

OPINION

Rule change is reminder of importance of IOLTA program

By David C. Henderson



Few lawyers had reason to reflect on the Supreme Judicial Court's recent amendment of its Rule 3:15 to increase the pro hac vice

registration fee in Massachusetts from \$301 to \$351.

But that increase in fees, effective Jan. 1, will be important to the continued success of the Massachusetts Interest on Lawyers' Trust Accounts program.

It also can be a reminder for some of us to re-examine other parts of the IOLTA program, because the other parts are important to the Massachusetts legal community in general, as well as crucial to an attorney who handles client funds or litigates a class action.

The key IOLTA points include the following.

1. The IOLTA program requires that client funds be handled in a structured manner that collaterally serves the greater well-being of the commonwealth.

The SJC established the Massachusetts IOLTA Committee and the IOLTA program in 1985 to receive and distribute certain funds in an ethical way that collaterally will improve the administration of justice and deliver critical civil legal aid services to those who cannot afford them. Those objectives continue to guide the IOLTA program today, more than three decades later.

The seminal rule is that lawyers holding client funds must place them in either an account paying interest to the client or an IOLTA account. An

IOLTA account can be used when the client funds are so modest in amount, or the funds are to be held for a period so short, that accumulating interest will be less than the cost of establishing and maintaining an individual account for the client's benefit.

The accumulated interest on the IOLTA account then is paid to the IOLTA Committee, where it is joined not only by interest paid on the multitude of similar IOLTA accounts throughout the commonwealth, but also by pro hac vice fees paid by out-of-state attorneys, Access to Justice fees paid voluntarily by Massachusetts lawyers, and certain residual funds remaining from class actions or bankruptcies.

Ultimately, the SJC's IOLTA Committee distributes the accumulated funds to three organizations — the Massachusetts Legal Assistance Corp., Massachusetts Bar Foundation and Boston Bar Foundation — so that those organizations can use the funds as grants to improve the administration of justice and deliver critical civil legal aid services to those who cannot afford them.

There thus is no question that the IOLTA program serves an important public need. It functions as one of two major funding sources for legal aid in the commonwealth, the other being the state budget.

The money ends up paying for educational programs and publications for judges and more than 100 civil legal aid projects addressing problems of housing, domestic violence, immigration, homelessness, and wrongful denial of food stamps and other governmental benefits.

2. IOLTA rules are particularly important to attorneys representing clients in class action litigation.

Massachusetts Rule of Civil Procedure 23(e)(1) defines "residual funds" as funds that remain in a class action after the payment of all approved

class member claims, expenses, litigation costs, attorneys' fees and other court-approved disbursements to implement the relief granted.

Attorneys in Massachusetts class actions need to understand three ways in which residual funds relate to the IOLTA program.

First, providing the residual funds to the Massachusetts IOLTA Committee is one of only two ways in which the residual funds can be disbursed. According to Rule 23(e)(2), the choice is as follows:

"[T]he residual funds shall be disbursed [1] to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or [2] to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts."

In other words, residual funds always can be disbursed to the IOLTA Committee. And disbursement of the funds to any other organization will be allowed only if the court agrees that the disbursement is proper in accordance with the rule.

Second, attorneys in a class action are required to give appropriate notice to the Massachusetts IOLTA Committee in advance of any residual funds disbursement. This necessarily means that the IOLTA Committee will have a chance to weigh in with the court to challenge a proposed disbursement to any other organization. Rule 23(e)(3) states this requirement as follows:

"Where residual funds may remain, no judgment may enter or compromise be approved unless the plaintiff has given notice to the Massachusetts IOLTA Committee for the limited purpose of allowing the committee to

be heard on whether it ought to be a recipient of any or all residual funds."

Third, active involvement of the IOLTA Committee on the issue of residual funds disbursement is more than a remote possibility. The committee can be expected to enter the fray on this point if it believes that the proposed disposition of the funds does not accord with Rule 23.

If the IOLTA Committee does weigh in to make such a challenge, full briefing and a hearing on the issue can be expected.

3. Massachusetts attorneys also can promote the objectives of the IOLTA program by keeping their IOLTA accounts in "leadership banks" or encouraging other banks to become leadership banks.

Where attorneys and law firms place their IOLTA funds makes a tremendous difference in the amount of public service funding available to the IOLTA Committee. For that reason, the IOLTA Committee encourages maximum support of the Leadership Bank Program.

A leadership bank is a bank that agrees to pay an interest rate on IOLTA accounts no less than 75 percent of the Federal Funds Target Rate (currently 1.69 percent). The additional interest earned on IOLTA accounts in leadership banks generates one of the most vital sources of support for civil legal aid for the poor and disadvantaged in the commonwealth.

More than 40 Massachusetts banks (identified on the IOLTA Committee's website) currently are cooperating in this important public service endeavor by serving as leadership banks.

Attorneys and law firms thus can support the IOLTA program and its important public service objectives either by keeping their IOLTA funds in leadership banks, or by encouraging any non-participating bank used for IOLTA accounts to become a leadership bank.

David C. Henderson is a member of the Massachusetts IOLTA Committee and a partner in the Litigation Department at Nutter in Boston.