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IOLTA Feature

The History of IOLTA – Lessons for the Future

By Linda K. Rexer

Introduction

The title of this article was also the title of a workshop presented at the Winter 2010 IOLTA Workshops. It is fitting that this workshop was presented in Orlando, Florida because Florida was the first state to adopt IOLTA in 1978, and its leaders have been helping other states build similar IOLTA legacies ever since. It was also appropriate that the workshop panelists included Florida IOLTA pioneers Arthur England and Jane Curran who helped make IOLTA a reality in Florida and, through many subsequent years of leadership, in the nation as well.

This session could have only been made more remarkable by going back even further in time than Florida's American foray into IOLTA. That was accomplished by the participation of Wayne Robertson from British Columbia, Canada, the site of the first IOLTA program in the western hemisphere. It was from leaders of that program that Arthur England (then Florida Chief Justice Arthur England) brought to the U.S. the concept of enhancing access to justice for those in need by capturing income from short term and nominal client funds held in trust by lawyers. As the last member of that panel, the author of this article had the privilege of moderating the session and asking these long-time IOLTA leaders about how IOLTA began and what lessons in IOLTA history can inform us into the future. This article will try to capture highlights from that discussion.

The Canadian Experience

To begin with the Canadian experience, we have to look first to England and Scotland where, prior to 1964, lawyers (solicitors) kept money they were holding on behalf of clients in an account marked "for clients" from which the lawyers kept the interest. The Council of the Law Society of Scotland found the practice of lawyers earning interest on clients' money acceptable, but the tax authorities did not. In the end, the House of Lords in the case of *Brown vs. Inland Revenue Commissioners, 1964 – 3 ALL E. R. 119*, found that the interest did not belong to the lawyer. Common law jurisdictions around the world then looked for ways to comply with this new statement of the law. One proposal, in 1965, was from British Columbia lawyer George Reilly, who wrote an article suggesting that a foundation be formed and that the funds be used to support legal aid.

In 1967, New South Wales, Australia decided to deal with the issue by creating the Law Foundation of New South Wales to receive the interest and use it for legal aid, legal education and legal research purposes. That year, Charles Braizier, QC, of the Vancouver firm of Davis and Company, went to Australia to learn about the Law Foundation. Upon his return, Mr. Braizier, who later became Treasurer (President) of the Law Society in British Columbia, informed his friends Arthur Harper, QC, and Kenneth Meredith, later Justice Meredith, about what New South Wales had done. They decided to recommend to the government that a Law Foundation be formed in British Columbia to collect and distribute the interest on lawyers' trust accounts in that province.

In April 1969, The Law Foundation of British Columbia was formed as the first IOLTA program in North America. After receiving a loan of $100 from the Law Society to buy supplies and enlisting the administrative support of

the local community foundation, the Law Foundation of British Columbia opened for business. Income in the first year was $50,031 and grants were made totaling $5,000; the program grew to more than $50 million in revenue in 2007.

From 1971 to 1986, law foundations were formed in all other Canadian jurisdictions, all by statute, all with significant support from the legal profession. IOLTA was originally voluntary for lawyers, but soon became mandatory. In 1975, in the case of *McAfee vs. The Law Society of British Columbia, 1975-57-DLR (3rd) 730*, the Law Foundation survived a challenge to its existence. Over $1 billion has been granted by Canadian law foundations since their inception in their mandated areas of legal aid, legal education, legal research, law reform and law libraries.

IOLTA Comes to the United States

Those readers picturing a world map in which the IOLTA history line had gone from England and Scotland to Australia and then to Canada should draw your next mental line from Vancouver to Tallahassee. The story of how the IOLTA concept came to the United States involves a senior lawyer in Vancouver, Sholto Hebenton, QC, of the law firm McCarthy, Tetrault, as well as fate. It happened that in 1961, both Mr. Hebenton and Arthur England were associates at the law firm Dewey, Ballantine in New York City. Later that decade, Mr. Hebenton returned to Vancouver, and Mr. England moved to Florida. In 1977, on the way back from a Canadian Bar Association meeting in Jamaica, Mr. Hebenton stopped in Tallahassee, Florida to visit his friend, Justice England, to whom he described the Law Foundation. Justice England then visited Vancouver to talk with leaders, including Mr. Hebenton and Arthur Harper, who were knowledgeable about their lawyer's trust account program.

After Justice England returned, he addressed The Florida Bar at its 1977 meeting, explained British Columbia's program, and recommended adoption of an interest on lawyers trust accounts program in Florida. Some young Florida lawyers, including Russ Carlisle, Don Middlebrooks, Randy Berg and Rod Petrey, took the lead in filing a petition to the Florida Supreme Court to establish an IOLTA program. The interest generated would be used to fund legal services for the poor and to provide grants for improvement in the administration of justice.

In 1978, Justice England authored an opinion[1] for the Florida Supreme Court, which approved the creation of a program to generate interest on lawyers trust accounts and designated The Florida Bar Foundation to administer the program. The opinion provided a road-map for other states with respect to the structure of an interest on trust accounts program, the arguments pro and con for such a program, and the constitutional issues implicated.

Moving IOLTA Forward

The 1978 opinion did not make the program operative in Florida, however. A number of things had to be accomplished before Florida's IOTA[2] program went into effect, including restructuring The Florida Bar Foundation from a small informal entity to one that could implement the IOTA program.[3] There were a number of more complicated steps needed to get IOTA up and running, and to give it national impetus. Someone had to convince the Internal Revenue Service that the income generated on lawyers' trust accounts was not taxable to the attorneys or to the clients under the "assignment of income" doctrine. Washington DC tax lawyer Henry Zapruder accomplished this in obtaining Rev. Ruling 81-209 and Revenue Ruling 87-2. That favorable tax treatment requires that the lawyer or law firm, and not the client or third person, determine whether trust funds are placed in an IOLTA account. That ruling rested in part on an opinion that had been obtained from the Florida Attorney General that the Bar Foundation would hold the entire beneficial interest in the income from IOTA accounts.

There were also a number of things being done on a broader and on-going scale in order to entrench IOLTA into the law on a nation-wide basis. In 1979, Justice England obtained endorsement of the IOLTA concept from the

Conference of Chief Justices, and Russ Carlisle persuaded the National Conference of Bar Foundations to support the idea.

It was also necessary to make sure that the IOTA concept was compliant with federal and state banking law laws. Colorado lawyer Bruce Buell procured an opinion from the Comptroller of the Currency, based on the recent authorization by the U.S. government of payment of interest on NOW accounts -- Negotiable Order of Withdrawal accounts (interest-bearing checking accounts), that NOW accounts could be used for IOLTA.[4] In 1982, David Shear of Tampa obtained an Ethics Opinion from the ABA[5] that clarified the appropriateness of lawyers participating in IOLTA programs.

Before Jane Curran became The Florida Bar Foundation's Executive Director, Randy Berg and Peter Siegel of the Florida Justice Institute in Miami assumed responsibility for implementing IOTA. In the summer of 1983, The Florida Bar Foundation gave its first grants totaling just under $300,000, based on participation of 17% of Florida's attorneys (the program was voluntary for lawyers at that time). Mr. Berg and Mr. Siegel undertook defending the lawsuits that were brought thereafter challenging the constitutionality of IOLTA.[6] They also worked to spread IOLTA nationally by planning and conducting the National Conference on IOLTA in Tampa in 1983 and by leading the charge to create the National IOLTA Clearinghouse in April 1983 (sponsored by the American Bar Association and others, with initial funding from the Legal Services Corporation).

IOLTA Becomes a National Movement

The ABA Task Force on IOLTA was created in 1981, and in 1986, the ABA established its Commission on IOLTA. Commission members and Justice England traveled the country to meet with state Supreme Court justices, legislators, bar association presidents and members, and bar foundation personnel to explain the IOLTA concept and to assist in getting state programs up and running. Justice England also made speeches to the American Judicature Society, to the National Conference of Bar Presidents, and to other groups promoting the concept of IOLTA. In 1986, the national IOLTA Clearinghouse duties were transferred from the Florida Justice Institute to the ABA Commission on IOLTA.

The National Association of IOLTA Programs (NAIP) was created in 1985; it has partnered with the ABA Commission on IOLTA ever since to assist IOLTA entities and other across the county to establish, manage and enhance IOLTA programs. The national network which had been institutionalized through the ABA Commission on IOLTA and NAIP enabled the centralization of resources and created a strong network of IOLTA programs assisting each other.

Mandatory IOLTA

By the early 1990s almost all states, Washington, DC and the Virgin Islands had IOLTA programs in place.[7] Many IOLTA programs began as voluntary for lawyers, which produced less revenue for charitable purposes than mandatory programs, in which all lawyers are required to participate. Over the years, 43 of the now 52 programs have adopted mandatory IOLTA; seven are (attorney) opt-out and two remain voluntary. The next challenge became revenue enhancement, which is achieved through negotiating with banks to waive fees and raise rates or, most recently, through interest rate comparability provisions.

IOLTA Rate Comparability

In IOLTA's early years, banks competed for deposits and paid as much as 5+% on standard checking accounts. Competition for deposits soon waned, however. That, coupled with the steady decline since then in the Federal Funds Target Rate, a key factor banks use to set checking account interest rates, resulted in IOLTA revenues declining just as steadily. During the same period, banks started to promote cash-management products paying higher interest rates to customers with larger checking balances.

The most common cash-management products are daily bank repurchase

agreements and government money market mutual funds. Both products automatically sweep out IOLTA balances overnight into the repurchase agreement or government money market mutual fund after all transactions clear the checking account and return the funds to the checking account the next morning along with the overnight interest. However, IOLTA balances that would otherwise qualify for the higher rates paid on these products (often average balances over $100,000) were only earning standard checking account rates because court rules and legislation governing IOLTA programs limited IOLTA-eligible funds to be held only in standard checking accounts.

The Ohio IOLTA program adopted the approach that lawyers must hold IOLTA accounts only in financial institutions that pay those accounts the same rates as accounts of non-IOLTA customers when IOLTA met the same minimum balance or other requirements.[8] In the decade since, 32 additional jurisdictions have adopted rate comparability provisions, in some instances resulting in a three to six-fold increase in IOLTA income.[9]

Overcoming Challenges

Other issues that have been addressed through the strength of the national IOLTA network working together have include two U.S. Supreme Court cases,[10] which culminated in 2003 with a decision upholding IOLTA's constitutionality. For these cases, the ABA Commission on IOLTA and NAIP worked with pro bono counsel from a number of distinguished law firms and the IOLTA programs in the affected states to bring numerous amici into the cases and assist those handing the litigation. Another example came in the recent economic downturn when some banks were failing; the national IOLTA community worked together to successfully advocate for full federal deposit insurance for IOLTA deposits.

Conclusion

The history of IOLTA highlighted in this article is the history of dedicated leaders in every state and the support of the organized bar whose efforts have resulted in much needed funding for legal aid for the poor and other charitable endeavors. IOLTA has been the second largest funding source in the country for legal aid, reaching $230 million in grants to nonprofit agencies providing civil legal aid to the poor in 2008.

Without IOLTA funding, many low-income families would have nowhere to turn for help with civil legal needs. These needs continue and the commitment to meet them continues. As Arthur England noted at the conclusion of the workshop, "IOLTA was an idea whose time had come. It was able to spread like wild-fire throughout the United States only because many people fanned its flames with enthusiasm and with dedication. It is more needed that ever because the need for legal aid has not decreased. The torch has now passed to new leaders who, I hope, will persevere and take inspiration from IOLTA pioneers and past leaders."

In 1989, Justice England gave a similar message at the end of a paper he authored entitled *Modern Day Alchemy: Interest on Lawyer's Trust Accounts*: "IOLTA is the product of the happy confluence of changed banking laws in the 1980s and a national cadre of public-spirited and imaginative judges and lawyers. Whether and for how long IOLTA programs will flourish will depend on the continued vigor and watchfulness of its supporters. Given the breadth and depth of commitment which has been manifest in the last eight years, I have little doubt that IOLTA will remain a potent force for equal justice well into the 1990s and beyond." The imaginative judges, lawyers and others who will guide IOLTA into the future can find no better model for their efforts than the leaders and history shared at the IOLTA workshop in Orlando in February 2010 and highlighted in this article.

Linda Rexer *has been Executive Director of the Michigan State Bar Foundation since 1987 before which she was a Managing Attorney for a legal aid program. She is a past President of NAIP, past Trustee of NCBF and currently serves on the ABA Commission on IOLTA and as Co-Chair of the ABA-NAIP Joint Technical Assistance Committee. Ms. Rexer gratefully*

acknowledges that much of the content for this article was compiled by three other panelists: Arthur England, Jane Curran and Wayne Robertson.

***Arthur England** is a Shareholder and Co-Chair of the appellate department at Greenberg Traurig. He was a Justice and Chief Justice of the Florida Supreme Court and is recognized as the original proponent of establishing IOLTA in Florida, the first IOLTA program in the United States.*

***Jane Curran** has been Executive Director of The Florida Bar Foundation since 1982. She is presently Chair of the Florida Philanthropic Network and Co-Chair of the ABA Commission on IOLTA-NAIP Joint Technical Assistance Committee.*

***Wayne Robertson** is the Executive Director of the Law Foundation of British Columbia - the first IOLTA program in North America.*

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1 *In re Interest on Trust Accounts*, 356 So.2d 799 (FL 1978). The program became operational in 1981 when federal tax aspects were resolved, *In the Matter of Interest on Trust Accounts*, 402 So.2nd 389 (FL 1981).

2 Florida's program is called "Interest on Trust Accounts" or IOTA. Most other states use the name "Interest on Lawyers Trust Accounts" or IOLTA.

3 In 1978, The Florida Bar Foundation was a small operation composed of senior members of The Florida Bar who made personal contributions for a scholarship fund, and it met once a year for a formal dinner in conjunction with the annual meeting of The Florida Bar.

4 In Florida, John Edward Smith with the Steel Hector and Davis law firm in Miami obtained similar approval from the Comptroller of Florida. He also obtained the Attorney General opinion referenced herein.

5 ABA Formal Opinion 348 (1982).

6 These included *Cone v. The Florida Bar*, 66 F. Supp. 132 (M.D. Fla. 1985) and *Cone v. The Florida Bar*, 819 F.2d 1002 (11th Cir. 1987). They also prepared an amicus brief before the California Court of Appeal in *Carroll v. State Bar of California, 166 Cal App3rd 1193 (4th Dist. 1985)* and an amicus brief in U.S. Supreme Court in *Chapman v. State Bar of California, Cert. Denied, Chapman v. State Bar of California, 474 U.S. 848 (U.S.Cal. Oct 07, 1985) (NO. 85-169)*, on behalf of 37 state bar associations and foundations.

7 IOLTA was not adopted in the last state, Indiana, until 1998.

8 Although Florida's IOLTA program enacted their "interest rate comparability" rule first, it was modeled on Ohio's pioneering concept.

9 For more details on interest rate comparability, which is based on concepts of fairness that banks treat IOLTA customers comparably to their other non-IOLTA customers and which authorizes the use of these higher paying cash management products for IOLTA, click here.

10 See *Phillips vs Washington Legal Foundation*, 524 U.S. 156 (1998) and *Brown vs. Legal Foundation of Washington,* 538 U.S. 216 (2003).

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