriate may be liable for the imputed interest and may also be subject to discipline.

**Client consent.** For many if not most clients, the IOLTA account will have the least net cost to each client. *Phillips* raises a theoretical problem in that the interest earned on client funds in an IOLTA account is paid to someone other than the client. The Director does not intend to investigate lawyers for such speculative rule violations. In any case, in theory lawyers could resolve this issue by obtaining client consent to deposit funds in an IOLTA account, after disclosing the costs associated with the client's other options and the purpose of the IOLTA program.

The Director suggests, however, that it may not be necessary to add another layer of disclosure and consent to our already complex legal system. Lawyers routinely choose between types of services based on their cost and may choose an option that is marginally less beneficial to save a client some money: sending information by regular mail instead of overnight courier, service by the sheriff rather than a private company, conducting interviews or depositions alone instead of accompanied by an associate or paralegal, etc. Lawyers do not consult their clients about every one of these decisions and the clients are well-served by their lawyers' efforts.

The same may be true of IOLTA accounts.

**Enforcement position.** Although this article has attempted to steer clear of a direct analysis of *Phillips*, the Director has decided, for the present, that lawyers may continue to use their IOLTA accounts (in compliance with the MRPC) without facing disciplinary sanctions. This position, of course, may change based on the forthcoming analysis of LTAB or further pronouncements from the United States Supreme Court.

Ultimately, the responsibility for appropriately safeguarding client funds remains where it has always been, with the lawyer. Regardless of *Phillips* and the funding of legal services, all client funds must be placed in a trust account. To the extent *Phillips* encourages all lawyers to pay closer attention to the way they administer client funds, the decision provides a service both to the bar and to the greater public.