Interest on Lawyers' Trust Accounts: A Proposal for Wisconsin

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SPECIAL PROJECT
INTEREST ON LAWYERS' TRUST ACCOUNTS:
A PROPOSAL FOR WISCONSIN

In the course of their day-to-day practice attorneys are routinely entrusted with clients' funds paid, for example, as advances or retainers. This entrustment enables attorneys to carry out their responsibilities and fulfill the expectations of those retaining their services. Historically, these funds have been commingled and placed in noninterest-bearing accounts held in trust for the individual clients. In 1981, however, the Supreme Court of Florida, based on the work of the Florida Bar Association, implemented a program utilizing the earning power of these aggregated trust funds. The Florida court approved a plan allowing interest to accrue on these otherwise idle funds and directed that money earned from the investment program be used to finance predetermined public service activities in the legal sector. Recently,

1. These trust accounts are mandated by the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1982). Specifically:
   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 accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein . . .

2. In re Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981). The interest on trust account concept is relatively new to the United States but has existed for years in foreign countries. At least 17 jurisdictions outside of this country have programs of this nature: the Australian states of Queensland, New South Wales, South Australia, Victoria and the Australian Capital Territory; the Canadian Provinces of Ontario, Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan; Namibia; the Republic of South Africa and Zimbabwe. At least two more jurisdictions, England and Newfoundland, have proposed its adoption. See Gonser, Almond & Ziegler, Financing Public Service Activities with Interest-Bearing Attorney Trust Accounts, 15 IDAHO L. REV. 219, 221 & nn. 6-7 (1979).

the State Bar of Wisconsin formed a committee which is considering proposing a similar plan to the state supreme court.

This article will examine the ramifications of the interest-bearing trust account concept in Wisconsin and other states. It will also analyze the constitutional implications arising from the operation of such a program.

I. THE PROGRAM

The viability of the interest on lawyers’ trust accounts (IOLTA) plan stems from the common practice of a client leaving money in trust with his attorney. This practice often facilitates the attorney’s completion of a specifically delineated transaction such as settlement of a personal injury claim. Generally, the amount deposited in trust with the attorney is either kept for a short period of time or is too small to be of significance. As a result of the administrative and

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4. The use of the word “program” or “plan” in this article refers to the general concept of obtaining interest on commingled attorney trust funds as opposed to any specific state plan. The Florida program is mentioned as a prototype since it represents the first successful implementation of this concept in the country. See England & Carlisle, History of Interest on Trust Accounts Program, 56 FLA. B.J. 101 (1982); Middlebrooks, The Interest on Trust Accounts Program, Mechanics of Its Operation, 56 FLA. B.J. 115 (1982). But plans do vary. Some have been created by a state supreme court rule while others have been enacted through legislation. See generally supra note 3. Some require mandatory attorney participation while others are voluntary in nature. Some set up an independent entity such as a “law foundation” for receiving and distributing the funds while others run the program through the state supreme court itself. There is more than one way to reach the single desired goal. The best program for each individual state depends upon the makeup of the state bar, the supreme court and the legislature in that state.

5. When a client places a large amount of money in trust, or the proposed holding period indicates that the accrued interest will exceed the administrative costs, then the attorney has a responsibility to the client to invest the funds in a special individual interest bearing account. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982). For years attorneys have used their discretion in deciding when an account of this kind is appropriate and very few problems have resulted. See Kaap, Establishing and Maintaining a Client Trust Account, Wis. B. Bull., Nov. 1979, at 12. The program discussed in this article simply builds on this traditional approach. The attorney makes the initial determination as to which kind of account is appropriate, the only difference being that either selection would now produce interest. No additional burdens are placed on the attorney. He could not be held liable for making an improper choice to the client’s detriment any more than he could be held liable under the present system. The purpose of the trust account does not
accounting costs incurred by the banking institutions and the law firms, attorneys have been economically precluded from depositing these amounts in separate interest bearing accounts. Moreover, the variability of client deposits in terms of amount and duration makes it "exceedingly difficult, if not impossible, to apportion the interest earned on a general account among the respective clients whose funds from time to time compose it." Standard nonincome-producing checking accounts for holding and distributing client trust funds are currently in general use throughout the country. The beneficiaries of the current system are the commercial banks which hold these often substantial aggregated accounts over long periods of time without having to make interest payments.

Recent developments in banking practices, however, have opened an avenue which permits money placed in these accounts to earn interest. By investing these previously inactive funds in one of the new banking programs, such as a negotiable order of withdrawal (NOW) checking account, interest income can be earned. The client's deposit along with other funds similarly situated would not be affected since the money is still available upon demand. However, the attorney's trust fund account would, for the first time, change; it is only the collateral issue involving the determination of the beneficiary that arises. See Gonser, Almond & Ziegler, supra note 2, at 221.

6. See Gonser, Almond & Ziegler, supra note 2, at 220.
8. See Gonser, Almond & Ziegler, supra note 2, at 220.
10. NOW accounts can be opened if the "entire beneficial interest" accrued from the accounts' operation "is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit." 12 U.S.C. § 1832(a)(2) (Supp. 1982). Thus, the NOW account works in this instance since the law foundation, or other fund, into which the account interest is transferred is held by a nonprofit organization. See Ronan & Lohmann, The Use of "NOW" Accounts for Client Trust Funds, Wis. B. Bull., July 1981, at 38.

A recent telephone survey of banks indicates that a money market account is, in many situations, an attractive alternative to NOW accounts. Money market accounts require a minimum balance of $2,500 to $5,000 but money in these accounts earns interest at two to three percent higher than money in a NOW account. Telephone interview with Carl Mattie, Personal Banking Officer, Marine National Exchange Bank, Milwaukee, Wis. (Apr. 12, 1983).
use the short-term deposits to fund legal public service programs which are becoming increasingly difficult to finance.¹¹

The theory behind this plan¹² is that, although there are no major contributions, the sum of the smaller individual deposits results in a consistently high NOW account balance. This large balance produces substantial interest income. The funds earned in the NOW account are then channeled directly into a nonprofit organization or other approved association.¹³ This nonprofit law foundation or association¹⁴ would then distribute the funds for certain limited uses determined to be beneficial to the public as a whole, rather than predominantly for the benefit of the legal profession.¹⁵

¹¹ The American Bar Association has concluded that IOLTA programs do not violate an attorney's ethical responsibilities to his client. This opinion is grounded on ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1980) which emphasizes safekeeping. The committee asserts that the provision does not specifically prohibit investment of this type as long as the money is available for the client's use upon demand. For a complete discussion resolving the ethical considerations of this program, see ABA Comm. on Ethics and Professional Responsibility, Formal Ethics Op. 348 (1982).

¹² For a general outline of a model plan, see In re Interest on Trust Accounts, 356 So. 2d 799, 803 (Fla. 1978).

¹³ For the lawyer, the process operates as follows: initially, the firm shifts its current trust fund from a standard checking account to a NOW account. See supra note 10. At this point interest begins accruing on the commingled funds in the account. The earned income is transferred automatically by the local bank to the law foundation's central account. By channeling it straight into a nonprofit organization, accounting and administrative costs are eliminated for the law firm and are substantially reduced for the banking institution.

After the money is transferred it continues to earn interest at the central location (not necessarily by the use of a NOW account) until it is distributed to the specifically approved legal public service programs. See infra note 15. For the individual law firm the only change is in the type of checking account used at the local bank. No additional responsibilities are imposed.

¹⁴ The State Bar committee is working under the assumption that the program in Wisconsin would be authorized by the state supreme court as opposed to being enacted by legislation. A nonprofit law foundation would be created by the court to implement the program and then to supervise its ongoing operation. The source of the court's ability to authorize such a plan arises from the "inherent power" given the judiciary in the constitutional separation of powers principle. See generally State v. Cannon, 196 Wis. 534, 221 N.W. 603 (1928); Comment, Inherent Power and Administrative Court Reform, 58 MARQ. L. REV. 133 (1975). Courts traditionally have been viewed as having power within themselves to guard their independence from both the executive and legislative branches. This "balance of power" protects the judicial system from outside control and insures its continued vitality in resolving matters affecting the administration of justice. Id. at 149. See generally Shavie v. State, 49 Wis. 2d 379, 182 N.W.2d 505 (1971); State ex rel. Reynolds v. County Ct., 11 Wis. 2d 560, 105 N.W.2d 876 (1960); In re Janitor of Sup. Ct., 35 Wis. 410 (1874).

¹⁵ Early commentators foresaw tax problems for such a scheme. See generally
In Wisconsin the State Bar committee studying this matter is proceeding with plans to propose a program similar to the Florida plan. Because of Wisconsin's integrated bar, the State Bar's program would differ from Florida's in that, in Wisconsin, attorney participation would be mandatory. However, recent actions of the Kenosha, Wisconsin, First Bank Southeast, N.A., present the committee with a unique situation. In November, 1982, the bank became the first institution in this country to offer interest on individual trust funds regardless of the amount of money or the period of time involved. It will also prepare separate records for each client and issue statements for tax purposes. However,
the bank provides this service only for those firms having a regular checking account with it. This condition effectively limits the program to lawyers practicing in the Kenosha area. As such, any mandatory program should provide an escape clause to enable Kenosha area attorneys to take advantage of the bank's service in order to serve the best interest of their clients. Thus, in Wisconsin the program would be required for all attorneys outside the Kenosha area or any other area in which a financial institution offered a similar service.

This escape provision is not without precedent. The Minnesota plan is mandatory but provides for just such a contingency. It allows attorneys to use an available service such as that offered by First Bank Southeast, N.A.. Wisconsin is not precluded from setting up a plan in this state simply because one bank has an alternative program. A mandatory or at the very least a voluntary program modeled

18. MINNESOTA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-103 (1982) provides:

INTEREST BEARING TRUST ACCOUNTS

(A) Each trust account referred to in DR 9-102 shall be in interest bearing trust account in a bank, savings bank, trust company, savings and loan association, savings association, credit union or federally regulated investment company selected by a lawyer in the exercise of ordinary prudence.

(B) A lawyer who receives client funds shall maintain a pooled interest bearing trust account for deposit of client funds that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of any transactions costs, shall be paid to the Lawyer Trust Account Board established by the Minnesota Supreme Court.

(C) All client funds shall be deposited in the account specified in subdivision (B) unless they are deposited in:

(1) A separate interest bearing trust account for the particular client or client's matter on which the interest, net of any transaction costs, will be paid to the client; or,

(2) A pooled interest bearing trust account with subaccounting which will provide for computation of interest earned by each client's funds and the payment thereof, net any transaction costs, to the client.

(D) In determining whether to use the account specified in subdivision (B) or an account specified in subdivision (C), a lawyer shall take into consideration the following factors:

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

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

(3) The capability of financial institutions described in subdivision (A) to calculate and pay interest to individual clients.
after the Florida plan outlined in this article can still be set up in Wisconsin.

II. CONSTITUTIONAL ISSUES RAISED IN IMPLEMENTING THE PROGRAM

The major constitutional problem that has been raised against the IOLTA concept is that the diversion of account interest into a nonprofit law foundation violates the “taking” clause of the fifth amendment. Parties opposing these plans assert that the money earned in the account more properly belongs to the clients whose funds make up the principal upon which the interest is earned. These opponents argue that, since the individual clients are not compensated for this improper taking, the plan itself is constitutionally defective and therefore cannot be implemented.

The taking clause provides: “nor shall private property be taken for public use, without just compensation.” The interpretation of this seemingly straightforward directive has been litigated numerous times. The United States Supreme Court has admitted its own difficulty in coming to terms with the fifth amendment’s command by remarking that “[t]he question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.” The Supreme Court has had no problem identifying the purpose of the taking provision, noting that it is “designed to bar Government from forcing some people alone to bear public burdens which, in all fair-

20. See supra note 19.
21. Id.
22. U.S. Const. amend. V.
23. The earliest reported case to deal with the taking issue was Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion). See also Baker & Wood, supra note 19, at 355, and cases cited therein.
ness and justice, should be borne by the public as a whole.\textsuperscript{25} The Court's view of the purpose of the taking clause, however, has not assisted them in formulating consistent decisions. The Court has not developed any set formula to determine where regulation ends and taking begins\textsuperscript{26} and instead has looked to the individual circumstances of each case.\textsuperscript{27}

\textit{A. The Historical Background of Taking Clause Decisions}

Past Supreme Court decisions interpreting the taking clause fail to provide present courts with concrete guidelines.\textsuperscript{28} The 1922 Supreme Court decision in \textit{Pennsylvania Coal Co. v. Mahon}\textsuperscript{29} is the definitive holding for analyzing the application of the taking clause. \textit{Pennsylvania Coal} represents the Court's adoption of a balancing approach taking into account both the public benefit and the individual loss given the facts of each case.\textsuperscript{30} In \textit{Pennsylvania Coal} Justice Holmes set forth as a "general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\textsuperscript{31} He went on to state that this becomes a "question of degree — and therefore cannot be disposed of by general propositions."\textsuperscript{32}

Justice Holmes's emphasis on the degree of the actual taking replaced, but did not overrule, the previous mode of

\begin{itemize}
\item \textsuperscript{25} Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).
\item \textsuperscript{27} \textit{Id.} at 124 (citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)) (citations omitted).
\item \textsuperscript{29} 260 U.S. 393 (1922). In \textit{Pennsylvania Coal} the Court invalidated Pennsylvania's Kohler Act, which had prohibited coal mining that caused damage to structures used for human habitation. The Court found the Act unconstitutional in that it had the effect of destroying company property without compensation.
\item \textsuperscript{30} See J. Nowak, R. Rotunda & J. Young, \textit{supra} note 28, at 440-41; Note, \textit{supra} note 28, at 1452, 1457.
\item \textsuperscript{31} \textit{Pennsylvania Coal}, 260 U.S. at 415.
\item \textsuperscript{32} \textit{Id.} at 416.
\end{itemize}
analysis in taking clause cases. That view, endorsed by Justice Harlan in the 1887 decision of Mugler v. Kansas,\(^3\) was more literal in its reading of the taking provision. To constitute a taking, Mugler required an actual physical appropriation of private property without compensation.\(^4\) The problem that has arisen is that instead of developing a “single framework to define a taking, the Supreme Court . . . has retained to some extent the theories of both Justice Holmes and Justice Harlan.”\(^5\) The result is that while Pennsylvania Coal is the rule, the Supreme Court may also borrow from Mugler when analyzing a “taking” problem.\(^6\)

In reviewing the applicability of the taking clause to a given situation two separate issues must be resolved. Initially, it must be determined that a valid property interest is the subject of the constitutional attack.\(^7\) Secondly, upon a finding that an individual has established a legitimate ownership claim, it must be determined that his interest has been taken without compensation.\(^8\) Only when both are found does the proceeding violate the fifth amendment taking clause.

**B. What Is Property?**

The first criterion which must be met before a taking clause argument can be successfully maintained is a determination that the claimant has a vested property interest in what is being confiscated.\(^9\) The inquiry into “what is property,” however, has produced answers which are “notoriously, even maddeningly, vague.”\(^10\) The most widely

\(^{33}\) 123 U.S. 623 (1887).

\(^{34}\) Id. at 667–69. See J. Nowak, R. Rotunda & J. Young, supra note 28, at 441–42.


\(^{36}\) Given this dichotomy one decision has held that in the end, the “[r]esolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic.” Andrus v. Allard, 444 U.S. 51, 65 (1979).

\(^{37}\) J. Nowak, R. Rotunda & J. Young, supra note 28, at 490.

\(^{38}\) Id.

\(^{39}\) Id.

accepted definition of the property concept was expressed by
the Supreme Court in the 1972 decision of Board of Regents
v. Roth.\footnote{41} In that decision the Court explained that: "[t]o
have a property interest in a benefit, a person clearly must
have more than an abstract need or desire for it. He must
have more than a unilateral expectation of it. He must, in-
stead, have a legitimate claim of entitlement to it."\footnote{42} After
Roth, disputes involving the resolution of property owner-
ship have centered on the concept of "entitlement."\footnote{43} If an
individual can show entitlement to the benefits of the prop-
erty seized, he will be deemed the owner of the property and
entitled to compensation for the taking.\footnote{44}

\section*{C. Has There Been a Taking?}

Upon a finding that there is a valid property interest
present, the next determination is whether an unconstitu-
tional taking has occurred. In considering this the Supreme
Court has focused on guidelines not necessarily reflective of
the Holmes or Harlan views. These more recent guidelines
were set forth by the Supreme Court in 1978 in Penn Central
Transportation Co. v. New York City.\footnote{45} Initially the Court
examined "[t]he economic impact of the regulation on the
claimant and, particularly, the extent to which the regulation
has interfered with distinct investment-backed expectations
. . . ."\footnote{46} Moreover, the "character" of the action taken by
the government is crucial.\footnote{47} The Court will more often find
a taking "when the interference with property can be charac-
terized as a physical invasion by government . . . [rather]
than when interference arises from some public program ad-
justing the benefits and burdens of economic life to promote
the common good."\footnote{48}

\textit{Penn Central} is an example of a case in which the guide-
lines of \textit{Pennsylvania Coal} could have been used to disarm a
statute. In *Penn Central* the application of New York City's Landmark Preservation Law 49 effectively precluded the construction of a huge multi-story office building over Penn Central Transportation Company's Grand Central Station. Because the building had been designated an historic landmark, any alteration in the physical appearance of the building, whether exterior architectural changes or construction of improvements on the site, needed advance approval from city officials. 50 When the planned addition was denied, Penn Central brought suit alleging a taking without compensation.

In ruling against Penn Central, the Supreme Court admitted that the statute imposed some inherent burdens on property owners and remarked that "designation as a landmark results in restrictions upon the property owner's options concerning use of the landmark site." 51 However, in its final analysis the Court focused both on "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ." 52 The Court concluded that the statute did not interfere with the present use of the terminal and therefore the company could realize a reasonable return on its investment. 53 Moreover, even though the law had eliminated building onto Grand Central Station, Penn Central could still have used one of its alternate sites for the proposed office building. 54

One year later in *Andrus v. Allard*, 55 the Court again focused on the plaintiff's rights as a whole rather than looking at the isolated effect of a statute. In *Andrus* the Court examined Eagle Protection Act regulations 56 and Migratory Bird Treaty Act regulations 57 and determined that both of these environmental measures were constitutionally valid. 58

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49. N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0 (1976).
51. *Id.* at 111.
52. *Id.* at 130-31.
53. *Id.* at 136.
54. Penn Central owned several other buildings in the immediate vicinity at least two of which were suitable for the project in the eyes of the court. *Id.* at 137.
56. 50 C.F.R. § 22.2(a) (1978).
57. *Id.* § 21.2(a).
These Acts are conservation statutes designed to protect certain species of birds and to prohibit the sale or possession of such birds or their parts. The plaintiffs in the action sold Indian artifacts, many of which contained feathers from the protected birds. The plaintiffs claimed that the statutes unconstitutionally deprived them of their livelihood in that the feathers in the artifacts were taken from birds killed before the protective safeguards went into effect.

The Supreme Court ruled against the plaintiffs, stating that:

The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.

The Court noted that the most profitable way of disposing of the artifacts was prohibited but that the plaintiff's right to possess, transport, donate or devise the items remained unaffected.

One comment made in Andrus perhaps best illustrates the Court's position in reviewing taking clause proceedings. It remarked that all "government regulation — by definition — involves the adjustment of rights for the public good." The Court also said that: "Often this adjustment curtails some potential for the use or economic exploitation of private property." Since the government cannot compensate those adversely affected each time it creates a statute, the Court then necessarily concluded that the "Taking Clause . . . preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'"

59. Id. at 52-54.
60. Id. at 54.
61. Id. at 54-55.
62. Id. at 65-66.
63. Id. at 66.
64. Id. at 65.
65. Id.
66. Id. (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
In analyzing the above cases, other Supreme Court decisions and legal commentary in this field, Professor Michelman of Harvard Law School has developed a set of four factors for use in determining whether compensation is required in a taking. They are:

1. whether the public or its agents have physically used or occupied something belonging to the claimant;
2. the size of the harm sustained by the claimant or the degree to which his affected property has been devalued;
3. whether the claimant's loss is outweighed by the public's concomitant gain;
4. whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to the other people.

He states that, although none of these criteria alone establishes a sound rule of decision, they are guidelines by which disputes of this nature are resolved.

D. Application of the Taking Clause to the Interest on Lawyers' Trust Accounts

In light of the previous Supreme Court interpretations of both the concept of property and the unconstitutional taking of valid property interests, it is unlikely that the Court would find the proposed Wisconsin IOLTA program violative of the fifth amendment taking clause. The funds placed in

67. Michelman, supra note 28, at 1183-84.
68. Id. at 1184.
70. Some commentators have suggested that the entire constitutional problem could be avoided by obtaining the client's consent to use his funds in this program. This could be implemented through the use of a notice-giving consent form. See Comment, supra note 15, at 129-31. The Florida plan originally had such a notice requirement. In re Interest on Trust Accounts, 356 So. 2d 799, 807 (Fla. 1978). However, this provision was later dropped from the program. In re Interest on Trust Accounts, 402 So. 2d 389, 396 (Fla. 1981). This was done in light of the problems that would have arisen regarding the contents of the form and the time and expense involved. Moreover, it would return to the client an element of control over the funds
individual lawyers' trust accounts are usually so small and are on deposit for so short a time that the administrative costs involved in computing the individual interest due each client would result in a net loss to the client. If these deposits were aggregated in one account set up under an IOLTA plan, each client's contribution of interest earned would be so minimal that the common law maxim *lex non curat de minimus*71 would be applicable. Moreover, clients in the past have never had any expectation of receiving interest on the funds they entrust to their attorneys. Thus, the program does not collide with the "interest that [is] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for fifth amendment purposes"72 and result in a taking without compensation.

Despite these arguments, opponents equate the plan with the statute struck down in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*.73 *Webb's* dealt with a Florida statute which allowed individual counties to appropriate the interest accrued on litigants' deposits held in a court interpleader fund. In addition to this appropriation, a separate fee was charged to the litigant for the clerk's handling costs.74 In *Webb's* the

which would bring back the tax problems that originally troubled these programs. *See supra* note 15 and accompanying text.

71. "The law does not concern itself with trifles." For an excellent discussion of the constitutional elements of this topic, see Baker & Wood, *supra* note 19, at 358. The authors discuss the de minimus concept at length labelling it the "best argument" available for proponents of these plans. *Id.* at 358-61. The authors note that "[t]he [de minimus] argument would suggest that finespun theories of property become gossamer at some point. . . . [and that] [s]ome commentators have suggested that there is a fourteenth amendment plimsoll line of property below which the Constitution has no application." *Id.* at 360 (citations omitted). This is precisely the notion meant to be conveyed by supporters of IOLTA programs.


73. 449 U.S. 155 (1980). A more recent Supreme Court case striking down a statute as violative of the fifth amendment taking clause is *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982). *Loretto* is distinguishable from the issue at hand because *Loretto* involved a complete loss of ownership rights. However, compared to the taking in *Penn Central*, the taking in *Loretto* was quite minor, involving as it did the placement of cable television wire on a rental building which the Court characterized as a tangible physical intrusion. One commentator suggests that *Loretto* signals a shift in the Court's willingness to accept takings for the public good. Lauter, *Paying for Legal Aid by IOTAs*, Nat'l L.J., Apr. 4, 1983, at 1, 22, col. 4 (IOLTA programs are alternatively referred to as Interest on Trust Accounts (IOTA) plans).

interest earned on the single account was over $100,000. The Court concluded that the enforcement of the statute constituted an improper taking in that the regulation did not adjust "the benefits and burdens of economic life to promote the common good." The Court found the initial fee adequate to cover the costs invoked and stated that the interest on the interpleader account was privately owned and not the court's to keep.

Wisconsin's proposed IOLTA program would not run into the problems found in Webb's since the facts involved in each are clearly distinguishable. The litigant in Webb's lost more than $100,000 as a result of the court appropriation of the interest earned in the interpleader account. The trust fund program, on the other hand, deals with nominal sums or short term deposits upon which an insignificant amount of interest is generated. As previously stated, so little is accumulated that it would not cover the costs incurred by law firms if they tried to pay the interest to the client. In short, the program puts an otherwise idle sum of money to productive use generating interest which need not be designated as the property of any particular client.

Also important is the Supreme Court's balancing process. In "taking" matters the purpose of the balancing pro-

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75. Id. at 163 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).
76. Webb's, 449 U.S. at 163-64.
77. This does not refer to localities like Kenosha, Wisconsin, which will have banking facilities available to calculate the interest at no cost to the firm. When this opportunity becomes available it is assumed that attorneys will use it because it will better serve their clients. See supra text accompanying notes 16-18.
78. This analysis is consistent with the Supreme Court of Florida's conclusion in In re Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981). There the court stated:

With respect to constitutional concerns regarding the program, we see none that bars implementation. There are many distinguishing features between the program today implemented for the generation of interest on lawyers' trust accounts, and the legal requirements of state law which led the United States Supreme Court to invoke the fifth amendment "taking" clause for the protection of private property in its Webb's decision. The most relevant distinction, plainly, is the fact that no client is compelled to part with "property" by reason of a state directive, since the program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances.

Id. at 395.
79. See supra notes 30-32 and accompanying text. See J. Nowak, R. Rotunda
cess is to determine whether the "public action is justified as promoting the general welfare" of state citizens despite the possibility of denying a "property owner of some beneficial use of his property or . . . restrict[ing] the owner's full exploitation of the property." The IOLTA program is for the benefit of the public in that, unlike the situation in Webb's, the proposed trust fund plan is closely connected to proper state concerns. One important objective of the legal profession is to give the poor competent representation and thus to further the goal of keeping the courts accessible to all. The Wisconsin IOLTA program would fund legal aid for the impoverished, while at the same time reducing the need for the state's contribution through tax dollars. Given these considerations, the program justifies itself by advancing legitimate state interests while causing minimal individual loss.

In addition, an application of Professor Michelman's factors for determining whether compensation is necessary for a taking illustrates the feasibility of the proposed Wisconsin IOLTA program. First, no funds that now accrue to the client would be used. A client cannot now obtain interest on small amounts of principal kept in trust with his attorney. It is solely the aggregation of his individual deposit with others like it that creates interest and as such does not entitle the client to any payment. Second, because principal is not eroded under this program, the client would sustain no loss. The client would retain every right to the use of his money that he held before enactment of the program. Third, the public would benefit in that money generated within the legal system instead of through citizen tax dollars would be used to fund legal public service programs.

Although the IOLTA program raises a number of constitutional issues, authority does exist for its support. The

& J. Young, supra note 28, at 440-41. See also Note, supra note 28, at 1452, 1457, 1468.  
80. Webb's, 449 U.S. at 163.  
81. The Court in Webb's concluded that the statute involved was in no conceivable manner beneficial to the public. Id. at 164-65.  
82. In addition, public policy favors placing assets into productive use. See, e.g., Melms v. Pabst Brewing Co., 104 Wis. 7, 11-16, 79 N.W. 738, 739-41 (1899).  
83. See supra text accompanying notes 67-69. The fourth factor is not applicable in this situation.  
84. See supra Part II.
Supreme Court has seldom looked with favor on claims of loss of projected future gains as a reason for invoking taking clause restraints. Indeed, the Court has commented that "because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." This consideration viewed in conjunction with cases in which significant losses have been held not to constitute a taking supports a conclusion that the interest on lawyers' trust accounts program would be constitutional.

III. Conclusion

With few exceptions attorneys have soundly exercised their discretion in determining whether funds deposited with them constitute such a significant amount that an interest-bearing account is required. The program proposed in this article and pioneered by the Florida Bar Association does nothing to change such discretion. The trust fund program seeks to put nominal or short-term funds held by the lawyer for his client to a more efficient use. Putting these aggregated funds in an interest producing account would benefit society and the whole legal system in Wisconsin. The program could be instituted at no cost to the public, at no real loss to any individual client and within the constitutional mandates of the fifth amendment taking clause.

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86. Id.
88. Additionally, attorney participation in this program would be in keeping with the ABA Model Code of Professional Responsibility Canon 8 (1980) which states that a "lawyer should assist in improving the legal system."