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# Are You Misappropriating Client Funds? Missouri's IOLTA Plan After *Mottl*

*Mottl v. Missouri Lawyer Trust Account Foundation*<sup>1</sup>

## I. INTRODUCTION

The purpose of Missouri's Interest on Lawyer Trust Accounts ("IOLTA") program, expounded in Rule 4-1.15,<sup>2</sup> is "to provide a source of funds for civil legal services to the poor, improve the administration of justice, and promote other programs for the benefit of the public."<sup>3</sup> Client funds placed into IOLTA accounts by Missouri attorneys earn interest that is remitted to the Missouri Lawyer Trust Account Foundation ("Foundation") to be disbursed to organizations that fulfill IOLTA's purposes.<sup>4</sup> Attorneys in Missouri are required to participate in the IOLTA program unless they meet a stated exception or choose to opt out of the program each year.<sup>5</sup>

In *Mottl v. Missouri Lawyer Trust Account Foundation*, the Missouri Court of Appeals for the Western District addressed the constitutionality of Missouri's IOLTA program for the first time and held that participation in Missouri's IOLTA program is not state action because of the voluntary nature of the program.<sup>6</sup> By so deciding, the court shifted liability for participation in the program from the state to private attorneys and law firms. As a result, an attorney must inform a client during initial consultation that the attorney or the attorney's firm voluntarily participates in the IOLTA program and that, as a result of this participation, the interest on client funds that is nominal in amount or held for a short period of time will be transferred to the Foundation.<sup>7</sup> Attorneys who fail to do so subject themselves to liability to the client for conversion of the client's interest and to possible disciplinary sanctions.<sup>8</sup>

## II. FACTS AND HOLDING

*Mottl* arose in 2002, when Robert Mottl filed a class action petition against the Foundation and the judges of the Missouri Supreme Court.<sup>9</sup> Mottl

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1. 133 S.W.3d 142 (Mo. Ct. App. 2004), *cert. denied*, 125 S. Ct. 346 (2004).

2. MO. SUP. CT. R. PROF'L CONDUCT 4-1.15.

3. *Id.* at 4-1.15 cmt.

4. *Id.* at 4-1.15(d)(4), (g)(2).

5. *Id.* at 4-1.15(e), (f).

6. *Mottl*, 133 S.W.3d at 147.

7. *See infra* notes 150-152 and accompanying text.

8. *See infra* notes 134-149 and accompanying text.

9. *Mottl*, 133 S.W.3d at 143-44. The judges of the Missouri Supreme Court named in the suit were "the Honorable Stephen N. Limbaugh, Jr., the Honorable

alleged that his attorney, Robert Heggie, deposited \$3,600 of Mottl's funds into an IOLTA account (the interest on which the Foundation collected) and that Mottl did not wish to have his funds so deposited.<sup>10</sup> Mottl sought a declaration that the retention and use of the IOLTA interest collected by the Foundation was an unconstitutional taking of private property "without just compensation in violation of the Fifth and Fourteenth Amendments" to the United States Constitution.<sup>11</sup> Additionally, Mottl sought injunctive and monetary relief on behalf of himself and a class of other clients whose attorneys had placed funds into IOLTA accounts.<sup>12</sup>

The Foundation and the Supreme Court judges filed motions to dismiss on the ground that the deposit of client funds into an IOLTA account did not constitute state action due to the voluntary nature of Missouri's IOLTA program.<sup>13</sup> Argument and hearing on the motions to dismiss were stayed pending the United States Supreme Court's decision on the constitutionality of Washington's IOLTA program.<sup>14</sup> Following the decision in *Brown v. Legal Foundation of Washington* in 2003, which upheld the Washington program,<sup>15</sup> the judges of the Missouri Supreme Court "filed a supplemental memorandum in support of their motion to dismiss," arguing the Missouri rule was materially the same as the Washington rule.<sup>16</sup>

After a hearing on the motions, the trial court "dismiss[ed] Mottl's petition for failure to state a claim upon which relief can be granted."<sup>17</sup> The trial court reasoned that because Rule 4-1.15 was similar to the Washington rule permitting client funds to be placed in an IOLTA account only when the funds were incapable of earning net interest for the client, the client suffered no loss as a result of the Rule, and therefore, the just compensation due Mottl would be zero.<sup>18</sup> In addition, the trial court ruled that because of the voluntary nature of the Missouri IOLTA program, Mottl could not prove the requisite state action to support his constitutional claim.<sup>19</sup>

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Duane Benton, the Honorable William Ray Price, Jr., the Honorable Ronnie L. White, the Honorable Michael A. Wolff, the Honorable Laura Denvir Stith, and the Honorable Richard B. Teitelman." *Id.*

10. *Id.* at 144.

11. *Id.*

12. *Id.* Mottl filed suit under 42 U.S.C. § 1983. *Id.*

13. *Id.* at 144-45. The Supreme Court judges alternatively argued "they were entitled to legislative immunity for promulgating the [Supreme Court] [R]ule" establishing Missouri's IOLTA program. *Id.* at 145 n.2. In addition, the judges argued that, if the court found that state action was present, Mottl's attorney must be a "state actor and [must be] joined as an indispensable party" to the action. *Id.*

14. *Id.* at 145.

15. See *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

16. *Mottl*, 133 S.W.3d at 145.

17. *Id.*

18. *Id.*

19. *Id.*

Mottl appealed to the Missouri Court of Appeals for the Western District.<sup>20</sup> The appellate court found that because of the voluntary nature of Missouri's IOLTA program, the decision to participate in the program "is in the hands of the attorney or law firm and ultimately the client who selects his attorney."<sup>21</sup> Thus, the court held that the deposit of client funds into an IOLTA account and the subsequent transfer of the earned interest to the Foundation is private action which cannot fairly be attributed to the State.<sup>22</sup> Thus, Missouri's IOLTA program is not an unconstitutional taking of private property without just compensation.

### III. LEGAL BACKGROUND

#### A. IOLTA History

Congress paved the way for state IOLTA programs in 1980 when it authorized the creation of Negotiable Order of Withdrawal ("NOW") accounts, which allowed federally insured banks to disburse interest on demand deposits for the first time.<sup>23</sup> NOW accounts may not accrue interest if held by for-profit corporations or partnerships unless the for-profit corporation or partnership holds funds in trust for a charitable organization that has "the exclusive right to the interest."<sup>24</sup> The interest is not treated as client income for federal income tax purposes<sup>25</sup> so long as the interest is subject to an IOLTA program administered by the state and "no client may individually elect whether to participate in the program"<sup>26</sup> or control the disposition of the interest.<sup>27</sup> The attorney or firm must elect whether to participate in the program as to all of its clients.<sup>28</sup> Therefore, an attorney's or firm's election to participate in the state's IOLTA program is an all-or-nothing decision; if an attorney or firm chooses to participate in the program, an attorney's or firm's clients may not choose not to participate on an individual basis.

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20. *Id.*

21. *Id.* at 147.

22. *Id.*

23. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 161 (1998) (citing 12 U.S.C. § 1832 (2000)).

24. *Id.* (citing a Letter from Federal Reserve Board General Counsel Michael Bradfield to Donald Middlebrooks (Oct. 15, 1981), reprinted in Donald M. Middlebrooks, *The Interest on Trust Accounts Program: Mechanics of its Operation*, 56 FLA. B.J. 115, 117 (Feb. 1982)). The court deferred to the Federal Reserve Board's interpretation of 12 U.S.C. § 1832, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *Phillips*, 524 U.S. at 161.

25. Rev. Rul. 87-2, 1987-1 C.B. 18.

26. Rev. Rul. 81-209, 1981-2 C.B. 16.

27. *Phillips*, 524 U.S. at 163.

28. Rev. Rul. 81-209, 1981-2 C.B. 16.

### B. Missouri's IOLTA Program

Missouri's IOLTA program is established in Missouri Supreme Court Rule 4-1.15, entitled "Safekeeping Property."<sup>29</sup> The purpose of the program is "to provide a source of funds for civil legal services to the poor, improve the administration of justice, and promote other programs for the benefit of the public as are specifically approved from time to time by the Missouri Supreme Court for exclusively public purposes."<sup>30</sup> Since the Foundation began collecting interest revenue in 1985, it has collected and disbursed over \$12.5 million to state legal services agencies and other public projects.<sup>31</sup>

Missouri's IOLTA program requires Missouri lawyers to establish and maintain interest-bearing depository accounts in which to deposit "all funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time."<sup>32</sup> The interest earned on these trust accounts is to be available for transfer on demand<sup>33</sup> to the Foundation and not to the individual clients whose funds comprise the account.<sup>34</sup> To determine whether client funds should be deposited into an IOLTA account, the attorney must consider: (1) the anticipated amount of interest to be earned during the period in which the funds are expected to remain in the account, (2) the costs required to establish and administer the account, (3) and the capability of the financial institution maintaining the account to calculate and pay interest to individual clients.<sup>35</sup> In determining whether funds will earn net positive interest, the attorney must consider: (1) service charges, (2) accounting fees, (3) tax reporting procedures, (4) the nature of the transactions involved, (5) the likelihood of delay, and (6) the costs of delivering the interest to the client, including stamps, envelopes, and clerical and administrative expenses.<sup>36</sup> The attorney is obligated to review the

29. MO. SUP. CT. R. PROF'L CONDUCT 4-1.15.

30. *Id.* at 4-1.15 cmt.

31. *From a Blueprint to a Footprint: After 20 Years, Missouri's IOLTA Program Continues Building a Legacy of Success*, MO. B. BULL., March 2005, at 9. The largest amount of money Missouri's IOLTA program has collected in a single year is \$1.3 million in 1991. *Id.* at 8. Falling interest rates have significantly reduced the program's revenues in recent years. *Id.* at 9. In 2003, IOLTA programs around the nation generated about \$200 million. JAMES R. DEVINE ET AL., PROFESSIONAL RESPONSIBILITY 156 (3d ed. 2004) (citing *Alabama Law Foundation's IOLTA Program Gets Good News from U.S. Supreme Court*, 64 ALA. LAWYER 261 (2003)).

32. MO. SUP. CT. R. PROF'L CONDUCT 4-1.15(d).

33. *Id.* at 4-1.15(d)(3).

34. *See id.* at 4-1.15(d)(4). The interest earned on the IOLTA account is to be forwarded to the Foundation at least quarter-annually. *Id.* at 4-1.15(d)(4)(i).

35. *Id.* at 4-1.15(d)(2).

36. *Id.* at 4-1.15 cmt.; *see also* *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 237-38 (2003).

account at reasonable intervals to determine if the client funds remain appropriate for deposit in the IOLTA account.<sup>37</sup>

Every lawyer in Missouri must certify to the Missouri Supreme Court that the lawyer or the law firm with which the lawyer is associated either participates in the IOLTA program or is exempt from participation.<sup>38</sup> There are five exemptions,<sup>39</sup> the first of which exempts an attorney from participation in the IOLTA program if the lawyer or law firm's practice, because of its nature, does not or is not required to maintain trust accounts.<sup>40</sup> Under the second exemption, a lawyer is exempt if the lawyer is primarily engaged in practice outside of Missouri and does not regularly practice law in Missouri.<sup>41</sup> The third exemption provides that a lawyer need not participate if the lawyer is part of a law firm with at least one lawyer admitted to practice in another jurisdiction and the lawyer or firm maintains a trust account outside of Missouri that remits the interest earned on such account to the client or third person who owns the fund or to an organization pursuant to the laws of the other jurisdiction.<sup>42</sup> The fourth exemption allows an attorney to decline to participate by notifying the Foundation in writing on or before January 31 of any year.<sup>43</sup> Finally, the Foundation's Board of Directors may exempt a lawyer from participation.<sup>44</sup>

### C. Constitutional Challenge

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment,<sup>45</sup> prohibits the government from taking private property for public use without just compensation.<sup>46</sup> This prohibition applies only to state action; it is inapplicable to actions taken by private parties.<sup>47</sup> For a taking to be considered state action, it must be carried out pursuant to state law and significant state involvement must exist.<sup>48</sup> For

37. MO. SUP. CT. R. PROF'L CONDUCT 4-1.15(d)(5).

38. *Id.* at 4-1.15(e).

39. *Id.*

40. *Id.* at 4-1.15(e)(1).

41. *Id.* at 4-1.15(e)(2).

42. *Id.* at 4-1.15(e)(3).

43. *Id.* at 4-1.15(e)(4), (f).

44. *Id.* at 4-1.15(e)(5).

45. U.S. CONST. amend. XIV; see *Philips v. Wash. Legal Found.*, 524 U.S. 156, 163 (1998).

46. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

47. *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982).

48. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 n.9 (1999).

[S]tate action requires *both* an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or a person for whom the State is respon-

“private” action to be attributable to the state, there must exist such a “close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”<sup>49</sup> A state will be found responsible for the actions of private parties when the state, by law, has compelled the act.<sup>50</sup>

Under 42 U.S.C. § 1983, a person may seek relief for the deprivation of rights, privileges and immunities secured by the Constitution or other law.<sup>51</sup> To be successful, the plaintiff must prove state action and that the deprivation was under color of law.<sup>52</sup> If the defendant’s conduct is deemed state action, then the conduct is also action “under color of state law” for purposes of section 1983.<sup>53</sup>

#### D. Case Law

Although *Mottl* is the first Missouri case to address the constitutionality of its IOLTA program, the United States Supreme Court has addressed the legitimacy of two other states’ IOLTA programs.<sup>54</sup> In the first case, *Phillips v. Washington Legal Foundation*,<sup>55</sup> the Court addressed a claim that Texas’ IOLTA program<sup>56</sup> amounted to a taking of private property without just compensation and, thus, violated the Fifth Amendment.<sup>57</sup> The Texas Supreme Court enacted its IOLTA program via State Bar Rule, providing that “client funds that are ‘nominal in amount or are reasonably anticipated to be held for a short period of time’ must [be placed by an attorney] in a separate, interest-

sible,” and that “the party charged with the deprivation must be a person who may fairly be said to be a state actor.”

*Id.* at 50 (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)).

49. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

50. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978) (citation omitted).

51. 42 U.S.C. § 1983 (2000).

52. *Sullivan*, 26 U.S. at 50.

53. *Brentwood*, 531 U.S. at 295 n.2 (citation omitted).

54. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

55. 524 U.S. 156 (1998).

56. Although *Phillips* specifically addressed Texas law, the Court cited to IOLTA programs in other states. *Id.* at 159-60.

57. *Id.* at 162. The plaintiffs included the Washington Legal Foundation, “a public-interest law and policy center with members in the State of Texas . . . opposed to the Texas IOLTA program,” a Texas attorney who regularly utilized an IOLTA account, and a Texas businessman who regularly utilized the services of an attorney. *Id.* at 162-63. At the time the case was decided, 49 states and the District of Columbia had adopted IOLTA programs. *Id.* at 159-60 n.1. Indiana was the only state that had not implemented an IOLTA program: *Id.* (citing *In re Ind. State Bar Ass’n Petition*, 550 N.E.2d 311 (Ind. 1990)). By 2003, every state and the District of Columbia had instituted an IOLTA program. *Brown*, 538 U.S. at 221.

bearing NOW account (an IOLTA account)."<sup>58</sup> The Texas IOLTA program considered funds to be "nominal in amount" or "held for a short period of time" if the lawyer holding such funds determined

such funds, considered without regard to funds of other clients which may be held by the attorney, law firm or professional corporation, could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be incurred in attempting to obtain the interest on such funds for the client.<sup>59</sup>

The interest proceeds from each attorney or law firm's IOLTA account were to be paid to the Texas Equal Access to Justice Foundation ("TEAJF"), which distributed the funds to nonprofit organizations which provided legal services for low income persons.<sup>60</sup>

The Court began its analysis of the Fifth Amendment taking issue by stating that the existence of a property interest is to be determined by state law.<sup>61</sup> The court then stated the general rule, dating back to English common law, that "interest follows principal."<sup>62</sup> Combining these principles, the Court stated that "as to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."<sup>63</sup> Finally, the Court characterized the Texas rule as a requirement that client funds incapable of generating net interest be deposited in IOLTA accounts.<sup>64</sup>

After characterizing the Texas IOLTA program in this manner, the Court rejected the view that "a physical item is not 'property' simply because it lacks a positive economic or market value."<sup>65</sup> The Court found that an owner has valuable property rights regardless of the fact that no economically realizable value is gained.<sup>66</sup> The Court also rejected an argument that the in-

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58. *Phillips*, 524 U.S. at 161 (citation omitted).

59. *Id.* at 162 (citation omitted).

60. *Id.*

61. *Id.* at 164 (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

62. *Id.* at 165-66 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980)).

63. *Id.* at 167.

64. *Id.* at 169.

65. *Id.*

66. *Id.* at 170. The Court specifically cited the owner's rights of possession, control, and disposition as being valuable despite the property's lack of economically realizable value. *Id.* The Court analogized the situation at bar to the government seizing rental income collected by the owner of a building, stating that the government



terest earned on the IOLTA accounts is not private property because the interest generated is “government-created value,”<sup>67</sup> finding instead that the interest income is generated by the client’s funds.<sup>68</sup> Thus, the Court held that interest income earned on funds placed in IOLTA accounts “is the ‘private property’ of the owner of the principal.”<sup>69</sup> In so holding, the Court specifically stated that it expressed no opinion as to whether the funds were taken by the state or as to the amount of just compensation due the owners of the principal if such a state taking occurred, leaving those arguments for another day.<sup>70</sup>

That day came in 2003, when the Supreme Court decided *Brown v. Legal Foundation of Washington*.<sup>71</sup> In *Brown*, the plaintiffs<sup>72</sup> claimed that the appropriation of interest earned on Washington IOLTA accounts amounted to an unconstitutional taking of their private property without just compensation.<sup>73</sup> Washington’s IOLTA program had four essential features:

- (a) the requirement that *all* client funds be deposited in interest-bearing trust accounts, (b) the requirement that funds that cannot earn net interest for the client be deposited in an IOLTA account, (c) the requirement that the lawyers direct the banks to pay the net interest on the IOLTA accounts to the . . . Foundation . . . , and (d) the requirement that the Foundation must use all funds received

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had no right to seize such funds simply because the rents collected exceeded the costs incurred by the owner to collect the rent. *Id.*

67. *Id.* The Court stated that the interest income was “economically realizable” by the IOLTA programs because of the federal government’s waiver of tax reporting costs and allowance of interest to be gained on the funds if the funds are remitted to the state, and that these allowances by the federal government “hardly constitute[] ‘government-created value.’” *Id.* at 170-71.

68. *Id.* at 171.

69. *Id.* at 172.

70. *Id.*

71. 538 U.S. 216 (2003).

72. The original plaintiffs in *Brown* were the Washington Legal Foundation, two Limited Practice Officers (“LPOs”), and two private individuals who regularly purchased and sold real estate and utilized the services of LPOs. *Id.* at 227-28 n.4. LPOs are nonlawyers who temporarily control client funds in their actions as escrowees in real estate transactions and fall within the provisions of the Washington IOLTA rules. *Id.* at 227. The Court of Appeals found that the Washington Legal Foundation and the two LPOs did not have standing to raise their claims. *Id.* at 228. The Washington Legal Foundation, which was a plaintiff in *Phillips v. Washington Legal Foundation*, is distinct from the Legal Foundation of Washington, the administrator of the IOLTA program. *Id.* at 216, 228; *supra* note 57.

73. *Brown*, 538 U.S. at 228-29. The plaintiffs alleged a violation of the Fifth Amendment, *id.*, applicable to the states through the Fourteenth Amendment, *supra* note 45. In addition, the plaintiffs alleged that having the IOLTA interest proceeds donated to specific organizations amounted to a forced association with the organization in violation of their First Amendment rights. *Brown*, 538 U.S. at 228.

from IOLTA accounts for tax-exempt law-related charitable and educational purposes.<sup>74</sup>

Furthermore, Washington's IOLTA funds include "only those funds that *cannot, under any circumstances, earn net interest (after deducting transaction and administrative costs and bank fees) for the client.*"<sup>75</sup>

In addressing the takings issue, the Court stated the general rule allowing the state to confiscate private property so long as the taking is for a public use and just compensation is paid to the owner.<sup>76</sup> The Court held that the first condition, public use, was "unquestionably satisfied."<sup>77</sup> Addressing the second condition, the Court found the "consistent and unambiguous holdings" of prior cases mandated that the just compensation due to the plaintiffs under the Fifth Amendment be "measured by the property owner's loss rather than the government's gain."<sup>78</sup>

The Court held that the client funds subject to the IOLTA program were funds that could in no event earn any net return; otherwise, the funds would not be subject to taking per Washington's IOLTA program.<sup>79</sup> The Court stated that if a client's funds were capable of earning net interest, the attorneys or LPOs would have violated the program rules by depositing them in the IOLTA account and the client's loss would be the result of private action instead of state action.<sup>80</sup> Conversely, if the funds were properly included in the program, then the just compensation due the plaintiffs for the state taking of their property in the IOLTA program would be nothing because the funds would be incapable of earning net interest, and therefore the Court found no constitutional violation when the plaintiffs were not compensated.<sup>81</sup>

After the initial decision in *Phillips*, the validity of the Missouri IOLTA plan was thrown into question due to the Supreme Court's ruling that the interest earned on IOLTA accounts was the clients' property.<sup>82</sup> To assuage this concern, the Missouri Bar's Legal Ethics Counsel advised attorneys in the state that the IOLTA program was still valid, but that attorneys should disclose their participation in the program to their clients whose funds may be

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74. *Brown*, 538 U.S. at 224 (emphasis added).

75. *Id.* at 226 (emphasis added).

76. *Id.* at 231-32.

77. *Id.* at 232. The majority stated that a state's actions in imposing a special tax to accomplish the same purposes as IOLTA programs would be a legitimate use of the public's money. *Id.*

78. *Id.* at 235-36. The Court quoted Justice Holmes' statement that "the question is what has the owner lost, not what has the taker gained." *Id.* at 236 (quoting *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910)).

79. *Id.* at 239-40.

80. *Id.*

81. *Id.* at 240.

82. *From a Blueprint to a Footprint: After 20 Years, Missouri's IOLTA Program Continues Building a Legacy of Success*, MO. B. BULL., March 2005, at 8.

deposited in an IOLTA account.<sup>83</sup> The Counsel's advisory opinion also reiterated that only funds to be held for a short period of time or nominal in amount should be deposited in IOLTA accounts.<sup>84</sup>

### *E. Conversion & Disciplinary Action*

"Conversion is the unauthorized assumption and exercise of ownership rights over the personal property of another party to the exclusion of the owner's rights."<sup>85</sup> For a successful action based on conversion, a plaintiff must show: (1) she was either "the owner of the property or entitled to possession of [it], (2) the defendant took possession of the property . . . inten[ding] to exercise . . . control over it, and (3) the defendant . . . deprived the plaintiff of [her] right to possess[ ] . . . the property."<sup>86</sup>

An action for conversion is usually not available "for money represented by a general debt."<sup>87</sup> However, where funds are entrusted to another for a specific purpose and the holder diverts the funds for a use other than that specified, an action for conversion is available.<sup>88</sup> Accordingly, where funds are placed with an attorney for a specific purpose by a client and the attorney uses the funds for a purpose other than that specified, the attorney is subject to liability for conversion, including possible punitive damages.<sup>89</sup>

Furthermore, an attorney who converts or misappropriates a client's funds is subject to disciplinary action. A lawyer has a duty to remit promptly to the client or a third person "any funds or other property that the client or

83. Missouri Legal Ethics Counsel Informal Advisory Opinion Number 980201.

84. *Id.*

85. *IOS Capital, LLC v. Allied Home Mortgage Capital Corp.*, 150 S.W.3d 148, 152 (Mo. Ct. App. 2004).

86. *Id.* at 153.

87. *Dillard v. Payne*, 615 S.W.2d 53, 55 (Mo. 1981) (per curiam).

88. *Id.* "An action will lie for the conversion of money where there is an obligation to return or otherwise particularly treat specific money." H.D. Warren, Annotation, *Nature of Property or Rights Other Than Tangible Chattels Which May Be Subject of Conversion*, 44 A.L.R.2d 927 § 7[a] (1955). "Money delivered for safekeeping, to which the keeper claims no title and which is required and intended to be kept segregated, substantially in the form in which it was received . . . may be the subject of conversion." *Id.* § 7[b].

89. *Dillard*, 615 S.W.2d at 54-55. In *Dillard*, a client alleged that his attorney converted \$300 which the client advanced to the attorney to be placed in a trust account for the payment of lawsuit expenses. *Id.* at 54. The court found that \$10 of the advanced funds was spent on expenses and the attorney converted the remaining \$290. *Id.* The Missouri Supreme Court found that the plaintiff's petition adequately stated an action for conversion in that it alleged that the client's funds were placed in the custody of the attorney for a specific purpose and that the attorney diverted those funds for his own use. *Id.* at 55. The court found that these allegations stated a claim for conversion and that the plaintiff could seek punitive damages from the attorney. *Id.*

third person is entitled to receive.”<sup>90</sup> An attorney misappropriates a client’s funds when the attorney disburses funds in which a client has an interest “for purposes other than those of the client’s interests.”<sup>91</sup> The Missouri Supreme Court has stated that the proper remedy for conversion or misappropriation of a client’s money is disbarment.<sup>92</sup> “Even an unintentional mishandling of client funds by an attorney can justify disbarment.”<sup>93</sup> However, “[d]isbarment is the ultimate sanction and should be reserved for a clear case.”<sup>94</sup>

The Missouri Supreme Court has often looked to the American Bar Association’s Standards for Imposing Lawyer Sanctions (“ABA Standards”) for guidance in determining the proper punishment for an attorney who violates a duty to a client.<sup>95</sup> According to the ABA Standards, admonition is appropriate when a lawyer negligently handles a client’s property, causing little or no injury to a client.<sup>96</sup> Admonition is also appropriate if the attorney engages in an isolated incidence of negligently failing to accurately and completely inform a client causing little or no injury.<sup>97</sup> Reprimand is appropriate when an attorney negligently fails to accurately or completely inform a client, causing injury or potential injury.<sup>98</sup>

#### IV. INSTANT DECISION

The Court of Appeals for the Western District began its opinion by summarizing the facts of the case, the Missouri IOLTA program, and the procedural posture of the case before it.<sup>99</sup> The court then addressed the standard of review. Because the case was disposed of on a motion to dismiss for failure to

90. MO. SUP. CT. R. PROF’L CONDUCT 4-1.15(b).

91. *In re Schaeffer*, 824 S.W.2d 1, 5 (Mo. 1992) (en banc).

92. *In re Griffey*, 873 S.W.2d 600, 603 (Mo. 1994) (en banc).

93. *Id.*

94. *Schaeffer*, 824 S.W.2d at 6.

95. *See, e.g., In re Crews*, 159 S.W.3d 355, 360 (Mo. 2005) (en banc) (per curiam); *In re Snyder*, 35 S.W.3d 380, 385 (Mo. 2000) (en banc) (per curiam); *In re Cupples*, 979 S.W.2d 932, 936 (Mo. 1998) (en banc).

96. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 4.14 (1992). “Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer’s right to practice.” *Id.* at 2.6. Negligence involves an attorney’s failure to “heed a substantial risk that circumstances exist or that a result will follow,” deviating from the standard of care of a reasonable attorney in the situation. *Id.* at Definitions.

97. *Id.* at 4.64.

98. *Id.* at 4.63. “Reprimand, also known as censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer’s right to practice.” *Id.* at 2.5.

99. *Mottl v. Mo. Lawyer Trust Account Found.*, 133 S.W.3d 142, 143-45 (Mo. Ct. App. 2004), *cert. denied*, 125 S. Ct. 346 (2004).

state a cause of action, the standard of review was *de novo*.<sup>100</sup> The court next addressed Mottl's taking claim, which involved a determination of whether the IOLTA program constituted state action.<sup>101</sup>

In addressing Mottl's claim, the court first summarized the law concerning takings by the state under the Fifth and Fourteenth Amendments.<sup>102</sup> The court reiterated that the prohibition against taking private property without just compensation does not apply to acts of private parties; it is only offended by acts of the state.<sup>103</sup> The court stated that a plaintiff in an action pursuant to 42 U.S.C. § 1983 must likewise prove state action.<sup>104</sup>

The court found that, because the transfers of interest from the IOLTA program to the Foundation were authorized by Supreme Court Rule 4-1.15, the transfers satisfied the first requirement of the state action test, action taken pursuant to state law.<sup>105</sup> The court then focused on the second inquiry mandated by the test: significant state involvement.<sup>106</sup> The court looked to "the specific conduct of which the plaintiff complain[ed]": the deposit of Mottl's funds by his attorney into an IOLTA account and the transfer of the interest earned on those funds to the Foundation constituted a taking of his property without just compensation.<sup>107</sup> The court identified the primary issue in the

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100. *Id.* at 145. The court stated that all the factual allegations in the plaintiffs' petition were assumed to be true and favorably construed for the plaintiffs. *Id.* (citing *Long v. Cross Reporting Serv., Inc.*, 103 S.W.3d 249, 252 (Mo. Ct. App. 2003)). "The petition is reviewed to determine whether it invokes principles of substantive law and whether the facts alleged, if proven, would entitle the plaintiff to relief." *Id.* (citing *Long*, 103 S.W.3d at 252).

101. *Id.* at 145-46. Mottl presented two different points on appeal. First, Mottl claimed the trial court erred in dismissing the case because the Missouri IOLTA plan did not "unambiguously forbid the deposit into IOLTA accounts of client funds that could earn net interest," and therefore a trial on the issue of just compensation was due. *Id.* at 145. The second claim was that the IOLTA program enacted by Supreme Court Rule 4-1.15 constituted state action. *Id.* at 145-46. The court did not address the first claim because it found the state action claim to be dispositive. *Id.* at 146.

102. *Id.* at 146.

103. *Id.* (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-38 n.6 (1982)).

104. *Id.* (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999)).

105. *Id.*

106. *Id.* Mottl argued that this second part of the inquiry need not have been addressed by the court because the state officials enforcing the rule, the Supreme Court judges, were joined in the suit. *Id.* at 147 n.4. The court dismissed this assertion because Mottl did not allege the judges were overtly involved or jointly participated with those private persons who took his property without just compensation. *Id.* Mottl alleged state action based on the judges creation and enforcement of the rule. *Id.* The court stated that the rule must meet the second element of the state action test for its constitutionality to be addressed pursuant to a section 1983 action. *Id.*

107. *Id.* at 147.

case as “whether these acts of private persons or entities are fairly attributable to the State.”<sup>108</sup>

Mottl contended the deposit of his funds into an IOLTA account by his attorney and the transfer of the interest earned on his funds to the Foundation were attributable to the state, thus satisfying the second requirement of the state action test.<sup>109</sup> The court noted that action authorized or encouraged by the state or done with the approval or acquiescence of the state is insufficient to attribute the conduct to the state.<sup>110</sup> The court found that because of Rule 4-1.15’s opt-out provision, participation in Missouri’s IOLTA program was “not required, compelled, or coerced by the State.”<sup>111</sup> This differentiated Missouri’s IOLTA program from Washington’s mandatory IOLTA program, addressed in *Brown*.<sup>112</sup> Accordingly, the court held that “the acts of depositing client funds into an IOLTA account and the subsequent transfer of interest earned on the account to the Foundation are not attributable to the State.”<sup>113</sup> Because Mottl failed to show that the alleged actions were fairly attributable to the State, there was no state action, and the court of appeals affirmed the trial court’s dismissal of his petition.<sup>114</sup>

## V. COMMENT

*Mottl* is important for many reasons. First, it is the first Missouri appellate case addressing the constitutionality of Missouri’s IOLTA program. Second, because Mottl joined as parties the judges of the Missouri Supreme Court and because the United States Supreme Court denied certiorari,<sup>115</sup> the decision of the Court of Appeals for the Western District is for now the final authority on this issue in Missouri. Third, and probably most importantly, this case switched liability for the deposit of a client’s funds in an IOLTA account and subsequent use by the Foundation from the state to private attorneys and law firms around the state.

Because *Mottl* is the first Missouri appellate case to address the constitutionality of Missouri’s IOLTA program, it, along with the two prior United States Supreme Court decisions, represents the only authority in Missouri on

108. *Id.*

109. *Id.*; see *supra* note 106 and accompanying text.

110. *Mottl*, 133 S.W.3d at 147 (citing *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52-53 (1999); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978)).

111. *Id.*

112. *Id.*

113. *Id.* The court stated that the Supreme Court’s finding in *Brown* that a private attorney’s mistaken deposit into an IOLTA account of funds that were capable of earning net interest would destroy state action supports the holding that a Missouri attorney’s deposit of any client’s funds in an IOLTA account destroys state action. *Id.* at 147-48.

114. *Id.* at 148.

115. See *Mottl v. Mo. Lawyer Trust Account Found.*, 125 S. Ct. 346 (2004).

its IOLTA program. Related to this is the fact that the appellate court's decision in *Mottl* will not be reviewed by a higher court. Because *Mottl* joined as defendants the judges of the Missouri Supreme Court,<sup>116</sup> the Supreme Court judges are unable to review the Western District's decision.<sup>117</sup> *Mottl* filed for certiorari with the United States Supreme Court but was denied review.<sup>118</sup> Thus, until a challenge is brought that does not involve the judges of the Missouri Supreme Court and that court decides to review it, *Mottl* represents binding authority on the state action issue underlying a challenge to Missouri's IOLTA program.

When combined with the prior holdings of the United States Supreme Court concerning other states' IOLTA programs, the Western District's decision in *Mottl* effectively shifts liability for participation in Missouri's IOLTA program from the state to private attorneys and law firms. In *Phillips v. Washington Legal Foundation*,<sup>119</sup> the United States Supreme Court held that the interest income earned on funds deposited in IOLTA accounts is the private property of the client because the client owns the principal.<sup>120</sup> In *Brown v. Legal Foundation of Washington*,<sup>121</sup> the United States Supreme Court held that the just compensation due from the state on funds properly submitted under Washington's IOLTA program is zero because the funds are incapable of earning a net return on the interest accrued.<sup>122</sup>

Because Missouri's IOLTA program is substantially similar to Washington's programs, presumably the holding would be applicable to Missouri's program. The holding in *Mottl*, however, makes the holding in *Brown* pertaining to just compensation inapplicable to Missouri's IOLTA program. The court held in *Mottl* that an attorney's participation in Missouri's IOLTA program is voluntary and therefore not an action attributable to the State.<sup>123</sup> Thus, the attorney, rather than the state, is ultimately responsible to the client

116. *Mottl*, 133 S.W.3d at 143-44.

117. According to the Missouri Code of Judicial Conduct, a judge must recuse when he or she is a party to the proceeding. MO. SUP. CT. R. 2.03, Canon 3E(1)(d)(i). The Code, however, allows for remittal of disqualifications by the terms of Canon 3E. *Id.* at 2.03, Canon 3F; see also MO. REV. STAT. § 476.180 (2000) (no judge who is interested in a suit may, without express consent of the parties, preside over a trial or determination thereof). Even with consent of the parties, it is doubtful that a judge who is a party defendant could sit and try his or her own case. *Kansas City v. Knotts*, 78 Mo. 356, 359-60 (1883). Thus, an appellate judge presumably also would be barred from reviewing a case in which he or she is a party, even with the consent of the other parties.

118. See *supra* note 115 and accompanying text.

119. 524 U.S. 156 (1998).

120. *Id.* at 172.

121. 538 U.S. 216 (2003).

122. *Id.* at 239-40.

123. *Mottl v. Mo. Lawyer Trust Account Found.*, 133 S.W.3d 142, 147 (Mo. Ct. App. 2004), *cert. denied*, 125 S. Ct. 346 (2004).

for the appropriation of the client's funds to the IOLTA program.<sup>124</sup> The fact that no net interest is capable of being earned on client funds properly deposited in IOLTA accounts does not save private attorneys or law firms who subject their clients' funds to the Missouri IOLTA program.

Clients entrust their property to attorneys, and attorneys have a duty to notify the client of, and promptly deliver to the client, funds and other property in which the client has an interest.<sup>125</sup> According to the United States Supreme Court, the interest earned on client funds deposited in an IOLTA account is the personal property of the client.<sup>126</sup> Thus, if an attorney or law firm deposits client funds in an IOLTA account and such funds earn interest, the client must be notified of such interest and the interest must be promptly delivered to the client regardless of whether the interest earned has a positive economic value to the client.<sup>127</sup> Because the interest is the client's property, the client has the right to determine how the interest is disposed.<sup>128</sup> Presumably, the only logical reason a client would decide to absorb the economic loss associated with delivery of the interest is because of the client's fundamental disagreement with his or her funds supporting the IOLTA program and the public services it funds.

Because an attorney must remit to the client the interest earned on his or her funds, if the attorney deposits the client's funds in an IOLTA account without the client's knowledge and tacit approval,<sup>129</sup> the attorney thereby appropriates the client's funds without client permission. In other words, the attorney or firm has unilaterally taken the client's interest and donated it to charity, thereby misappropriating the funds.<sup>130</sup>

Because the court of appeals in *Mottl* found that the State does not compel participation through Rule 4-1.15,<sup>131</sup> an attorney cannot merely remit the client's interest to the Foundation under the impression that participation in the program is mandated. The court found that state action did not exist because the voluntary nature of the program placed the decision to participate

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124. See *id.* at 147. The Fifth and Fourteenth Amendments to the Constitution do not apply to private action, nor does section 1983. See *supra* notes 46-52 and accompanying text.

125. MO. SUP. CT. R. PROF'L CONDUCT 4-1.15(b).

126. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

127. *Id.* at 170 ("While the interest income . . . may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.").

128. *Phillips*, 524 U.S. at 170.

129. The client's tacit approval would be through the client's decision to retain the representation of an "IOLTA attorney." If a client informed of the attorney's voluntary participation in the IOLTA program retained the attorney, the client would, thus, be agreeing to have the attorney donate the interest earned on the client nominal or shortly-held funds to the Foundation.

130. See generally *In re Schaeffer*, 824 S.W.2d 1, 5 (Mo. 1992) (en banc).

131. *Mottl v. Mo. Lawyer Trust Account Found.*, 133 S.W.3d 142, 147 (Mo. Ct. App. 2004), *cert. denied*, 125 S. Ct. 346 (2004).



“in the hands of the attorney or law firm and ultimately the client who selects his attorney.”<sup>132</sup> The court’s finding that the decision is ultimately in the hands of the client assumes that the client’s attorney or law firm informs the client that the attorney or law firm’s participation in the IOLTA program is voluntary.<sup>133</sup> If the attorney informs the client that the attorney participates in the IOLTA program and that this participation is voluntary and explains the effect of this participation on the client’s funds, the client’s subsequent retention of the attorney’s services would be a tacit approval of the attorney’s transfer of any interest earned on funds subject to the IOLTA provisions to the Foundation. However, if the attorney fails adequately to inform the client before the client’s retention of the attorney’s services, the attorney is acting unilaterally by remitting the client’s interest to the Foundation and is thereby misappropriating client funds.

If the attorney or law firm fails to gain the client’s express or tacit approval to remit any IOLTA interest earned to the Foundation, the attorney or firm could be liable for damages to the client. An attorney who fails to inform the client of the attorney’s IOLTA participation and who subjects those funds to the IOLTA program would be exercising ownership rights over the property of the client without permission. These actions satisfy the elements for conversion.<sup>134</sup> The interest proceeds from the deposit of a client’s funds into an IOLTA account are the property of the client,<sup>135</sup> thus the first element of conversion, establishing that the plaintiff is the owner of the property,<sup>136</sup> is satisfied. By placing a client’s funds into an IOLTA account knowing that the interest would be diverted to the Foundation, the attorney would be taking possession of the client’s property and intentionally diverting it to the Foundation, thereby satisfying the second element.<sup>137</sup> These actions deprive the

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132. *Id.* Individual clients of an attorney or law firm that participates in the IOLTA program cannot elect not to have their funds subjected to the program if the clients retain the participating attorney or firm. See *supra* notes 25-28 and accompanying text. In order to not have their funds subject to the program, clients would be required to find an attorney or firm that does not participate in the program. See *Mottl*, 133 S.W.3d at 147.

133. This position is reinforced by the position that the Missouri Legal Ethics Counsel took in an informal advisory opinion offered after the United States Supreme Court’s decision in *Phillips v. Washington Legal Foundation* was rendered. See Missouri Legal Ethics Counsel Informal Advisory Opinion Number 980201. In the opinion, Missouri attorneys were advised that their participation in the Missouri IOLTA program should be disclosed to clients whose funds may be deposited in IOLTA accounts. *Id.*

134. “Conversion is the unauthorized assumption and exercise of ownership rights over the personal property of another party to the exclusion of the owner’s rights.” *IOS Capital, LLC v. Allied Home Mortgage Capital Corp.*, 150 S.W.3d 148, 152-53 (Mo. Ct. App. 2003).

135. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

136. The first element of conversion is establishing that the plaintiff is the owner of the property. *IOS Capital*, 150 S.W.3d at 153.

137. The second element of conversion is the defendant’s taking of possession of the plaintiff’s property intending to exercise control over it. *Id.*

client of possession and control of her interest and the right to dispose of it according to her wishes in satisfaction of the third element of conversion.<sup>138</sup>

An action for conversion is appropriate when a person entrusted with money for a specified purpose utilizes those funds for a purpose other than that specified.<sup>139</sup> The actions of an attorney placing a client's funds into an IOLTA account without the client's permission would meet this definition because the attorney is entrusted with those funds so the attorney will hold them for the purposes of advancing the client's interests. The attorney presumably would hold the interest earned on those funds for the same purposes.<sup>140</sup> The attorney holds the funds as a trustee for the client and must promptly remit the funds to the client.<sup>141</sup> By disbursing the interest to the Foundation without the client's knowledge and approval, attorneys are diverting the interest with which they are entrusted for purposes other than those specified by their clients. Thus, an attorney who subjects a client's interest to the Missouri IOLTA plan without the client's knowledge could be liable for conversion of the client's interest.

In addition to potential liability for conversion, the attorney could face disciplinary sanctions. The Missouri Supreme Court has held that misappropriation or conversion of a client's funds is grounds for disbarment.<sup>142</sup> The penalty of disbarment, however, is normally invoked against attorneys who steal client funds for their own purposes or who fail to properly account for client funds.<sup>143</sup> Thus, arguably, disbarment would not be appropriate for an attorney who subjects his client's nominal amount of interest to the IOLTA program without permission. The Missouri Supreme Court, however, has used harsh language which leaves the possibility of disbarment open for less dubious conduct, stating that "[e]ven an unintentional mishandling of client funds by an attorney can justify disbarment."<sup>144</sup> Nevertheless, because disbarment has been characterized as "the ultimate sanction,"<sup>145</sup> a possibility

138. The third element of conversion is the deprivation of the defendant's right to possession of the property in question. *Id.*

139. *Dillard v. Payne*, 615 S.W.2d 53, 55 (Mo. 1981) (per curiam); *see also supra* notes 86-89 and accompanying text.

140. The principle that "interest follows principal" would seemingly apply here. *See supra* note 62.

141. *See MO. SUP. CT. R. PROF'L CONDUCT 4-1.15(b)*.

142. *See In re Griffey*, 873 S.W.2d 600, 603 (Mo. 1994) (en banc); *In re Schaeffer*, 824 S.W.2d 1, 5 (Mo. 1992) (en banc).

143. *See, e.g., Griffey*, 873 S.W.2d at 602-03 (attorney disbarred in part for failing to properly account for clients' funds, expending funds without clients' permission, failing to inform clients of funds received, and fraudulently endorsing clients' checks and depositing the checks in the attorney's operating account); *Schaeffer*, 824 S.W.2d at 5 (attorney disbarred in part for depositing client funds in account used by attorney for attorney's own purposes).

144. *Griffey*, 873 S.W.2d at 603.

145. *Schaeffer*, 824 S.W.2d at 6.

exists that an attorney would not be disbarred for participating in a program the attorney felt was mandated by a Supreme Court Rule.

The ABA Standards for Imposing Lawyer Sanctions support the contention that disbarment is not the appropriate remedy in such a circumstance. The attorney's failure to inform the client of the attorney's participation in the IOLTA program and the attorney's transfer of the client's interest to the Foundation would probably rise to the level of negligence under the ABA Standards,<sup>146</sup> because such conduct would likely deviate from the standard of care a reasonable attorney would exercise in the situation.<sup>147</sup> Additionally, the client would suffer little or no actual monetary damages as a result of the attorney's conduct because the client would essentially be losing a negative amount of money.<sup>148</sup> Thus, pursuant to the ABA Standards, the appropriate sanction would likely be a reprimand or an admonition.<sup>149</sup>

Now that *Mottl* has placed attorneys and law firms in the crosshairs for potential liability and disciplinary sanctions, only two viable options exist for the Missouri attorneys and firms to avoid such dire consequences. First, the attorney can disclose that participation in the IOLTA program is voluntary and that the attorney or firm participates in it before the client agrees to representation. Second, the attorney or firm may decline to participate in the IOLTA program altogether.

If the attorney or law firm elects to participate in the IOLTA program, the attorney or law firm should properly inform a potential client of its voluntary participation in the program during the initial consultation.<sup>150</sup> By so informing the potential client, the attorney puts the decision to participate in the hands of the client.<sup>151</sup> The client can make an informed decision to participate by retaining that attorney's services rather than seeking an attorney who does not participate in the program.<sup>152</sup> The client's informed decision to be represented by an "IOLTA attorney" would moot any issues of conversion or misappropriation because of the client's consent to remit any interest generated to the Founda-

146. See *supra* notes 95-98 and accompanying text.

147. See *supra* notes 95-98 and accompanying text.

148. See *supra* notes 32-37 and accompanying text.

149. See *supra* notes 96-98 and accompanying text.

150. This is the position espoused by the Missouri Legal Ethics Commission, and is something that the attorney or firm should have been doing anyway. See Missouri Legal Ethics Counsel Informal Advisory Opinion Number 980201.

151. The court, in part, based the *Mottl* decision upon the premise that the client makes an informed decision to participate in the IOLTA program when the client chooses to be represented by an attorney who participates in the program. *Mottl v. Mo. Lawyer Trust Account Found.*, 133 S.W.3d 142, 147 (Mo. Ct. App. 2004), *cert. denied*, 125 S. Ct. 346 (2004). However, this position assumes that some attorneys have already opted out.

152. In addition, the attorney can explain to the client the basic workings of the IOLTA program and that the fees to deliver the interest earned on the client's funds would outstrip the amount of the interest to be delivered.

tion. Because this approach can be achieved quickly in the initial meeting with the client, it seems to be the easier and more straightforward approach.

The other option would be for the attorney or law firm to opt-out of the IOLTA program altogether. This can be achieved through the opt-out provision of Rule 4-1.15.<sup>153</sup> Under this rule, an attorney or law firm may opt-out of the program by notifying the Foundation in writing on or before January 31 of any year.<sup>154</sup> This would alleviate any potential misappropriation or conversion problems because the attorney would not be remitting the client's interest to the program at all. However, if this option is taken by a large number of attorneys and law firms throughout the state, the effect on Missouri's IOLTA program could be disastrous.

Rule 4-1.15 further provides that if the attorney or law firm fails to meet the January 31 deadline, the attorney or law firm must maintain IOLTA accounts for the year.<sup>155</sup> Thus, once a firm or sole practitioner has decided to opt-out of the program, there may be a period of lag-time where the attorney or law firm will still be required to maintain an IOLTA account. During this period, an attorney should inform the client about the attorney's voluntary participation in the program, as previously discussed, to avoid any conversion or misappropriation problems.

## VI. CONCLUSION

The *Mottl* court's holding that an attorney's participation in Missouri's IOLTA program is not conduct attributable to the state has far-reaching effects for practitioners and the future of the IOLTA program. The holding has made attorneys and law firms who fail to inform a client of their voluntary participation in the Missouri IOLTA program liable to their clients for conversion of any interest earned on those clients' funds that are remitted to the Foundation pursuant to the program. Additionally, attorneys are subject to discipline for misappropriation of client funds. The holding could detrimentally impact the IOLTA program as a whole because the attorneys and law firms may simply opt-out of the program instead of addressing the issues surrounding the placement of client funds in IOLTA accounts with each client before retention. If enough attorneys and law firms opt-out of participation, it could have a devastating effect on a program that serves the public good throughout Missouri.

TIMOTHY D. STEFFENS

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153. Mo. SUP. CT. R. PROF'L CONDUCT 4-1.15(f).

154. *Id.*

155. *Id.*

