Court Rules

Effective March 21, 1986

State of Wisconsin—In Supreme Court

IN THE MATTER OF THE CREATION OF SCR CHAPTER 13 AND AMENDMENT OF SCR 11.05 AND SCR 20.50: INTEREST ON TRUST ACCOUNTS PROGRAM

ORDER

On February 4, 1985, the State Bar of Wisconsin petitioned for the creation of an interest on trust accounts program requiring attorneys practicing in Wisconsin to deposit client funds in interest-bearing trust accounts or income-generating investments, with the interest on those funds to be used for law-related charitable and educational purposes. A public hearing on the petition was held on May 20, 1985, at which the petitioners and other interested persons appeared.

IT IS ORDERED, effective the date of this order, that SCR Chapter 13 is created to read:

SCR CHAPTER 13

INTEREST ON TRUST ACCOUNTS PROGRAM

SCR 13.01 Creation and purpose; definitions. (1) An interest on trust accounts program of the state bar is created for law-

related charitable and educational purposes as provided by this chapter.

(2) In this chapter, unless the context otherwise requires:

(a) "Attorney" means a person who is an active member of the state bar of Wisconsin who is providing legal services under his or her license to practice law in Wisconsin.

(b) "Board" means the board specified in SCR 13.02(1).

(c) "Program" means the interest on trust accounts program administered by the Wisconsin Trust Account Foundation, Inc.

(d) "State bar" means the State Bar of Wisconsin.

SCR 13.02 Administration. (1) The program shall be operated and administered by the board of a Wisconsin nonstock, nonprofit corporation organized for law-related charitable and educational purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1954, as amended (or corresponding provisions of any future federal internal revenue laws), to be known as the Wisconsin Trust Account Foundation, Inc.

(2) The board shall consist of 15 persons. The president of the state bar shall appoint, with the approval of the state bar board of governors, 9 attorney and 3 non-attorney members. The chief justice shall appoint 3 members from the Wisconsin judiciary. Members shall serve staggered 3-year terms. The terms of 3 attorney, one judicial and one nonattorney members shall expire each year. No person may serve more than 2 full terms consecutively.

(3) Each year the board shall select a board member to serve as chairperson at the pleasure of the board.

(4) The board members shall serve without compensation but shall be entitled to reimbursement from the program for their expenses reasonably incurred in the performance of their duties.

SCR 13.03 Powers and duties of the board. (1) In consultation with the state bar board of governors, the board shall adopt articles of incorporation, bylaws and rules and procedures consistent with this chapter for the management and administration of the program and its affairs. Except as provided in sub (2), these actions are subject to review by the supreme court on its own motion or upon petition of any interested party.

(2)(a) The board shall accept grant applications and make grants or expenditures of funds received under SCR 20.50(3) for any of the following purposes:

1. To provide legal aid to the poor.

2. To fund programs for the benefit of the public as may be specifically approved from time to time by the supreme court for exclusively public purposes.

3. To pay the reasonable and necessary expenses of the board and other costs reasonably and necessarily incurred for the administration of the program, including the employment of staff for that purpose.

(b) Grant-making decisions of the board are final and not subject to appeal or judicial review.

(3) Funds received by the program under SCR 20.50(3) may be invested by the board.

(4) If a client asserts a claim against an attorney based upon the attorney's determination to place the client's funds in a trust account under SCR 20.50(3)(a) rather than in a segregated trust account under SCR 20.50(3)(b), the board, upon written request by the attorney, shall review the claim and:

(a) If, at the time of their deposit, the funds could reasonably have been expected to produce a positive net return to the client, approve the claim and remit directly to the claimant any sum of interest remitted to the board on account of the funds; or

(b) If, at the time of their deposit, the funds could not reasonably have been expected to produce a positive net return to the client, reject the claim and advise the claimant in writing of the grounds therefor. If there is subsequent litigation involving the claim, the board shall interplead any sum of interest remitted to the board on account of the funds and shall assume the defense of the action.

(5) The program shall be audited by auditors annually and at such other times as the supreme court may direct, the audits to be at the expense of the program. Each year the program shall submit to the supreme court and the state bar board of governors a report, including the audit, reviewing in detail the administration of the program and its activities during the preceding year.

SCR 13.04 Attorney participation in the program. (1) An attorney shall participate in the program as provided in SCR 20.50 unless:

(a) The attorney certifies on the annual trust account statement filed with the state bar that:

1. Based on the attorney's current annual trust account experience and information from the institution in which the attorney deposits trust funds, service charges on the account would equal or exceed any interest generated; or

2. Because of the nature of the attorney's practice, the attorney does not maintain a trust account; or

(b) The board, on its own motion or upon application from an attorney, grants a waiver from participation in the program for good cause.

(2) The board may reimburse an attorney incurring service charges on an account established under SCR 20.50(3)(a) if the charges were reasonably and necessarily related to the attorney's participation in the program.

(3) Refusal or neglect by an attorney to participate in the program, except as provided under sub (1), constitutes professional misconduct and may be grounds for disciplinary action under the rules governing enforcement of attorneys professional responsibility.

SCR 13.05 Grants of program funds. (1) The program may make grants of available funds to eligible programs for any of the purposes specified in SCR 13.03(2).

(2) The program is authorized to maintain a reasonable reserve fund.

(3) The program shall solicit applications for grants at least annually.

(4) The board shall promulgate written rules and procedures for submission, review and approval of grant applications and for termination of grants.

(5) The program shall require grantees to submit a report detailing application of the grant funds within a reasonable time after the conclusion of the period for which the grant was made. The board may require periodic interim reports at any time respecting a particular grantee.

IT IS FURTHER ORDERED, effective January 1, 1987, that the Supreme Court Rules are amended as follows:

I. **SCR 11.05**(1) is amended to read:

A member of the state bar shall not commingle the money or other property of a client with his or her own, and he or she shall promptly report to the client the receipt by him or her of all money and other property belonging to the client. ~~Unless the client otherwise directs in writing, whenever~~ Whenever an attorney collects any sum of money ~~upon any action, claim or proceeding, either by way of settlement or after trial or hearing for a client,~~ he or she shall promptly deposit his or her client's funds in ~~a bank, trust company, credit union or savings and loan association, authorized to do~~

~~business in this state, in an account separate from his or her own account and~~ a trust account as provided in SCR 20.50 clearly designated as "Clients' Funds Account" or "Trust Funds Account," or words of similar import. ~~The attorney, with the written consent of the client, may deposit the client's funds in a segregated client's trust account with all interest accruing thereon to the client.~~ Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank, trust company, credit union or savings and loan association authorized to do business in this state, which safe deposit box shall be clearly designated as "Clients' Account" or "Trust Account," or words of similar import, and be separate from the attorney's own safe deposit box.

II. **SCR 20.50**(1) and (a) are amended to read:

(1) All funds of clients paid to a lawyer or law firm ~~, other than advances for costs and expenses,~~ shall be deposited in one or more identifiable ~~bank~~ trust accounts as provided in sub (3) maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm may be deposited in such an account except as follows:

(a) Funds reasonably sufficient to pay ~~bank~~ account service charges may be deposited in the account.

III. **SCR 20.50**(3) is created to read:

SCR 20.50(3) Each trust account under this rule shall be an account in any bank, trust company, credit union or savings and loan association, selected in the exercise of ordinary prudence, authorized by federal or state law to do business in Wisconsin and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, the Wisconsin Credit Union Savings Insurance Corporation, or the Federal Savings and Loan Insurance Corporation. An interest-bearing trust account shall bear interest at a rate no less than that applicable to individual accounts of the same type, size and duration and in which withdrawals or transfers can be made without delay when funds are required, subject only to any notice period which the depository institution is required to observe by law or regulation. Lawyers and law firms are subject to the following:

(a) 1. A lawyer who receives client funds shall maintain a pooled interest-bearing trust account for deposit of client funds that are:

a. Nominal in amount or expected to be held for a short period of time, or

b. Not deposited in an account or investment under par (b), or

c. Not eligible for an account or investment under par (b) because the client is a corporation or organization not permitted by law to maintain such an account or the terms of the account are not consistent with a need to make funds available without delay.

2. The interest accruing on this account, net of any transaction costs, shall be paid to the Wisconsin Trust Account Foundation, Inc., which shall be deemed the beneficial owner thereof. A lawyer may notify the client of the intended use of these funds.

(b) A lawyer shall deposit all client funds in the account specified in par (a) unless they are deposited in any of the following:

1. A separate interest-bearing trust account for the particular client or client's matter, the interest on which shall be paid to the client, net of any transaction costs.

2. A pooled interest-bearing trust account with subaccounting by the financial institution, the lawyer or the law firm that will provide for computation of interest earned by each client's funds and the payment thereof to the client, net of any transaction costs.

3. An income-generating investment vehicle selected by the client and designated in specific written instructions from the client on which income shall be paid to the client, net of any transaction costs.

4. A demand deposit or other non-interest-bearing account for funds that are neither nominal in amount nor expected to be held for a short term, provided the client specifically so directs.

(c) In deciding whether to use the account specified in par (a) or an account or investment specified in par (b), a lawyer shall determine, at the time of their deposit, only whether the client funds could be utilized to provide a positive net return to the client by taking into consideration all of the following:

1. The amount of income the funds would earn during the period they are expected to be on deposit.

2. The cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for income accruing to a client's benefit.

3. The capability of financial institutions to calculate and pay interest or other income to individual clients.

(d) The determination whether funds to be invested could be utilized to provide a positive net return to the client rests in the

sound judgment of the lawyer or law firm. If a lawyer acts in good faith in making this determination, the lawyer is not subject to any charge of ethical impropriety or other breach of the rules of professional conduct.

(e) For accounts created under par (a), the lawyer or law firm shall direct the depository institution to remit to the Wisconsin Trust Account Foundation, Inc., at least quarterly, the interest or 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, together with a statement showing the name of the lawyer or law firm for whose account the remittance is sent, the rate of interest applied, the amount of service charges deducted, if any, and the account balance for the period for which the report is made, and to provide a copy of the statement to the owner of the account.

Dated at Madison, Wisconsin, this 21st day of March, 1986.

BY THE COURT:
/s/ Marilyn L. Graves

Marilyn L. Graves
Clerk

Day, J., would include in the rule, SCR 13.03(2), specifying the purposes for which "interest on lawyer's trust account" funds may be used, "to improve the administration of justice," as proposed by the State Bar.

SHIRLEY S. ABRAHAMSON, J. *(dissenting).* I would adopt a voluntary, rather than a mandatory, participation program. Of the 40 jurisdictions (39 states and the District of Columbia) in which Interest on Trust Accounts Programs have been approved, 34 have implemented programs in which attorney participation is voluntary. IOLTA Update, vol 3, No. 3 (Winter 1986). I would even consider making participation dependent upon the wishes of the client rather than the attorney.

I am not convinced a new board is necessary, but if a new board is necessary, I would not adopt the model established by the court. Rather than requiring the president of the state bar to select 12 of the 15 members, I would have the members of the bar elect attorney members. I would not limit the nonattorney members of this 15-person board to 3. The program is operated with interest derived from funds which do not belong to attorneys and the interest is to be

spent for public purposes. I would have the court select the nonattorney members and they should make up a majority or at least a substantial minority of the board.

The expenditure of IOLTA funds is limited to provide legal aid to the poor and to pay the administrative expenses of the program. This limitation is unfortunately necessitated by the compulsory nature of the program. Limiting expenditures may reduce any controversy which may be generated over the use of funds raised by mandatory participation. Cf. Petition re State Bar's Lobbying Activities. If IOLTA funds are to be expended for purposes other than to provide legal aid to the poor and for administrative expenses, the court must specifically approve the expenditure for exclusively public programs. Because there are many worthy projects in addition to providing legal aid to the poor, this court may soon be operating as a granting agency for what may well be a million-dollar-a-year fund. The court should not be in the business of granting funds. If the Wisconsin program were voluntary, the court could more easily approve the state bar's request that IOLTA funds be made available for the broad purpose of improving the administration of justice. This broad category would reduce or eliminate the need to seek approval of the court for expenditures for public purpose programs.

I do not join the majority because I believe that a voluntary IOLTA program is the wiser way to begin this worthwhile program in Wisconsin.

STEINMETZ, J. *(dissenting).* There can be no argument against the purpose of the "Interest on Trust Accounts Program" (IOLTA) as stated in SCR 13.01. There is a need for legal aid to the poor, even though that group is not defined by these rules. (SCR 13.03(2)(a).) However, that need should be satisfied by the State of Wisconsin through the tax system. Every taxpayer and citizen of this state has a right and duty to support legal aid to the poor or be recipients of such services, if qualified. It is a function of government to see that the need is met. There is no reason that clients of bar members should be the only persons in society supplying the funds as an investment base for the money to support a legal aid program.

The court rationalizes making IOLTA mandatory for all licensed attorneys based on the court's supervisory authority over attorneys and its inherent rule making powers. However, there is no logical nexus between the use of clients' funds to raise monies for support of the program and the regulation of attorneys. Proponents of IOLTA state that presently only banks benefit from the deposits of certain

trust monies and therefore it is proper to use these same qualifying funds of clients to support IOLTA. In other words, these funds do not now benefit the clients and, therefore, the program will not deprive the clients of anything. The court has no authority over these client funds except through the convoluted reasoning that it controls the attorney's conduct and therefore has control over investment of these qualifying monies and the interest therefrom. I do not believe that it should be influential at all that presently no one, other than banks, realizes any benefits from the deposit of such nominal short term deposits.

I also question whether the program can be equitably enforced. All attorneys are required to participate in the program unless:

"**SCR 13.04**...

"(a) The attorney certifies on his or her annual trust account statement filed with the state bar that:

"1. based on the attorney's current annual trust account experience and information from the institution in which he or she deposits trust funds, service charges on the account would exceed or equal any interest generated; or

"2. because of the nature of the attorney's practice, the attorney does not maintain a trust account.

"(b) The board, on its own motion or upon application from an attorney, grants a waiver from participation in the program for good cause."

Refusal or neglect by an attorney to participate in the program, except as provided under subsections (1) and (2) above, constitutes professional misconduct and may be grounds for disciplinary action under the rules governing enforcement of attorneys professional responsibility. SCR 13.04(3).

The determination whether funds to be invested could be utilized to provide a positive net return to the client (and therefore excepted) rests in the sound judgment of each attorney or law firm. No charge of ethical impropriety or other breach of the rules of professional conduct shall attend a lawyer's exercise of sound judgment, provided the lawyer is acting in good faith. SCR 20.50(3)(c). The test of sound judgment arrived at while acting in good faith is not a very certain one upon which the Board of Attorneys Professional Responsibility can determine misconduct.

In the history of the integrated bar there have been developing areas of attorney conduct subject to discipline. First, it was the basic requirement of paying dues or not being allowed membership.

Second, in SCR Chapter 20, the Code of Professional Responsibility set the standards for ethical conduct. Third, in SCR 31.08 continuing legal education was required. Fourth, Chapter 11 required client security funds to protect clients from unethical conduct of attorneys. IOLTA is the first discipline being imposed on the bar members for conduct not directly related to the continuing practice of law.

I would not make participation in IOLTA mandatory on the members of the Wisconsin Bar Association, in which membership is mandatory. Making the program mandatory on attorneys also makes it mandatory on their qualifying clients' funds and is therefore confiscatory. I would allow voluntary participation in the program.