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A CRITIQUE OF INTEREST ON LAWYERS' TRUST ACCOUNTS PROGRAMS

In the past five years, twenty American jurisdictions¹ have initiated programs to permit or require lawyers to invest client funds for the benefit of state bar associations or foundations.² Such legal heavyweights as the American Bar Association (ABA) Committee on Ethics and Professional Responsibility³ and the Conference of Chief Justices of the Fifty State Courts⁴ have promoted the adoption of the programs. Opposing bankers and lawyers in only a few states have successfully contested adoption of the programs.⁵ Louisiana has not adopted such a program, but the Board of Governors of the Louisiana State Bar Association has asked that a committee be formed to study the programs.⁶ The issues concerning these programs deserve serious and thoughtful analysis.

This comment will first review the current Louisiana status on use of client funds and will then analyze three issues concerning the programs: (1) Do the programs violate the Taking Clause of the fifth and fourteenth amendments to the United States Constitution? (2) Do the programs violate the procedural due process requirements of the fourteenth amendment to the United States Constitution? (3) Are the programs unethical?⁷

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1. As of August 1983, the following jurisdictions, listed in order of adoption, had initiated lawyers' trust accounts programs: Florida, California, Idaho, Maryland, Colorado, New Hampshire, Minnesota, Oregon, Illinois, Nevada, Virginia, Oklahoma, and Michigan. Rivlin, *I.O.L.T.A. Gains Momentum Nationwide*, 69 A.B.A. J. 1036, 1038 (1983); see also *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151, 156-57 (Minn. 1982). Since August 1983, seven additional states have adopted programs. See *At Issue: Has IOLTA's Time Arrived?*, 70 A.B.A. J., Jan. 1984, at 16.

2. In most cases, the funds are channeled through either the bar association (California) or a bar foundation (Florida). See, e.g., CAL. BUS. & PROF. CODE § 6212(c)(1) (West Supp. 1984); *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981). In one state, however, the income is paid directly to the Legal Services Corporation. See MD. ANN. CODE art. 10, § 44(a)(2) (Supp. 1983). Because Florida's plan was the first one adopted in the United States, its practice of sending the funds to the bar foundation is considered the predominant practice throughout this comment. Although interest on lawyers' trust accounts programs are commonly given the acronym, I.O.L.T.A., throughout this comment they will be referred to as "the programs."

3. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982) (placing clients' funds at interest) [hereinafter cited as ABA Formal Op. 348], reprinted in *Professional Ethics Opinions*, 68 A.B.A. J. 1502-06 (1982).

4. See Berg, *A Significant New Revenue Source for Legal Services Begins: Interest on Trust Accounts*, 15 CLEARINGHOUSE REV. 1015, 1015 (1982).

5. Arkansas, Georgia, Maine, North Carolina, Pennsylvania, Texas, and West Virginia have rejected the programs. Rivlin, *supra* note 1, at 1038.

6. Barham, *IOLTA, A New and Painless Revenue Source for Legal Services*, 31 LA. B.J. 270, 273 (1984). For a brief essay on legal services for the indigent in Louisiana, see Hogan & Duhon, *Legal Services for the Poor*, 28 LA. B.J. 129 (1980).

7. For discussion of the current Louisiana practice, see *infra* text accompanying notes 8-53; the Taking Clause issue, see *infra* text accompanying notes 77-117; the procedural due process issue, see *infra* text accompanying notes 118-92; the ethics issue, see *infra* text accompanying notes 193-220.

Present Practice in Louisiana

The current practice of attorneys handling client funds is to place the funds into non-interest-bearing checking accounts until the funds are disbursed in accord with the client's wishes.⁸ In some cases, when the client so requests, the attorney places the funds into an individual interest-bearing account,⁹ such as a relatively new NOW (negotiable order of withdrawal) account.¹⁰ Interest paid on the individual client's funds is remitted to the client or used for his benefit.¹¹

In 1982, the ABA Committee on Ethics and Professional Responsibility issued an opinion on several issues concerning client funds in general.¹² Although the opinion is merely advisory and is not binding on Louisiana lawyers,¹³ it is persuasive authority on the duties of Louisiana lawyers concerning client funds.

The Committee first addressed the question of whether the *Model Code of Professional Responsibility*¹⁴ allows lawyers to place client funds in interest-bearing accounts. The Committee concluded that nothing in the *Model Code* prohibits the lawyer from putting client funds into interest-bearing accounts,¹⁵ so long as the lawyer complies with disciplinary rule 9-102. Disciplinary rule 9-102 requires a Louisiana lawyer to: (1) deposit

8. Telephone interview with Tom Collins, Executive Counsel to the Louisiana State Bar Association (July 27, 1983) [hereinafter cited as Telephone interview with Tom Collins].

9. When the lawyer places funds into interest-bearing accounts for the benefit of his clients, potential conflicts of interest arise. For example, it is possible that a lawyer would negotiate with his bank to offer the lawyer an inducement for depositing his client trust funds in that bank. The lawyer might bargain for a lower rate of interest on a personal or business loan from the bank, in exchange for the bank's agreement to pay a lower rate of interest on the trust account. Such a transaction would violate the proscription of a lawyer having a personal interest in conflict with his client's interest. See LA. CODE OF PROF. RESP. DR 5-104(A) (found in ARTICLES OF INCORP., LA. STATE BAR ASS'N art. XVI; La. R.S. tit. 37, ch. 4, app. (1974)) [hereinafter cited as CODE OF PROF. RESP.]. Or, if the lawyer represents the bank, he might agree to open his trust account at a lower rate of interest in order to get a larger share of the bank's legal business. That agreement would violate disciplinary rule 5-104(A).

10. Use of this account may violate federal law. See *infra* text accompanying notes 25-32.

11. Telephone interview with Tom Collins, *supra* note 8.

12. ABA Formal Op. 348, *supra* note 3.

13. The Louisiana Supreme Court has the final authority on disciplinary matters concerning Louisiana lawyers. See *infra* notes 205-10 and accompanying text.

14. The Committee based its opinion on the *Model Code*, which is substantially the same as Louisiana's Code of Professional Responsibility. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979), reprinted in 1 NAT'L REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 1-56 (1982). In August 1983, the American Bar Association (ABA) adopted the *Model Rules of Professional Conduct*, reprinted in 69 A.B.A. J. 1671 (1983), replacing the old *Model Code* in its entirety. Because the ABA opinion was based on the old *Model Code* and because Louisiana's Code of Professional Responsibility is an adaptation of the old *Model Code*, references to the newly adopted *Model Rules* will not be made unless pertinent.

15. ABA Formal Op. 348, *supra* note 3, at 2.

client funds (other than costs and expense advances) into a bank account,¹⁶ (2) avoid commingling client funds with his own funds,¹⁷ (3) notify the client of the receipt of funds,¹⁸ (4) maintain records of client funds,¹⁹ (5) render an accounting to the client regarding his funds,²⁰ and (6) deliver a client's funds to him on demand.²¹

The Committee's opinion indicates that a lawyer could invest client funds in interest-bearing accounts, but not in all kinds of interest-bearing accounts. Investment of client funds in passbook savings accounts probably would not violate disciplinary rule 9-102 because the funds could be withdrawn at any time to repay the client if the client so requested.²² Unless the client consents, a Louisiana lawyer could not invest client funds in time deposits, such as certificates of deposit, because those accounts are not payable on demand of the client.²³ Nor could he invest client

16. 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 except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

CODE OF PROF. RESP. DR 9-102(A) (1974), *supra* note 9.

17. Legitimate commingling of a client's funds with other clients' funds can also be a problem. When a lawyer deposits all his clients' trust funds into one trust account and is inattentive to the balance of an individual client, he may negligently overdraw the balance of one client. Such an overdrawal constitutes a conversion of another client's funds to benefit the first client. The Minnesota Supreme Court refused to excuse this improper handling of a trust account. *In re Fling*, 316 N.W.2d 556 (Minn. 1982).

18. "A lawyer shall: (1) Promptly notify a client of the receipt of his funds, securities, or other properties." CODE OF PROF. RESP. DR 9-102(B)(1) (1974), *supra* note 9.

19. "A lawyer shall: . . . (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them." *Id.* DR 9-102(B)(3).

20. For one way to organize a system to account for client funds, see Kurzer, Coleman, Leiter & Trager, *Attorneys' Trust Accounts—Rules and Pitfalls*, 55 FLA. B.J. 355 (1981).

21. "A lawyer shall: . . . (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive." CODE OF PROF. RESP. DR 9-102(B)(4) (1974), *supra* note 9.

22. But if the lawyer's contract with the bank on the passbook savings account provided that the bank did not have to pay on *demand*, use of the accounts would violate disciplinary rule 9-102.

23. If funds are not payable on demand of the client, then the attorney has committed at least a technical violation of disciplinary rule 9-102. Violations of this disciplinary rule are already a serious problem, judging from the number of recent cases involving these infractions. See *LSBA v. Mitchell*, 375 So. 2d 1350 (La. 1979); *LSBA v. Jordan*, 375 So. 2d 89 (La. 1979); *LSBA v. Rivette*, 368 So. 2d 1045 (La. 1979); *LSBA v. Phillips*, 363 So. 2d 667 (La. 1978); *LSBA v. Jacques*, 260 La. 803, 257 So. 2d 413, *cert. denied*, 409

funds in any non-bank investment account, such as brokerage accounts or mutual funds, since disciplinary rule 9-102(A) requires the client's funds to be deposited in a bank.²⁴

Whether Louisiana lawyers can use NOW (negotiable order of withdrawal) accounts depends on whether the funds are eligible for deposit in a NOW account. The Depository Institutions Deregulation and Monetary Control Act of 1980²⁵ places strict limitations on who can use a NOW account and on what kind of funds can be deposited in a NOW account. The depositor must be either an individual, a fiduciary, an agent, a nonprofit organization, or a governmental unit.²⁶ Corporations, partnerships, associations, business trusts, or other organizations are expressly prohibited from using a NOW account unless they qualify as an agent or fiduciary.²⁷

Regulation Q of the Federal Reserve Board provides that depositors who are fiduciaries of trust accounts may use NOW accounts if the beneficiaries of the funds on deposit in the trust account are exclusively individuals.²⁸ The same provision applies to agents holding escrow funds under agency agreements.²⁹

The conclusion to be drawn from the federal act and the regulations is that a Louisiana lawyer could use NOW accounts as client trust accounts in only two situations. First, a solo practitioner who is unincorporated could use a NOW account for his clients' funds because he is an individual.³⁰ Second, a lawyer or law firm conducting practice as a partnership or professional corporation could, as the clients' agent or fiduciary, use a NOW account for clients' funds, but *only* when no entity other

U.S. 877 (1972); *LSBA v. Klein*, 253 La. 603, 218 So. 2d 610 (1969); *LSBA v. Haylon*, 250 La. 651, 198 So. 2d 391 (1967); *LSBA v. Mayeaux*, 249 La. 7, 184 So. 2d 537 (1966); *LSBA v. Powell*, 248 La. 237, 178 So. 2d 235 (1965); *LSBA v. Yoder*, 243 La. 909, 148 So. 2d 597 (1963); *LSBA v. Woods*, 243 La. 94, 141 So. 2d 828 (1962).

24. Whether "bank" excludes savings and loans or credit unions is uncertain. Arguably, the requirement for depositing client funds in a bank is due to concern for the safety of the client's funds. Since savings and loan associations and credit unions are subject to federal and state laws regulating the protection of depositors' funds, such institutions should qualify as "banks" for purposes of disciplinary rule 9-102(A).

25. Pub. L. No. 96-221, 94 Stat. 132.

26. 12 U.S.C. § 1832(a) (1982); Eligibility for NOW Accounts, 12 C.F.R. § 217.157 (1983); *see also* 12 U.S.C. § 371a (1982); Eligibility for NOW Accounts, 12 C.F.R. § 329.103 (1983).

27. *See* Eligibility for NOW Accounts, 12 C.F.R. § 217.157 (1983).

28. *Id.*

29. *Id.*

30. *Id.* The regulation permits an individual to use a NOW account for any purposes, whether personal or business. But the lawyer could not commingle client funds with other funds in a NOW account any more than he could in any other kind of account. *See* CODE OF PROF. RESP. DR 9-102(A) (1974), *supra* note 9.

than an individual will have a beneficial interest in the funds.³¹ Thus the lawyer may have to refrain from using a NOW account if his client is not an individual or if anyone else who is not an individual has or might acquire a beneficial interest in the deposited funds.

The lawyer practicing in a partnership or professional corporation may wish to avoid the use of a NOW account for client funds because of the potential problem of depositing ineligible funds into such accounts.³²

The ABA Committee also addressed the question of whether a lawyer is ever under a *duty* to place client funds in an interest-bearing account. Since the *Model Code* requires only that the lawyer safeguard a client's property, the Committee concluded that the law of agency and trusts governs this issue,³³ and that law does not require a fiduciary to invest funds if circumstances show that his only duty under the agreement with the client was to safeguard the funds.³⁴ The Committee stated that in most instances the lawyer's only duty is to safeguard and not to invest.³⁵ Therefore, the Committee concluded, the lawyer is not under a duty to place client funds in an interest-bearing account.³⁶ The Committee noted one exception, however: When the funds are to be held for a long period *and* the amount of money is substantial, so that the income earned would exceed the costs of administering the account, the lawyer should consult with the client and follow the client's wishes concerning investing.³⁷ An "extreme violation" of this duty to consult would be grounds for disciplinary action.³⁸

Nothing in the Louisiana jurisprudence or the Louisiana State Bar Association opinions indicates that a failure to invest a client's funds to earn a profit for the client would violate the Code of Professional Responsibility.³⁹ It is reasonable to conclude, however, that the Louisiana Supreme Court, like the ABA Committee, would consider the amount of money and the length of the holding period in determining whether

31. See 12 U.S.C. § 1832(a) (1982); Eligibility for NOW Accounts, 12 C.F.R. § 217.157 (1983).

32. To avoid this problem in the Florida program, the proponents obtained a special ruling from the Federal Reserve System to permit Florida lawyers to use NOW accounts. See ABA Formal Op. 348, *supra* note 3, at 6.

33. *Id.* at 3.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 3-4. The basis for such disciplinary action is "DR 6-101(A)(3) (neglect); DR 6-101 (A)(1) (competence); and DR 7-101(A)(1) (zealous representation)." *Id.* at 4.

39. Of course, if the attorney and the client agreed that the attorney would invest the funds for the client's profit, and the attorney failed to do so, a lawyer would have violated disciplinary rule 6-101(A)(3) which reads: "a lawyer shall not . . . neglect a legal matter entrusted to him."

a lawyer acted in the best interests of his client, if he failed to consult the client about investing a large sum of money to be held for a lengthy period.

The ABA Committee also addressed the question of what are a lawyer's duties to the client when the client's funds *are* invested in an interest-bearing account. The Committee concluded that the lawyer in such a case must comply with the requirements of disciplinary rule 9-102(B)(1), (3), and (4)⁴⁰ because interest posted to the client's account becomes the client's funds. Those rules require that the lawyer give notice to the client when the interest on the account is earned,⁴¹ maintain records of the income earned,⁴² render an accounting of the earned income to the client,⁴³ and promptly pay the income to the client when the client requests the funds.⁴⁴ These rules should apply to Louisiana lawyers since, under Louisiana law, the income belongs to the client.⁴⁵ The lawyer is under a duty to treat that income as he would any other property of the client.

The ABA committee additionally addressed the issue of whether the lawyer could retain the interest earned on a client's account if his administrative costs exceeded the income earned. The Committee concluded that the lawyer's retention of the interest would violate disciplinary rule 5-104's prohibition⁴⁶ of "conflicts between the financial interest of the lawyer and those of the client."⁴⁷

40. ABA Formal Op. 348, *supra* note 3, at 4.

41. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(B)(1) (1979).

42. *Id.* DR 9-102(B)(3).

43. *Id.*

44. *Id.* DR 9-102(B)(4).

45. *See infra* text accompanying notes 64-76.

46. Disciplinary rule 5-104(A) states: "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure."

47. ABA Formal Op. 348, *supra* note 3, at 5-6. This conclusion was based on two earlier opinions rendered by the Committee and on Canon 11 of the former Canons of Professional Ethics. *Id.* Former Canon 11 stated:

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS 47 (ABA 1967).

This canon had formed the basis for ABA Comm. on Professional Ethics, Informal Decision 545 (1962) and Informal Op. 991 (1967). ABA Formal Op. 348, *supra* note 3, at 5-6. In Informal Decision 545, the Committee on Professional Ethics stated that a lawyer who earned interest on commingled client's funds could not keep the interest, even if it was "quite difficult to allocate" the interest to particular clients." ABA Formal Op. 348, *supra* note 3, at 5 (quoting ABA Comm. on Professional Ethics, Informal Decision 545

This last issue apparently has not arisen in Louisiana, but an analogy can be made to cases where the attorney has kept interest on judgments collected for his clients. In *Louisiana State Bar Association v. Mitchell*,⁴⁸ a plaintiff's attorney received from the defendant's attorney a check representing interest, costs, and attorney fees due the plaintiff on a judgment. The plaintiff's attorney used the interest for his own benefit instead of paying it to his client.⁴⁹ Charged with violating disciplinary rule 9-102, the attorney defended his conduct on the ground that, since his expenses had exceeded the amount of interest collected on the judgment, he had not converted the client's funds.⁵⁰ The Louisiana Supreme Court rejected this argument and publicly reprimanded the attorney.⁵¹

Likewise, if the attorney keeps interest earned on an investment of a client's funds, where administrative costs do not exceed the income earned, he has converted the client's property and violated disciplinary rules 5-104⁵² and 9-102.⁵³

Background: Interest on Lawyers' Trust Accounts Programs

An interest on lawyers' trust accounts program is a plan⁵⁴ whereby

(1962), reprinted in 1 INFORMAL ETHICS OPINIONS 544 (ABA Comm. on Ethics and Prof. Resp. 1975)). In Informal Opinion 991, reprinted in 2 INFORMAL ETHICS OPINIONS 867 (ABA Comm. on Ethics and Prof. Resp. 1975), the Committee decided that a lawyer could not use interest earned on a client fund account to offset the costs of operating the account. ABA Formal Op. 348, *supra* note 3, at 5.

48. 375 So. 2d 1350 (La. 1979).

49. *Id.* at 1351.

50. *Id.* at 1353.

51. *Id.* at 1354. The court said it imposed the light penalty partially because the lawyer had committed a mere "technical violation." *Id.* The usual penalty for conversion of a client's funds, in the absence of mitigating circumstances, is disbarment. See *LSBA v. Jordan*, 375 So. 2d 89 (La. 1979); *LSBA v. Phillips*, 363 So. 2d 667 (La. 1978); *LSBA v. Jacques*, 260 La. 803, 257 So. 2d 413, *cert. denied*, 409 U.S. 877 (1972); *LSBA v. Klein*, 253 La. 603, 218 So. 2d 610 (1969); *LSBA v. Haylon*, 250 La. 651, 198 So. 2d 391 (1967); *LSBA v. Yoder*, 243 La. 909, 148 So. 2d 597 (1963); *LSBA v. Woods*, 243 La. 94, 141 So. 2d 828 (1962).

52. See *infra* text accompanying note 201.

53. See *infra* text accompanying notes 195-98.

54. In some states, the plans have been adopted by statute. See, e.g., CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1984); MD. ANN. CODE art. 10, § 44 (Supp. 1983). In other states, the plans have been adopted by the state supreme courts under their authority to legislate for and regulate the legal profession. See, e.g., *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982). If the Louisiana Supreme Court were asked to adopt such a program under its authority to regulate the legal profession within Louisiana, the court might face the question of whether its regulatory power can be so extended under the Louisiana Constitution. "The powers of government of the state are divided into three separate branches: legislative, executive, and judicial." LA. CONST. art. II, § 1. "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." *Id.* art. II, § 2. See *infra* note 210.

lawyers⁵⁵ deposit client funds into interest-bearing trust accounts in financial institutions. The financial institutions channel the interest earned on the client funds to state bar foundations to pay for special law-related projects considered to be in the public interest. The plans vary somewhat from state to state, but generally work in the following fashion.

The plan affects only those client funds that are to be held for a short period or that are so small that it is not practical to place them into a separate interest-bearing account for the individual client.⁵⁶ When a lawyer receives funds that meet one of the two criteria, he places the funds into a special trust account in a bank or savings and loan

55. The lawyer, not the client, decides whether to participate in the program. In a number of states, the client has absolutely no voice in deciding whether his funds are to be used to generate income for the bar foundation. In Florida, for example, the Florida Supreme Court has ruled that the lawyer need not even give the client any notice that his funds may be used to earn interest that will be paid to the bar foundation. *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981). In accord are the Minnesota and New Hampshire Supreme Courts. See *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982). The California and Maryland statutes adopting these plans do not require that the client have any choice in whether his funds are used to generate income for the bar foundation. See CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1984); MD. ANN. CODE art. 10, § 44 (Supp. 1983). Contrary to these states' decisions and statutes, the Arkansas Supreme Court refused to adopt a program that did not require notice to the client. *In re Interest on Lawyers' Trust Accounts*, 279 Ark. 84, 648 S.W.2d 480 (1983). For a more detailed discussion of the constitutional issue of whether absence of notice to the client in these plans violates procedural due process, see *infra* text accompanying notes 118-92.

56. If the amount of the funds is large enough to earn an amount of interest that will cover the charges of maintaining the account and accounting for the interest earned for the individual client, then a separate account is established for the individual client and the interest earned on that account is paid to the client. The same is true if the funds are small in amount but will be held for a period of time long enough to earn interest sufficient to cover the costs of the account. In general, the lawyer is charged with determining whether the income from the funds advanced by the client will be sufficient to cover the charges. The Maryland statute provides a guideline for the lawyer to use in determining whether to place the funds in an individual account for the benefit of the client or into a pooled account for the benefit of the bar association or its foundation.

If in the judgment of the attorney any trust moneys received from any client or beneficial owner are too small in amount or are reasonably expected to be held for too short a period of time to generate at least \$50 of interest or such larger amount of interest as in the judgment of the attorney may be equivalent to the cost of administering an account for the benefit of the client or beneficial owner, such moneys may be pooled and commingled by the attorney with other such moneys held for other clients or beneficial owners, and the aggregate interest earned on such commingled account shall be paid at least quarterly, net of any service charges, by the depository bank or savings and loan association, to the Maryland Legal Services Corporation exclusively for the charitable purposes defined in its statutory charter.

MD. ANN. CODE art. 10, § 44(a)(2) (Supp. 1983). But other states have furnished no guidelines to the attorney deciding whether the amount of money is small enough or the period short enough to qualify the funds for the programs. Therefore, the lawyer is left to his own

association.⁵⁷ Each lawyer maintains one special trust account for all funds that meet the criteria above, whether the funds are advanced by one of his clients or by several of his clients. The interest earned on the pooled funds is paid to the state bar foundation,⁵⁸ which uses the interest to finance public interest programs, generally including legal services for the poor and other activities considered to be of benefit to society as a whole.⁵⁹

The rationale behind the plan is that when the sums advanced are small or when they are to be held for only a short time, placing the funds into interest bearing accounts for the benefit of the individual client is impractical because the cost of accounting for the income to each client

discretion to decide whether the sum is small enough or the period short enough to qualify the funds for participation in the program. For a discussion on the possible problems that could arise from this absence of a standard, see *infra* text accompanying notes 185-89.

57. Generally, the plan works on a voluntary basis, *i.e.*, each lawyer or firm chooses whether to participate in the program. Florida, Maryland, and New Hampshire, for example, all have voluntary programs. See *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); MD. ANN. CODE art. 10, § 44(a)(2) (Supp. 1983); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982). But, in at least two states, the program is mandatory; every lawyer who receives from a client funds that qualify for the program must deposit the funds into pooled accounts from which the income is paid to the bar foundation. See CAL. BUS. & PROF. CODE § 6211 (West Supp. 1984); *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982). The purpose of making the Minnesota program mandatory, said the Minnesota Supreme Court, was to maximize the income to the bar foundation and to avoid the difficulties that Florida had experienced in urging lawyers to participate voluntarily. *Id.* at 158. Florida has experienced some trouble in convincing lawyers to join the program, and currently, 85% of the lawyers do *not* participate in its program. Rivlin, *supra* note 1, at 1037-38. For an example of the appeals from the Florida Bar Association to lawyers in Florida to increase their participation, see Smith, *Something for Nothing*, 55 FLA. B.J. 692 (1981).

58. As a general rule, the moneys earned on the accounts are paid to bar foundations that are exempt from federal income tax. See, *e.g.*, *In re Interest on Trust Accounts*, 356 So. 2d 799 (Fla. 1978); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982). However, other entities have also been established as the recipient of the funds that will be used for law-related projects. In California, the state bar itself is the recipient. CAL. BUS. & PROF. CODE § 6212 (West Supp. 1984). In Maryland, the recipient is the Maryland Legal Services Corporation. MD. ANN. CODE art. 10, § 44(a)(2) (Supp. 1983). In Minnesota, the state supreme court established a board of lawyers to administer the funds received from the program. *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982). For simplicity's sake, all references in this paper to recipients who are tax-exempt will be termed the "bar foundation."

59. Some of the other activities funded by income generated from the trust accounts are loans and scholarships for law students and other programs to "improve the administration of justice." See, *e.g.*, *In re Interest on Trust Accounts*, 356 So. 2d 799, 811 (Fla. 1978). California has provided strict guidelines for determining what programs qualify to receive grants to provide legal services for the indigent and specifies what guidelines are to be used to allocate the funds geographically. CAL. BUS. & PROF. CODE §§ 6213, 6214, 6216 (West Supp. 1984). Some activities that were proposed for funding through the interest on trust accounts have had to be dropped because the activity did not meet the Internal Revenue Service's requirements for preserving the tax exempt status of the bar foundation. *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981).

is thought to exceed the amount of interest that an individual client would earn.⁶⁰ In the absence of the plan, these funds are deposited into non-interest-bearing accounts in order to avoid incurring the accounting costs; thus, the financial institution where the funds are deposited has free use of the money. Proponents of the plan claim that a policy allowing the funds to earn interest that can be used to benefit the public is better than allowing the banks to use the funds without charge.⁶¹

Pooling client funds in these programs generates a substantial amount of interest over a one-year period. In Canada, for example, a plan such as this earns over \$34 million annually for the bar association.⁶² Such a substantial source of revenue cannot be ignored when demands on the state coffers are increasing. On the other hand, a state should not adopt such a program without examining some serious legal questions.⁶³

60. Gonser, Almond, F. Ziegler, *Financing Public Services Activities With Interest-Bearing Attorney Trust Accounts*, 15 IDAHO L. REV. 219, 220 (1979); Rivlin, *supra* note 1, at 1037; Comment, *A Source of Revenue for the Improvement of Legal Services, Part II: A Recommendation for the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Texas Bar Association and an Analysis of the Federal Income Tax Ramifications*, 11 ST. MARY'S L.J. 113, 113 (1979) [hereinafter cited as Comment, *A Source of Revenue, Part II*]; Comment, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds Held by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539, 539 (1979) [hereinafter cited as Comment, *A Source of Revenue, Part I*]; Note, *Interest on Attorney Trust Accounts: A Questionable Approach in Florida*, 8 STETSON L. REV. 413, 421 (1979).

61. Rivlin, *supra* note 1, at 1036. The accounting cost rationale is subject to some criticism. Even simple desktop computers are capable of allocating the income earned among clients. Indeed, some financial institutions now furnish such services to customers. ABA Formal Op. 348, *supra* note 3, at 3. Thus the actual computing of the income may not cost more than the income that is generated. What may cause the costs of accounting to exceed the amount of income earned on an individual client's balance in a trust account is the additional cost of accounting to the Internal Revenue Service for the amount of interest paid to each client. Federal tax laws require the lawyer to file an information return with the Internal Revenue Service for each client to whom the lawyer made a payment of interest of \$10 or more in a one-year period. See I.R.C. § 6049(a) (1976). Thus, there exists the possibility of the curious situation in which it would be cost-effective to pay interest to a client if the sum was under \$10, and yet not cost-effective to pay the client interest of a sum exceeding \$10.

62. Rivlin, *supra* note 1, at 1037.

[B]y the end of May, 1983, with only a 15 per cent participation rate among the state's lawyers, the Florida Bar Foundation has raised \$1.3 million after 19 months. . . . An A.B.A. task force on I.O.L.T.A. estimated that \$100 million might be raised in one year if every penny of the \$1.8 billion deposited in noninterest-bearing accounts by all attorneys were deposited at 5.25 per cent interest.

Id.

63. One of those legal issues has been resolved. For federal income tax purposes, the Internal Revenue Service has ruled that the income generated by the trust account programs is not taxable to either the client or the lawyer. Rev. Rul. 209, 1981-2 C.B. 16; *cf.* General Counsel Memorandum No. 38,374 (May 12, 1980) (LEXIS, Fedtax library, Gen. Counsel

Income as Client's Property Under Louisiana Law

The resolution of each issue concerning the programs depends in part on whether state law considers the interest income as the client's property. Only *property* is protected by the fourteenth amendment, and only the *client's* property is protected by Louisiana's Code of Professional Responsibility. Thus, in analyzing whether Louisiana should adopt such a program, a threshold question is whether the client has a property right under Louisiana law. An examination of Louisiana law leads to the conclusion that the client does.

Louisiana Civil Code article 551 specifies that interest is a civil fruit: "Civil fruits are revenues derived from a thing by operation of law or by reason of a juridical act, such as . . . interest" ⁶⁴ As a civil fruit, interest is the property of the owner of the principal. ⁶⁵

Proponents of the program might concede that the income itself is property, but they argue that the client has no right to the income because the "program creates income where none existed before." ⁶⁶ In other words, the client has only an inchoate right to the income. ⁶⁷ The fallacy in this argument is the failure to recognize that the *client's inchoate right to the income* is also property. The jurisprudence defines *property* as "the total mass of existing or *potential* rights and liabilities attached to a person for the satisfaction of his economic needs." ⁶⁸

In *State v. Hagerty*, ⁶⁹ the Louisiana Supreme Court recognized that an inchoate right to income is property. In *Hagerty*, the public administrator of Orleans Parish was convicted of theft of interest earned for the state. In violation of his fiduciary duty to collect and hold for the state certain unclaimed property, the administrator had invested the funds and retained the interest earned. The court rejected his defense that, since the state did not own the funds, ⁷⁰ it could not own the income earned

Memo. file); see also *id.* No. 38,854 (May 18, 1982); Private Ruling No. 8,330,104 (Apr. 18, 1983) (LEXIS, Fedtax library, Priv. Ruling file); *id.* No. 8,316,108 (Jan. 19, 1983); *id.* No. 8,314,065 (Jan. 6, 1983).

64. LA. CIV. CODE art. 551.

65. LA. CIV. CODE art. 483.

66. See, e.g., Berg, *supra* note 4, at 1017.

67. Civiletti & Machen, *At Issue: The Case for IOLTA*, 70 A.B.A. J., Jan. 1984, at 16, 18.

68. Due v. Due, 342 So. 2d 161, 165 (La. 1977) (emphasis added) (citing A. YIANNOPOULOS, PROPERTY § 125 in 2 LOUISIANA CIVIL LAW TREATISE 319 (2d ed. 1980)). In addition to the Civil Code's provisions, other statutes support the conclusion that the income earned on the trust account is "property." For example, a state banking law implies that banks must pay interest on interest-bearing accounts to someone. See La. R.S. 6:11 (Supp. 1984). That statute creates a right to receive income earned on an interest-bearing account. That right is "property" within the meaning of Civil Code article 483.

69. 251 La. 477, 205 So. 2d 369 (1967), *cert. denied*, 391 U.S. 935 (1968).

70. The state did not own the funds because it was possible that the owners or their

on the funds. The court found that the state's inchoate right to the funds gave the state an inchoate right to the income and that the inchoate right to the income was superior to any claim to the income which was not based on title to the funds.⁷¹

Implicit in *Hagerty* is the recognition that an inchoate right to either the funds or the income is property. The case was decided on the basis of property articles in the civil code,⁷² a basis which would be inappropriate if the court did not consider the inchoate rights to be property.

In the program, the client has title to the funds, which gives rise to an inchoate title to the interest earned on the funds.⁷³ Under *Hagerty*, that inchoate right to the interest earned is a property right.

heirs would claim the property and because title to the funds had never been transferred to the state.

71. The court reasoned:

The State's title to the funds in defendant's possession at the time the instant interest accrued was inchoate; that is, partial, temporary unfinished, provisional, begun but not completed. . . . The State's title could have been taken away by the appearance of the previously unknown owners or heirs, but until they made their appearance the State had inchoate rights. As admitted by the defendant, . . . he did not own the funds. Under the circumstances herein, the State's inchoate title gave it an indicia of ownership.

251 La. at 494-95, 205 So. 2d at 375 (citations omitted).

72. The court applied the predecessors of Civil Code articles 483 and 551 to find that the state owned the interest by accession. 251 La. at 494-95; 205 So. 2d at 375.

73. LA. CIV. CODE ART. 483. It reads: "In the absence of rights of other persons, the owner of a thing acquires the ownership of its natural and civil fruits." Since the client owns the funds, he also acquires the ownership of the interest earned on the funds—unless article 483's qualifying phrase, "[i]n the absence of rights of other persons," applies. Comment (c) to article 483 states:

The phrase "in the absence of rights of other persons" has been inserted to indicate that accession does not supersede rights of other persons. For example, despite the principle of accession, the fruits of a thing may belong to a usufructuary, a possessor in good faith, or even a lessee.

This comment could be the basis for the argument that article 483 allows subsequent legislation to create exceptions to the general rule of accession. Thus, proponents could argue, the adoption of a program would merely be an exception to accession. Since a program would be a later expression of legislative will, LA. CIV. CODE art. 23, the program legislation would override article 483.

This argument can be rebutted by pointing out that in *Hagerty* the court noted that "rights of other persons" were not involved since the defendant had no title to the funds themselves. 251 La. at 494-95, 205 So. 2d at 375. Here, the bar foundation has no claim of title to the client's funds. The holding in *Hagerty* can be rationalized with the examples in comment (c) to article 483. The client in the program is in a different position than a naked owner because a naked owner either consents to give up his revenues when he creates a conventional usufruct, LA. CIV. CODE arts. 544-545, or knowingly accepts the naked ownership subject to a testamentary or legal usufruct. See LA. CIV. CODE arts. 544 & 890. But the client neither consents, see *infra* text accompanying note 120, nor acquires his funds initially on the condition that income will be paid to a third party. The same distinction exists between a lessor and the client. The lease is consensual, see LA. CIV. CODE art. 2669, whereas the program is not.

The client's inchoate right to income is protected by the Louisiana Constitution. Article I, section 4 of the Louisiana Constitution of 1974 provides in part: "Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power."⁷⁴ Since, in the opinions of the drafters of the Louisiana Constitution, federal courts construing the United States Constitution had not given adequate protection to property rights,⁷⁵ the drafters intended the meaning of *property* to be broadly construed.⁷⁶

The Louisiana constitutional protection of property affects the programs because it establishes that one who owns property has a right to control it and use it for his own purposes.

Violation of the United States Constitution's Taking Clause

The most serious constitutional question that has arisen⁷⁷ concerning these programs is whether they violate the Taking Clause of the fifth amendment to the United States Constitution. The fifth amendment, through the fourteenth amendment, prohibits states from taking private property without just compensation.⁷⁸ Proponents of the programs argue

Furthermore, *Amiss v. State*, 340 So. 2d 1085 (La. App. 1st Cir. 1976), rejects the idea that a third party can keep or dispose of interest earned on funds entrusted to him in a fiduciary capacity, in the absence of express statutory authority that overrides the general principle of article 483. In *Amiss*, the sheriff of East Baton Rouge Parish had been holding revenue sharing funds claimed by the state, the parish, and other public entities. When a trial court ordered him to turn over the funds to the claimants, the sheriff refused to turn over the interest earned on the funds in his possession. The first circuit rejected the sheriff's arguments that certain statutes, LA. R.S. 6:748 (as it appeared prior to its amendment by 1983 La. Acts, No. 675, § 1); LA. R.S. 39:1271 (as it appeared prior to its amendment by 1982 La. Acts, No. 371, § 2), permitted him to retain the income, on the basis that the statutes were not applicable. The court cited the predecessors to current articles 483 and 551 as controlling the disposition of this dispute. 340 So. 2d at 1088.

Thus, a third person holding funds for an owner is not entitled to keep the interest earned on the funds because the owner of the funds owns the income. If the third person cannot keep the income, neither can he give it away, as the program would require.

74. See Hargrave, *Declaration of Rights of The Constitution of 1974*, 35 LA. L. REV. 1, 10-13 (1975); Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 24 (1975).

75. *State v. 1971 Green GMC Van*, 354 So. 2d 479 (La. 1977); Jenkins, *supra* note 74, at 19-20.

76. Jenkins, *supra* note 74, at 19-20.

77. See, e.g., Berg, *supra* note 4; Berg & Johnson, *A Proposed New Revenue Source for Legal Services in Texas*, 46 TEX. B.J. 57 (1983); Rivlin, *supra* note 1.

78. The fifth amendment to the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." The fifth amendment has been held applicable to the states through the fourteenth amendment. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897); *Pacific Ry. Co. v. Nebraska*, 164 U.S. 403 (1896); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

that no "property" is taken because the program takes only income that it creates, and that the client has no property interest in the income.⁷⁹ Opponents charge that the state takes income from the client without compensation.⁸⁰ State courts have decided the issue in favor of the proponents, primarily on the ground that the client had no property right in the income under state law,⁸¹ but, in Louisiana, the courts should reach the conclusion that the programs do violate the Taking Clause.

The "Property" Right at Stake

A violation of the Taking Clause occurs when two requirements are satisfied: First, the right must be "property" within the meaning of the fifth and fourteenth amendments, and second, the government must have "taken" the property right.

Since the inchoate right to income is "property" under Louisiana law,⁸² it meets the first requirement for a violation of the Taking Clause if it falls within the federal definition of *property*: "[T]he group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."⁸³

Thus, the client's right to *use* the funds meets the federal definition of property. Since his right to use the property includes his right to control others' use, the client's right to control the attorney's use of the funds also meets the federal definition.

The United States Supreme Court has recognized the right to control the use of one's property as a property right protected by the fourteenth

79. See Civiletti & Machen, *supra* note 67, at 18.

80. See Marsh, *At Issue: IOLTA Should be Rejected*, 70 A.B.A. J. Jan. 1984, at 16, 16.

81. *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); see also *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982). The Florida Supreme Court found that the income was not a property interest of the client for two reasons: (1) the property was created where it did not exist before, and (2) the client would never benefit from the income anyway. 402 So. 2d at 395. The first of those reasons was rejected in the similar case of *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), which the Florida Supreme Court attempted to distinguish. 402 So. 2d at 395-96; see *infra* note 94. The second reason is also debatable. Clients could be paid the interest earned if technological costs were reduced, and it is also possible that the grants made by the bar foundation might benefit the client in some cases.

82. See *infra* text accompanying notes 64-76.

83. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (emphasis added). For a recent and scholarly discussion of what constitutes "property," see Alexander, *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545 (1982). See also Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861 (1982).

amendment.⁸⁴ In *Pruneyard Shopping Center v. Robins*,⁸⁵ high school students were evicted from a shopping center for distributing pamphlets and soliciting petitions for a cause of which the shopping center owner disapproved. When the California Supreme Court upheld a judgment against the shopping center owner for violation of the students' first amendment rights, the owner appealed to the United States Supreme Court, arguing that the California Supreme Court's ruling which permitted the students to exercise their first amendment rights on his property violated his own rights under the due process clause.⁸⁶ He argued that the right to exclude others from his property was a fundamental property right which the state could not deny him without due process⁸⁷ nor take from him without just compensation.

Although the Supreme Court held that the state had not taken his property right,⁸⁸ it did agree that the owner of the shopping center *had* a property right. The court acknowledged: "that one of the essential sticks in the bundle of property rights is the *right to exclude others*."⁸⁹ In a footnote the court wrote:

The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." . . . It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the *group of rights inhering in the citizen's relation to the physical thing*, as the *right to possess, use and dispose* of it."⁹⁰

84. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The Court in *Kaiser Aetna* analyzed the property right this way:

[There are] a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the [owner's] property. . . . [W]e hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.

Id. at 179-80 (footnote omitted). In *Kaiser Aetna*, the property right involved was the right to exclude the public from a private marina. The Court held that the United States could not take a navigational servitude on part of that property without paying the owner compensation. *Id.* at 80.

85. 447 U.S. 74 (1980).

86. *Id.* at 79-80.

87. *Id.* at 79-80, 82.

88. *Id.* at 83. The rationale for the conclusion that there had been no taking was that the owner of the building was deemed to have opened his premises to the public. *Id.*

89. *Id.* at 82 (emphasis added) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

90. *Id.* at 82 n.6 (emphasis added; citation omitted) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945)).

As the shopping center owner had a property right to deny others the use of the shopping center, the clients have a right to deny the bar foundation the use of their funds. And just as the students in *Pruneyard Shopping Center* used "property" belonging to the shopping center owner, the bar foundation uses "property" belonging to the clients.

The United States Supreme Court's decision in *Webb's Fabulous Pharmacies v. Beckwith*⁹¹ authoritatively established this proposition. In *Webb's Fabulous Pharmacies (Webb's)*, Eckerd's had agreed to purchase Webb's but discovered that Webb's might be insolvent. Eckerd's sued Webb's, interpleaded all of Webb's creditors, and deposited the purchase price into the court registry. A subsequently appointed receiver for Webb's demanded the funds for Webb's creditors, plus interest earned while the funds were in the registry. The clerk remitted the funds (less a substantial fee allowed by statute),⁹² but refused to turn over the interest on the basis of a state statute⁹³ which provided that all interest earned on registry funds belonged to the clerk of court.

The Florida Supreme Court held that because the creditors had no property right, but merely an expectation, there was no violation of the Taking Clause.⁹⁴ The United States Supreme Court reversed. Addressing

91. 449 U.S. 155 (1980).

92. "The clerk of the circuit court shall make the following charges for services rendered by his office in recording documents and instruments and in performing the duties enumerated. . . . (13) For receiving money into the registry of court: (a) First \$500.00, percent . . . 2.00, (b) Each subsequent \$100.00, percent . . . 1.00." FLA. STAT. ANN. § 28.24 (13) (West 1983).

93. The clerk of the circuit court in each county shall make an estimate of his projected financial needs for the county and shall invest any funds in designated depository banks in interest-bearing certificates or in any direct obligations of the United States in compliance with federal laws relating to receipt of and withdrawal of deposits. . . . [A]ll interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court.
FLA. STAT. ANN. § 28.33 (West Supp. 1983).

94. *Beckwith v. Webb's Fabulous Pharmacies*, 374 So. 2d 951 (Fla. 1979). The bases for the Florida court's decision to allow the clerk to keep the income were that the funds became "public money" upon deposit into the registry, that the "statute takes only what it creates," and that the interest earned was not private property. This rationale, which the Supreme Court rejected in *Webb's*, is the same that the Florida court uses to justify its approval of the program. See *supra* note 81. Less than a year after *Webb's* was decided, the Florida Supreme Court held that the interest on lawyer's trust account programs did not involve a "property" interest of the client, within the meaning of the fourteenth amendment. *In re Interest on Trust Accounts*, 402 So. 2d 389 (1981). In this decision, the court sought to distinguish *Webb's* on several grounds. First, it stated that the interest on lawyers' trust account programs differed from *Webb's* because they create "income where there had been none before." *Id.* at 395. That same argument had been made in *Webb's*, but did not convince the United States Supreme Court. 449 U.S. at 164. The Supreme Court apparently felt that the time of creation of the property was irrelevant to the question of whether the property is protected by the United States Constitution. *Id.* Second, the Florida Supreme Court tried to distinguish *Webb's* on the ground that the property interest in *Webb's*

the issue of whether Webb's creditors had a property interest in the income earned on the deposited funds or a mere expectancy which was not a protected right, the Court stated:

Webb's creditors, however, had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county. . . . The creditors thus had a state-created property right to their respective portions of the fund.

. . . [They were also entitled to claim] a proper share of the interest, *the fruit of the fund's use*⁹⁵

Application of the *Webb's* analysis to the programs clearly indicates that the clients have a property interest protected by the Taking Clause. First, the funds deposited by a client are private property, like the funds deposited into the court in *Webb's*. Second, the client retains his ownership of the funds deposited with the attorney. Third, the client has a claim to the funds that is protected by state law and is a state-created right.⁹⁶ Fourth, the income earned on the lawyer's trust account is "the fruit of the funds' use." Therefore, under a *Webb's* analysis, the client's inchoate right to the income is a property interest protected by the fourteenth amendment.

The Supreme Court decisions in *Webb's* and *Pruneyard Shopping Center* thus indicate that the client does have a property interest in income earned on deposited funds; therefore, the programs meet the first criterion for a Taking Clause violation.

The Taking

In order for the programs to violate the Taking Clause, they must

was created by state law, whereas the client's interest in the income did not stem from state law. 402 So. 2d at 395-396. This conclusion may be correct under Florida law, but the court should have explained why the doctrine of accession does not apply to this case. It appears from some preliminary research that the doctrine of accession would cause the income to be considered the client's property. Florida has applied the doctrine in the past. *Mossler Acceptance Co. v. Norton Tire Co.*, 70 So. 2d 360 (Fla. 1954); 1 FLA. JUR. 2D, *Accession, Confusion, and Improvements* § 3 (1977). The third distinction that the Florida Supreme Court made between *Webb's* and the program was that the programs were voluntary, whereas the statute in *Webb's* had been mandatory. 402 So. 2d at 396. Whether a client chooses to participate voluntarily, however, depends on whether the lawyer informs his client that funds on deposit with the lawyer may be used to generate income for the bar foundation. *Id.* at 396. While the program does not prohibit lawyers from informing their clients, it does not require the lawyer to inform the client. The choice is left entirely up to the lawyer. *Id.* It can hardly be said that in all cases the client willingly gives the lawyer or the bar foundation the right to use his funds to generate income for the foundation.

95. 449 U.S. at 161-62 (emphasis added; citation omitted).

96. See *supra* text accompanying notes 64-81.

meet the second criterion—the government must have “taken” property. Not every deprivation of a property right is a taking in the constitutional sense.⁹⁷ The question of whether a taking exists in any set of facts is basically a policy decision that results from balancing the weight of the government’s interest against the extent of the deprivation of an individual’s interests. In other words, the question is whether it is fair to place the burden of the loss on the individual or whether the government should spread the burden of the loss among the members of society by paying the individual for his loss.⁹⁸ To aid in this policy decision, the United States Supreme Court, choosing not to rely on one single test, has devised a number of theories.⁹⁹

The Court has determined that the government’s physical invasion of an individual’s property is a taking.¹⁰⁰ This deprivation is deemed serious enough to outweigh the government’s interests; therefore, the government must pay compensation. The most recent application of the invasion theory, *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁰¹ supports the conclusion that the extent of the deprivation of the client’s right to the income under the program outweighs the government’s interest in providing revenue to fund legal services and law-related programs.

The Court in *Loretto* held that the government’s permanent physical occupation of the owner’s property was a taking *per se*.¹⁰² A New York statute¹⁰³ allowed cable companies to install wires and several small boxes

97. *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *United States v. Causby*, 328 U.S. 256 (1946). If the state is exercising its right of eminent domain, the state must compensate the owner of the property. *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982). If the state is validly exercising its police power, it does not have to pay compensation. *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Munn v. Illinois*, 94 U.S. 113 (1876); *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646 (1st Cir. 1974); *Johnson v. United States*, 479 F.2d 1383 (Ct. Cl. 1973). “Taking” has the same meaning under both the fifth and fourteenth amendments to the United States Constitution. *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081 (6th Cir. 1978).

98. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1172 (1967); see also *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; *Sax, Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

99. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

100. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

101. 458 U.S. 419 (1982).

102. *Id.* at 432. But, where the physical invasion does not go so far as to become a permanent occupation, the *Penn Central* factors should be applied to determine whether there is a taking. *Id.* at 440; see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

103. N.Y. EXEC. LAW § 828(1) (McKinney 1982).

upon landlords' property without the landlords' consent. In a suit by a landlord against a cable company, the *Loretto* court found that the company had physically invaded the landlord's property by using space for its wires and boxes, that the physical invasion amounted to a permanent occupation of the space containing the wires and boxes, and that the *per se* rule applied, even though only a very small amount of space was taken.¹⁰⁴

This *per se* invasion theory should apply to the programs. First, the programs require a physical invasion of the client's funds and his right to the income from those funds. The invasion is physical because the government takes *possession* of the property right to receive the income. The money earned with the client's funds is not permitted to go into the physical possession of the client. Instead, the government allows the income to go into the physical possession of the bar foundation. The property, which is in an intangible form,¹⁰⁵ is possessed and controlled solely by the bar foundation and agents for the bar foundation and the government.¹⁰⁶ The substance of the program is that the government reaches into a private bank account and seizes for itself the income earned on that account. Such possession and control constitute a physical invasion,¹⁰⁷ even if it affects only a small sum of money.

104. 458 U.S. at 425-26.

105. A physical invasion of an incorporeal occurs when the government possesses or destroys the incorporeal. See Michelman, *supra* note 98, at 1184 & n.37.

106. The programs, in effect, order the financial institution to act as the government's agent in paying the interest to the bar foundation.

107. Two cases imply that possession constitutes a physical invasion. In *Loretto*, the Court stated: "So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." 458 U.S. at 440. This passage must be considered in the context of the *Loretto* opinion which states that physical invasions include both permanent occupations and temporary invasions that are physical. *Id.* at 435-36. The passage states that one type of physical invasion (the permanent occupation) is to be analyzed under the *Loretto* rule. But the other type of physical invasion (the temporary invasion) is to be analyzed under the tests used for nonpossessory acts by the government. The Court is implying that physical invasions are in a different category than nonpossessory acts. Therefore, it seems logical to conclude that the *Loretto* Court viewed possession as the rough equivalent of a physical invasion. This conclusion follows because possession is clearly not a "nonpossessory" act. The division the Court made was between "nonpossessory" and physical invasions. Therefore, if possession must fall into one of those two classes, and if it cannot fall into the "nonpossessory" class, then it must fall into the class of physical invasions.

The second case that lends support to this classification of possession as a physical invasion is *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), discussed *supra* text accompanying notes 91-96. In *Webb's*, the Court rejected the argument that the regulation in question was merely a restriction on the use of the interpleaded fund. The Court then characterized the government's action as an "exaction" and a "forced contribution to general governmental revenues." *Id.* at 163. The language in *Webb's* is not framed in terms of a physical invasion versus a nonpossessory activity, as is the language in *Loretto*.

Furthermore, the physical invasion amounts to a permanent occupation of part of the property: the client's right to the income. The state, through the program, not only occupies the income but removes any possibility that the client may possess it¹⁰⁸ or use it in any way. Such a deprivation is a permanent occupation of the client's income.¹⁰⁹

The *Loretto* court found that where the government allows a third party to occupy the property, the severity of the occupation was an even greater justification for compensating the owner.¹¹⁰ In the programs, the invasion is made not by the government itself, but by the bar foundation. Thus the taking of the client's income by a "stranger" burdens the client with a "special kind of injury . . . [that] adds insult to injury."¹¹¹

Application of other theories such as the diminution of value theory,¹¹²

Nevertheless, in both cases the Court is making the same distinction between physical invasions and regulation through nonpossessory acts. In *Webb's*, the government took possession of the income earned on the interpleader fund, just as the government allows the bar foundation to take possession of the income earned on the clients' funds under the programs under discussion. Clearly, in both cases the Court considers the act of taking possession and excluding the property owner as a physical invasion.

108. "[T]he permanent physical occupation of property forever denies the owner any power to control the use of property; he not only cannot exclude others, but can make no *non-possessory* use of the property." 458 U.S. at 436 (emphasis added).

109. The Court in *Webb's* found that the "forced contribution" of income earned on the interpleader fund was a taking. Assuming that the Court was applying the invasion theory there, it must have thought that the "forced contribution" was a permanent occupation of the income by the government. Thus, *Webb's* would stand for the proposition that anytime the state takes income from funds deposited by a client, the state has made an unlawful taking. That the amount of income taken is small does not mean it is "not of constitutional significance." The size of the loss is irrelevant where there is a physical occupation. 458 U.S. at 438 n.16.

110. The Court stated:

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. . . . [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. . . . Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Id. at 436.

111. *Id.*

112. The diminution of value theory has been applied in a large number of cases to determine what is a "taking." See, e.g., *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. Causby*, 328 U.S. 256 (1946); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (dicta); *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); *Chrysler Corp. v. Fedders Corp.*, 519 F. Supp. 1252 (D.N.J. 1981); *Amchem Prod. v. Costle*, 481 F. Supp. 195 (S.D.N.Y. 1979); *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975); *Brooklyn Union Gas Co. v. Prendergast*, 7 F.2d 628 (E.D.N.Y. 1925); *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977). The essence of this theory is that a taking occurs only when the value of all of the property is substantially lowered as a result of the government's action. In other words, if the decrease

the strand-bundle theory,¹¹³ or the *Penn Central* factors,¹¹⁴ may lead to

in value of the individual's property is slight, then the government's interest is deemed to be greater than the individual's interest. Therefore, the government is not obligated to spread the individual loss among members of society. The policy is that government is permitted to extract small amounts of wealth from individuals and redistribute that wealth to others. See Michelman, *supra* note 98, at 1181-82.

When this theory is applied to the interest on lawyers' trust account programs, the programs do not seem offensive to the Taking Clause. The actual amount of the interest that is taken from the individual client should be small. Even though the client loses the right to receive income from his property, the amount of that loss will not be substantial in comparison with the value of the funds themselves.

However, the programs are more similar to cases where the courts have refused to apply the diminution of value theory. For example, in *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977), the court of claims held that the diminution of value theory did not apply where the government had deprived the Willard Hotel owners of any use of the hotel to produce income. The programs also deny the client the right to use his funds for earning any income for himself or anyone else, other than the government. Therefore, this theory should not apply to the programs.

113. In *Andrus v. Allard*, 444 U.S. 51 (1979), the United States Supreme Court stated the strand-bundle theory: "[W]here 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." *Id.* at 65-66. See also *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Pete v. United States*, 531 F.2d 1018 (Ct. Cl. 1976); *Johnson v. United States*, 479 F.2d 1383 (Ct. Cl. 1973); *Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970); *R.J. Widen Co. v. United States*, 357 F.2d 988 (Ct. Cl. 1966); *Eyherabide v. United States*, 345 F.2d 565 (Ct. Cl. 1965); *Ripley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983). The policy that supports this theory is that the government can take some uses of property as long as it leaves the owner some other uses that are of economic value. In other words, an individual's interest in only certain limited uses of his property is not sufficient to overcome the government's interest in prohibiting those same limited uses.

In the *Andrus* case, the Secretary of the Interior had issued a regulation prohibiting commerce in bird parts. The plaintiffs, who were owners of bird parts, sued on the ground that the regulation took one of their property rights in the bird parts, namely the "opportunity to earn a profit" from the sale of the parts. The Supreme Court held that the regulations did not violate the Taking Clause. The Court pointed out that the plaintiffs were deprived of only one of their property rights inherent in their ownership of the bird parts. The plaintiffs were still free to "possess and transport their property, and to donate or devise the protected birds." 444 U.S. at 66. The fact that the plaintiffs were denied the most profitable use of their property—the right to sell it—was insufficient cause to find that a taking had occurred. *Id.* at 66-68.

On one hand, it appears that the application of the strand-bundle theory to the programs would mean that the programs do not violate the Taking Clause. If the client owns a bundle of rights in the funds, including the right to possess, the right to transport, the right to donate, and the right to devise, then the destruction of one of those rights—the right to the income from the investment of the property—would not result in a compensable taking.

On the other hand, the programs are distinguishable from cases such as *Andrus*. In *Andrus*, the regulation *forbade* certain uses of the property. Here, the program *prescribes* the use of the funds and allows only that one use of the income. The prohibition of some uses may be distinguishable from the prescription of only one use, especially where that use is to benefit the government. A prohibition is more in the nature of an exercise of the police power than a command that income be earned and be paid to the government. A command to earn and pay income is surely a taking under the invasion theory.

114. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), provides six

different results. But, where the application of the invasion theory results in a finding that there has been a taking, courts will not apply other theories. One writer states:

The modern significance of physical occupation is that courts, while they sometimes do hold non-trespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation . . . seems to occur when government . . . [or] its agents . . . "regularly" use, or "permanently" occupy, . . . a thing which theretofore was understood to be under private ownership. This may be true although the invasion is practically trifling from the owner's point of view¹¹⁵

Consequently, in deciding whether the programs accomplish a taking of the client's income, a court should first determine whether the invasion theory applies. Since there is a taking under the invasion theory, the other theories will not apply. To hold otherwise would be to produce just the sort of "danger" that Justice Holmes spoke of in *Pennsylvania Coal Co. v. Mahon*:¹¹⁶ "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹¹⁷

Since the programs accomplish a governmental taking of constitutionally protected property without compensation, the programs meet both criteria for violation of the Taking Clause. Compensating the client would

factors to balance against one another to determine whether there has been a taking. Those factors include a consideration of both the government's interest and the individual's loss. After weighing all of the factors in *Penn Central*, reasonable men might differ, but they could support an argument that there is a taking under that test.

115. Michelman, *supra* note 98, at 1184-85. See also *Noranda Exploration v. Ostrom*, 113 Wis. 2d 612, 335 N.W.2d 596 (1983). The *Loretto* case bears out this viewpoint. Under the diminution of value theory, the loss of a few square feet in a building would not have diminished the building's value substantially, so there would have been no taking. Likewise, under the strand-bundle theory, the loss of a small strand such as the right to deny the use of a few square feet would not have severely affected the owner's bundle of rights in the building. But the Court first applied the invasion theory, and, finding that there was a taking under the invasion theory, did not apply any of the other theories. It expressly ruled out the application of the strand-bundle theory or *Penn Central* factors. The Supreme Court stated in *Loretto* that where there was a permanent occupation of the property, the strand-bundle theory was not to be applied. The reason, it said, was that where there was a permanent occupation, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." 458 U.S. at 435. "So long as these regulations do not require the [property owner] to suffer the physical occupation of a portion of his [property] by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)." 458 U.S. at 440.

116. 260 U.S. 393 (1922).

117. *Id.* at 416.

defeat the purpose of the program; thus the Taking Clause precludes the constitutional enactment of such a program.

Violation of Procedural Due Process

Two characteristics of the interest on lawyers' trust accounts programs raise the question of whether the programs also violate the procedural due process commands of the fourteenth amendment.¹¹⁸ Those characteristics are that the government apparently deprives persons of private property¹¹⁹ and that the government does not give notice or a hearing at any time before or after the deprivation.¹²⁰ The first of these characteristics has been addressed by two courts¹²¹ in considering the constitutionality of these programs. The second characteristic has caused great concern among law review writers and courts alike.¹²²

118. The fourteenth amendment's Due Process Clause states: "nor shall any State deprive any person of life, liberty, or property, without due process of law" Procedural due process is to be distinguished from substantive due process. Procedural due process is "the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). That duty of the government requires it to provide notice and an opportunity to be heard to the person being deprived. *Id.* Substantive due process, by contrast, "demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934), *quoted in* *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980). For a discussion of the source of the fourteenth amendment, see E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 325-27 (1973). *See generally*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 501-63, 886-990 (1978).

119. *See infra* text accompanying notes 123-75.

120. Originally, the Florida program required an attorney participating in the program to obtain the consent of his client before investing the client's funds for the benefit of the Florida Bar Foundation. *In re Interest on Trust Accounts*, 356 So. 2d 799, 807 (Fla. 1978). But the consent requirement was later removed, and the program was changed to deprive the client of any control over the income earned on the account. *In re Interest on Trust Accounts*, 402 So. 2d 389, 391 (Fla. 1981). The change was precipitated by the insistence of the Internal Revenue Service that it would tax the interest earned on the account to the client under the assignment of income doctrine. *Id.* Such a tax treatment would require accounting work that might cost more than the income. Lavine, *State Bars Seek to Put Clients' Money to Work*, 1 NAT'L L.J., Mar. 26, 1979, at 10. Plans adopted in other states generally followed the Florida pattern of not requiring notice to the client. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1984) (absence of any reference to client's consent or notice to client); MD. ANN. CODE art. 10, § 44 (Supp. 1983) (absence of any reference to client's consent or notice to client); *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982) (lawyers do not have to notify clients because clients do not have a "property interest"); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 974, 453 A.2d 1258, 1260 (1982) (lawyers do not have to notify clients).

121. *See In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982). The Florida court resolved that issue by deciding that there was no "property" that was protected by the fourteenth amendment. The Minnesota court agreed with Florida's opinion.

122. *See cases cited supra* note 120; *see also* Comment, *A Source of Revenue, Part II*, *supra* note 60, at 129; Comment, *A Source of Revenue, Part I*, *supra* note 60, at 556-59.

Definition of Property

The Due Process Clause does not protect against a deprivation of every kind of interest that a person may hold;¹²³ only those interests that constitute "property" are protected.¹²⁴ As previously discussed,¹²⁵ Louisiana does give the client the right to the income earned on a trust account. *Hagerty* clearly provides a remedy for clients whose income is taken without their consent.¹²⁶ *Hagerty* and the Louisiana property laws create a reasonable expectation in clients that any income earned on their trust funds will be paid to the clients. Therefore, the interest income is property under state law for purposes of the Due Process Clause.

Claim of Entitlement

Once an interest is classified as property under state law, it is necessary to determine whether the property interest raises a "claim of entitlement."¹²⁷ The United States Supreme Court's approach is a bit unclear on how to determine whether the property interest raises a claim of entitlement. After the pronouncement of the claim of entitlement test in *Board of Regents v. Roth*¹²⁸ and until *Memphis Light, Gas & Water Division v. Craft*,¹²⁹ the Court seemed to equate a finding that state law defined an interest as property with a finding of a claim of entitlement. That is, once the Court determined that state law gave rise to a property interest, it routinely found that the property interest was a claim of entitlement.¹³⁰ But in *Craft* and *Logan v. Zimmerman Brush Co.*,¹³¹ the Supreme Court inserted an additional test into the formula for determining what is a claim of entitlement. Justice Blackmun, writing for the majority in *Logan*, stated: "The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"¹³² Therefore, it is not enough to say that the income from the trust accounts is "property" under Loui-

123. *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972).

124. *City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973); *Perry v. Sindermann*, 408 U.S. 593, 603 (1972); *Lapham v. California Energy Resources Conserv. & Dev. Comm'n*, 705 F.2d 358, 360 (9th Cir. 1983); *Durham v. Jones*, 698 F.2d 1179, 1181 (11th Cir. 1983).

125. See *supra* text accompanying notes 64-76.

126. See *supra* text accompanying notes 69-73 & note 73.

127. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1016 (8th Cir. 1983).

128. 408 U.S. 564 (1972).

129. 436 U.S. 1 (1978).

130. See, e.g., *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Perry v. Sindermann*, 408 U.S. 593 (1972).

131. 455 U.S. 422 (1982).

132. *Id.* at 430.

siana law. To find a claim of entitlement, it is necessary to show that the right under state law can be taken only "for cause."

Two restrictions on the power of the attorney to assign the income to the bar foundation limit the causes for which property may be taken. The bar foundation can claim the interest only in certain narrow situations: when the period of time the funds will be held is short or where the funds are a small amount.¹³³ Thus, the program in general establishes two causes for taking the income. Since the program embodies a "cause" standard and the income is "property" under Louisiana law, such a program in Louisiana would give rise to a claim of entitlement by the client.¹³⁴ Therefore, the client has a property interest protected by the fourteenth amendment, if he can establish that the property right taken is significant.

Significant Deprivation

The United States Supreme Court said in *Fuentes v. Shevin* that "[A]ny significant taking of property by the State is within the purview of the Due Process Clause."¹³⁵ In determining what is a significant deprivation, courts cannot rely solely on factors such as the length of the

133. See *supra* text accompanying notes 56-60.

134. A recent case might be analogized to the programs and cited as support for holding that the income is not a property interest. In *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982), the Supreme Court held that procedural due process was not violated by a California statute that delegated to distillers the authority to restrict imports to certain wholesalers only. The wholesalers challenging the statutory restriction had argued that they had a protected property interest, but the Court rejected the argument that they had a constitutionally protected liberty or property interest. Certain language in the opinion could be used to argue that the client has no property interest in the earned income. The Court said:

Thus, the Due Process Clause is not offended by the wholesaler's inability to challenge the distiller's decisionmaking. What respondents are really challenging is the California Legislature's decision to give such a power to the distiller without establishing any criteria to govern the exercise of that power. The Due Process Clause does not authorize this Court to assess the wisdom of the California Legislature's decision.

Id. at 664. The language used by the Court here suggests that it lacks the power to review the adequacy of the statute for due process purposes, if the only ground asserted as a violation is the absence of standards in a delegation of power to a private entity. If that were true, then a court could not review the constitutionality under the Due Process Clause of the programs here. What must be clarified, when reading *Rice*, is that the Court did not make these remarks in a vacuum, nor were the remarks even necessary to the Court's holding. The language quoted above followed the Court's resolution of the case which was based entirely on its finding that the wholesalers lacked a protected property interest. Furthermore, the Court did not really explain why the wholesalers' interest was not protected property, nor even why it was not property. The Court merely said that their interest was not "protected" property. Therefore, *Rice* is distinguishable on its facts from the programs discussed here.

135. 407 U.S. 67, 86 (1972). *Accord* *North Georgia Finishing Co. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975).

deprivation¹³⁶ and the severity of the deprivation.¹³⁷ A claimant need not show a "grievous loss"¹³⁸ nor an absolute ownership right in the property.¹³⁹ The most important factors in determining whether the deprivation is significant are the nature and the weight of the property interest.¹⁴⁰ If the nature and the weight of the property interest are not "*de minimis*,"¹⁴¹ then the deprivation is significant.

In assessing the nature of the client's property interest in the income earned on his funds, an important fact is that the client has full title to the funds. The law has historically given greater protection to ownership rights than it has given to mere possessory interests.¹⁴² Thus, the client's ownership of the funds is a strong reason to find that a taking of interest earned on those funds is a significant deprivation.

Additionally, the right to income from the funds invested in interest-bearing accounts during legal disputes concerning title to the funds is generally awarded to the *owners* of the funds.¹⁴³ This "usual and general

136. North Georgia Finishing Co. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975).

137. *Id.*

138. Goss v. Lopez, 419 U.S. 565, 575-76 (1975). *Contra* Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982). In *Rose*, the first circuit refused to find that students in public schools had a protected property interest in not having school bus service interrupted for up to five days. Part of the basis for its opinion was that the students suffered no grievous loss. *Id.* at 281.

139. North Georgia Finishing Co. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975); Fuentes v. Shevin, 407 U.S. 67, 84-85 (1972).

140. Goss v. Lopez, 419 U.S. 565, 575-76 (1975); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

141. Goss v. Lopez, 419 U.S. 565, 576 (1975); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring). The First Circuit Court of Appeals recently found that a student's right to school bus transportation was not deprived where the student lost that service for a few days. The court said that the loss was *de minimis*, and that the property interest probably was not "sufficiently weighty for the Due Process Clause to apply." *Rose v. Nashua Bd. of Educ.*, 679 F.2d 279, 281 (1st Cir. 1982). The court said that the right was not very important, and that no great principle was at stake, as there had been in cases on voting rights, the environment, and public assistance. *Id.* at 281-82.

142. The comparisons between full ownership and property interests that constitute less than full ownership in the caselaw on procedural due process make this conclusion abundantly clear. For example, in *Fuentes* the Supreme Court states that "[t]he Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest.' . . ." 407 U.S. at 86 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). Implied in that statement is a recognition that full ownership has been given greater weight in property law in general. The import of this recognition is that, in general, property law's greater deference to ownership gives rise to a reasonable expectation that such ownership rights will be protected. "In deciding whether an interest in a government benefit rises to the level of protected property, the Supreme Court has us look to the reasonable expectations of those who receive the benefit." *Rose v. Nashua Bd. of Educ.*, 679 F.2d 279, 282 (1st Cir. 1982). Clients who advance funds to a lawyer would reasonably expect that any income earned from those funds would belong to the client.

143. "The usual and general rule is that any interest on an interpleaded and deposited

rule"¹⁴⁴ is further evidence of the great protection given to owners of invested funds. If the right to the income were not significant, such a "usual and general rule" would not exist.

In assessing the weight of the property interest, an additional factor is relevant: the frequency with which the property interest might be interfered. Since the inauguration of the interest on lawyers' trust accounts programs, other occupational groups have grown interested in adopting similar programs. For example, realtors have already begun to express a desire for laws to permit them to deposit their clients' funds into trust accounts for the benefit of housing programs.¹⁴⁵ If realtors, certified public accountants, stock brokers, trading factors, and a host of other business persons were to have similar programs adopted, the frequency of the taking of income from clients' funds would increase dramatically.¹⁴⁶ The potential for this program's expansion into other occupations and businesses makes it imperative that a court assess the impact of the lawyers' programs' deprivation in light of its possible effect on other occupations and businesses and their clients.¹⁴⁷

In order for the deprivation to be significant, the property right itself must be significant; the loss in dollars and cents to an individual should not be dispositive. Although the Supreme Court has never stated expressly that economic value is assigned little weight in determining what is "significant," the Court's decisions clearly show that it gives economic value little weight. For example, little economic value is at stake in a ten-day suspension from public school, yet the Court found that the fourteenth amendment protected the right to attend public school.¹⁴⁸ In the *Fuentes* cases, the Court found that the Due Process Clause protected the rights to possess: a stove and a stereo; a child's clothes, furniture,

fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162 (1980).

144. *Id.*

145. See General Counsel Memorandum No. 38,374 (May 12, 1980) (LEXIS, Fedtax library, Gen. Counsel Memo. file).

146. Suppose, for example, that insurance companies found that computing a few days interest on funds it held for the benefit of its customers actually cost the companies more than the amount of interest that they paid the customers, so that customers were actually losing money by having this interest paid to them. Further suppose that all the insurance companies decided to have that interest paid over to a foundation to benefit victims of accidents who had no insurance. The impact would be staggering. Surely, a court would find that the interest of the companies' individual customers was significant.

147. Banks and other financial institutions already use sophisticated means of taking advantage of the "float" on transfers of money between each other. If lawyers and other professions and occupations adopt programs to benefit projects, many more groups will be using the "float." These additional groups using the "float" are not subject to examination or regulation by the federal government, as are the banks. Furthermore, the use of computers to manipulate the float can hide criminal transactions fairly easily.

148. *Goss v. Lopez*, 419 U.S. 565 (1975).

and toys; and a bed, table, and other household goods.¹⁴⁹ If one were to compute the economic value lost by each of the claimants above on the basis of the fair rental value of the items for a period of five days, it is unlikely that the total loss in any case would exceed fifty dollars. Yet, Maryland's program considers fifty dollars *de minimis*.¹⁵⁰ If the Constitution protects fifty dollar possessory losses under *Fuentes*, the fifty dollar loss in ownership of income to the client under the Maryland program should also be protected. The Fifth Circuit took a similar approach in *Price v. City of Junction*,¹⁵¹ where the court held that a junk car was protected property, *whether its value was little or great*. Consequently, the programs accomplish a significant deprivation whether the amount of income taken from the client is large or small.

State Action

In order to show that the programs violate procedural due process, the state, rather than a private party, must cause the deprivation.¹⁵² That the lawyer acts pursuant to a statute passed by the legislature¹⁵³ or a rule issued by the judiciary¹⁵⁴ is not enough to establish state action. In *Lugar v. Edmondson Oil Co.*,¹⁵⁵ the Supreme Court stated that, in order to attribute an act to the state, two tests must be met:

First, the deprivation must be caused by the exercise of some *right or privilege created by the State* or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.¹⁵⁶

Both voluntary and compulsory programs meet the first test since, in all cases, either the legislature or the state supreme court creates the programs. In states with voluntary programs, the state creates a right for the lawyer to act.¹⁵⁷ In states with compulsory programs, the state im-

149. 407 U.S. 67 (1972).

150. See MD. ANN. CODE art. 10, § 44(a)(2) (Supp. 1983).

151. 711 F.2d 582 (5th Cir. 1983).

152. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *The Civil Rights Cases*, 109 U.S. 3 (1883).

153. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978); see *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Mugler v. Kansas*, 123 U.S. 623 (1887).

154. The Due Process Clause applies to the judiciary of a state government, as well as to the executive and legislative branches. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165 (1978).

155. 457 U.S. 922 (1982).

156. *Id.* at 937 (emphasis added; citation omitted).

157. See, e.g., MD. ANN. CODE art. 10, § 44 (Supp. 1983); *In re Interest on Trust*

poses an obligation on the lawyer to act.¹⁵⁸

In discussing the second part of the state action requirement—that the depriving party be a state actor—the *Lugar* Court recognized several tests employed in earlier cases.¹⁵⁹ One of them, the state compulsion test,¹⁶⁰ is especially germane to the compulsory programs. Essentially, under this test state-compelled action is state action.¹⁶¹ In states with mandatory programs, the lawyer must deposit funds that meet the criteria into accounts that will pay the income to the bar or its designated recipient.¹⁶² The state does not permit the lawyer to refuse to comply with the rule; the lawyer is subject to disciplinary action by the state supreme court if he disobeys.¹⁶³ Consequently, the state compels the lawyer to assign the income from the clients' funds and to deprive his clients of property protected by the fourteenth amendment. This compulsion constitutes state action.

Since compulsory programs contain all of the elements necessary to find a deprivation within the meaning of the fourteenth amendment, clients whose interests are assigned to the bar foundations in compulsory programs are entitled to notice and a hearing.¹⁶⁴

With respect to the voluntary programs, it is not immediately clear whether the lawyers' act of assigning the income constitutes state action. There are several ways to analyze this issue. One approach is the "nexus" test of *Burton v. Wilmington Parking Authority*,¹⁶⁵ in which the Supreme Court found state action in a state agency's lease of part of a building to a restaurant that discriminated against blacks. The lease had created a mix of rights, obligations, and benefits in favor of both the restaurant and the state which made the restaurant and the state interdependent. That interdependence between private enterprise and the state was a form of joint participation in the discrimination and constituted state action.¹⁶⁶

Were the Louisiana Supreme Court to adopt a program for interest

Accounts, 402 So. 2d 389, 393-94 (Fla. 1981); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 974, 453 A.2d 1258, 1260 (1982).

158. See, e.g., CAL. BUS. & PROF. CODE § 6211(a) (West Supp. 1984); *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151, 158 (Minn. 1982).

159. 457 U.S. at 939.

160. *Id.*; see also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970).

161. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970).

162. See *supra* note 57.

163. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1979).

164. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

165. 365 U.S. 715 (1961).

166. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982); *Little v. Streater*, 452 U.S. 1, 9-11 (1981); *Gilmore v. City of Montgomery*, 417 U.S. 556, 574 (1974); *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973); *Evans v. Newton*, 382 U.S. 296, 299 (1966); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961); *Buller v. Buechler*, 706 F.2d 844, 849 (1983); see also *Dumez v. Louisiana High School Athletic Ass'n*, 334 So. 2d 494 (La. App. 1st Cir.), *writ refused*, 337 So. 2d 275 (1976).

on trust accounts, a similar mix of rights, obligations, and benefits would exist in the relationship between practicing lawyers and the Louisiana Supreme Court. The supreme court has "the inherent power . . . to regulate and control membership in the bar of the state"¹⁶⁷ and "to prescribe rules and regulations to govern the right to practice law in this state."¹⁶⁸ The lawyer has a right to practice law only if the supreme court grants him that right.¹⁶⁹ The supreme court has exclusive and original jurisdiction over disciplinary proceedings against a lawyer practicing in Louisiana.¹⁷⁰ In exchange for the lawyer's court-granted right to practice law and his obedience to the supreme court's disciplinary rules, the court protects him from competition by those whom the court has not admitted to practice.

These strong ties exist not only between the supreme court and the lawyer, but also among the supreme court, the lawyers, and the state bar association. The bar association owes its very existence to the state supreme court.¹⁷¹

Additionally, the programs direct that client funds be spent on projects that will indirectly achieve *state* goals: provision of legal services, access to courts, and the improvement of the justice system. The lawyers are merely conduits or agents through which the state acts to achieve its goals and obligations. These ties between the state, the lawyers, and the goals of such programs lead to the conclusion that in states with voluntary programs as well as in states with compulsory programs, the act of the lawyer in assigning the income to the bar association would be state action.¹⁷²

Like that in *Lugar*, the Supreme Court's rationale in *Jackson v.*

167. *In re Mundy*, 202 La. 41, 47, 11 So. 2d 398, 400 (1942); see LA. CONST. art. V, § 5(A). In holding that the state bar association could enforce the rule that members of the bar pay dues by revoking the license of a nonpaying member, the Louisiana Supreme Court said:

The members of the bar, unlike the members of other professions, are under the direct control of the courts in the practice of their profession; hence it should not require much formality to constitute due process of law in the matter of compelling an attorney at law to obey the rules of court.

202 La. at 57-58, 11 So. 2d at 403.

168. *In re Mundy*, 202 La. 41, 49, 11 So. 2d 398, 400 (1942).

169. See LA. R.S. 37:213 (1974).

170. LA. CONST. art. V, § 5(B).

171. See LA. R.S. 37:211 (1974).

172. The conclusion should apply to states that have adopted voluntary programs whether legislatively or by rule of the state supreme court. When the supreme court both regulates the practice of law and issues a rule with the force of law adopting the programs as part of the regulation of the practice of law, it clearly is giving aid to the lawyer's act. For example, where the state regulates public education and also supplies books to private schools that discriminate, the combination of regulation and aid constitutes state action. *Norwood v. Harrison*, 413 U.S. 455 (1973); cf. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

*Metropolitan Edison Co.*¹⁷³ supports the conclusion that state action is present in the programs. In *Jackson*, the Court held that the acts of a business that was subject to regulation were not necessarily state acts. The Court distinguished the case from those cases in which regulated businesses' acts might indeed be considered acts of the state: "It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics."¹⁷⁴

The supreme court heavily regulates the legal profession in Louisiana, and lawyers do have something of a governmentally protected monopoly. The characteristics suggest that a lawyer's assignment of income from his clients' accounts for the benefit of the bar association is state action.

Since the programs meet all the requirements for fourteenth amendment protection, the clients are entitled to procedural due process—notice and hearing.¹⁷⁵

Notice and Hearing

Generally speaking, the programs adopted as of August 1983 do not require that notice or hearing be afforded the client at any time.¹⁷⁶ Courts testing the programs' constitutionality have not addressed the hearing issue,¹⁷⁷ but some have addressed the notice issue. Those courts address-

173. 419 U.S. 345 (1974).

174. *Id.* at 350-51.

175. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

176. See, e.g., CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1984); Md. Ann. Code art. 10, § 44 (Supp. 1983); *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re Minnesota State Bar Ass'n*, 332 N.W.2d 151 (Minn. 1982); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982). The Florida program, as originally adopted, did require that the lawyer give notice to his clients, and further required that the lawyer desist from using a clients' funds to generate income for the bar association if the client gave the lawyer written objections to having his funds used in that way. *In re Interest on Trust Accounts*, 356 So. 2d 799, 805 (Fla. 1978). The assumption was that a client who had been given notice and did not object in writing wished to have his income paid over to the bar foundation. That assumption has been questioned. Comment, *A Source of Revenue, Part II*, *supra* note 60, at 129-31. The writer of that comment pointed out that the assumption was being used to argue that a client who did not object in writing had "waived" his rights in the income that would be earned on his funds. The writer went on to state that such a "waiver" was probably not knowing, voluntary, or intelligent, and so was not a valid waiver of any constitutional rights to the income. The waiver issue became moot when the Florida Supreme Court later determined that a client had no constitutional rights to the income. This history of the notice issue in Florida is significant because neither notice to the client nor an assumed waiver would have been necessary in the original program unless the court had felt that there were property rights of the client involved.

177. Other states followed the Florida analysis. ABA Formal Op. 348, *supra* note 3, at 8; see *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981); *In re Minnesota*

ing the issue have found that notice was not required because the property interest asserted did not exist.¹⁷⁸ But, as discussed earlier, this property interest does exist and is protected by the fourteenth amendment.¹⁷⁹ Therefore, at some point, the lawyer is constitutionally required to inform his clients that he intends to deposit or has deposited their funds into accounts, the income from which will be paid to the bar foundation. Since the programs do not now require such notice, the programs are constitutionally defective, at least with regard to those clients who do not receive notice.¹⁸⁰

The client must also be afforded "some kind of hearing."¹⁸¹ Whether that hearing must be a full-blown evidentiary court proceeding with the right to counsel and the right to cross-examination, whether it can be as informal as an opportunity to make an oral argument before a hearing examiner, or whether some intermediate range of protective procedures is required, depends on the three point analysis adopted by the Supreme Court in *Mathews v. Eldridge*.¹⁸² The first step is to examine the "private interest that will be affected by the official action."¹⁸³ The private interest affected by the programs is the right to receive income on invested funds. The amount of the income at stake in any individual case should be small, and the severity of the individual loss will be mild. In cases where the funds are held for a short time, the duration of the deprivation of the right to receive interest should be short. A reasonable conclusion is that the effect on the private individual's interest will not be great. Yet, at the same time, the potential exists for a much greater effect on all individuals in the aggregate. A principle of some magnitude is at issue: The individuals affected will suffer a loss to further the state's interest in funding public programs without the protection of the state legislature's appropriation and taxation committee process. Instead, the loss will be at the hands of a legislative committee or court that may have no experience or even desire to adhere to sound taxation policies.¹⁸⁴

State Bar Ass'n, 332 N.W.2d 151 (Minn. 1982); *In re New Hampshire Bar Ass'n*, 122 N.H. 971, 453 A.2d 1258 (1982).

178. See cases cited *supra* note 177.

179. See *supra* text accompanying notes 64-76.

180. The program may not be unconstitutional on its face, because the statutes or rules adopted do not prohibit the lawyer from giving notice to his client. In fact, the Florida Supreme Court approved of lawyers giving notice to their clients, on the basis that it would assist the lawyer-client relationship. *In re Interest on Trust Accounts*, 402 So. 2d 389, 396 (Fla. 1981). Some lawyers would inform their clients. Therefore, the analysis above pertains only to clients who did not get notice.

181. *Ingraham v. Wright*, 430 U.S. 651, 675 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see Sager, *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17 (1981); Friendly, *Some Kind of Hearing*, 123 PA. L. REV. 1267 (1975).

182. 424 U.S. 319 (1976).

183. *Id.* at 335.

184. The question of whether court-adopted programs constitute taxation without represen-

The second *Mathews* factor is the "risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards."¹⁸⁵ The procedures used to accomplish the deprivation in these programs vary,¹⁸⁶ but several of the programs give the lawyer the discretion to determine what is a "short period" and what is a "small sum."¹⁸⁷ In the absence of a standard for determining what is a short period, some lawyers may conclude that a short period is five days, while others may conclude that a short period is thirty days. Similarly, lawyers are likely to have diverse interpretations of what a small sum of money is. Clearly the absence of standards can result in deprivation of one client when another client in a similar situation would not be deprived.¹⁸⁸ The lack of standards makes it impossible to ascertain what an erroneous deprivation is. Since it also is impossible for a lawyer to be able to tell in advance whether he is making an erroneous deprivation, he might unwittingly open himself to liability for conversion.¹⁸⁹ The addition of some guidelines for the attorney's decision as to what constitutes a short period or a small sum would clearly be of tremendous value in preventing erroneous deprivations. Besides the addition of standards, a requirement that the lawyer notify the client that he intends to invest the funds for the benefit of the bar association would certainly reduce the risk of erroneous deprivation, because the client otherwise may not even know that a deprivation has occurred. These considerations suggest that under the first and second *Mathews* factors, it is essential that the client be afforded the protection of at least some well-defined standard, if not a full blown hearing at which he can challenge the basis for the attorney's judgment that the period was short or the sum was small.

tation has been raised by at least one writer. Note, *supra* note 60, at 427. Treatment of that issue is beyond the scope of this article, but it should be noted that under the Louisiana Constitution only the legislative branch of state government has the power to tax. See LA. CONST. art. III, § 16(B).

185. 424 U.S. at 335.

186. Maryland has provided in its statute that the client's funds may be deposited for the benefit of the Legal Services Corporation if the amount of income from those single client's funds will be less than \$50. MD. ANN. CODE art. 10, § 44(a)(2) (Supp. 1983).

187. See, e.g., CAL. BUS. & PROF. CODE §§ 6210-6228 (West Supp. 1984); *In re* Interest on Trust Accounts, 402 So. 2d 389 (Fla. 1981); *In re* Minnesota State Bar Ass'n, 332 N.W.2d 151 (Minn. 1982); *In re* New Hampshire Bar Ass'n, 122 N.H. 971, 453 A.2d 1258 (1982). It should be noted that California provided in its statute for the issuance of regulations by the Board of Governors of the State Bar Association. CAL. BUS. & PROF. CODE § 6225 (West Supp. 1984). Those regulations, if any exist, may provide standards.

188. Obviously, the programs raise some substantive due process issues. However, treatment of those issues is beyond the scope of this article.

189. However, he would apparently not be open to any disciplinary action for having made a wrong decision. *In re* Interest on Trust Accounts, 402 So. 2d 389, 394 n.14 (Fla. 1981). *But see* CAL. BUS. & PROF. CODE § 6211(c)-(d) (West Supp. 1984) (gives powers to the state supreme court and the state bar association to make and enforce rules regarding the programs).

The third of the *Mathews* factors is a consideration of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."¹⁹⁰ The function of the programs is to raise revenue to fund legal services for the indigent and other law-related projects for the benefit of society. The state has a great interest in supporting such programs because they increase access to the judicial system, educate the public, and improve the judicial system. If the suggested additional procedures were adopted, the state itself would incur no fiscal or administrative burdens to give notice because the addition of standards requires no money and the lawyer could easily shoulder the responsibility for notifying the client. However, if formal hearings were required when a dispute arose, the state might have to shoulder a tremendous load. It would be unfair to permit the bar association to resolve these disputes because it has a direct financial interest in the outcome of the dispute. And, because it is a private corporation¹⁹¹ and not a state agency, it is questionable whether the bar association ought to be settling these disputes between the state and its citizens in the first place. Likewise, the lawyer is a private citizen who should not be authorized to settle disputes between the state and its citizens when it is the lawyer's act on behalf of the state that is the focus of the dispute. The only existing entity left to assume the responsibility of providing the hearing would be the courts, which are already suffering under monstrous workloads. One alternative is to create a committee or agency to act as a hearing examiner to resolve disputes between the state and the client. But such a committee or agency might cost as much in taxes as the revenues that are earned on the client accounts contribute to legal services. In that case, it would be more sensible simply to fund legal services out of taxes and eliminate altogether both the program and the need for the committee.

Another alternative would be to protect the client's due process rights by coupling together two protective measures. First, the state could add well-defined standards to the program to determine exactly what is a short period and what is a small sum. Second, the state could allow the client to sue the attorney and the bar association for conversion, and allow damages equal to the erroneous deprivation plus costs and attorney fees. Practically, few clients would sue on frivolous claims because the award of damages would be so small. Most suits could be heard in city courts where dockets are not as crowded as in district courts. Moreover, the threat of suit and its unfavorable publicity to the individual lawyer would have a deterrent effect on violations of the client's due process rights.

A final alternative, especially in light of the prior determination that

190. 424 U.S. at 335.

191. See LA. R.S. 37:211 (1974).

the program violates the Taking Clause,¹⁹² would be to decide that the program is not worth the cost of providing a client due process. However, even if the state finds an acceptable means of granting due process to the client, there remains the question of whether a lawyer's participation in the program is ethical.

Lawyers' Trust Accounts and Legal Ethics

Persons considering the ethics of adopting and implementing a program must address five problems. The first question is whether the program fulfills the lawyer's duty to make legal counsel available.¹⁹³ The program does not fulfill the lawyer's duty, because the state, rather than the lawyer, is making legal counsel available. Practically, participating lawyers only act as agents of the state to collect funds to fulfill the state's goal of providing access to the judicial process.¹⁹⁴

The second problem is that the programs violate Louisiana's Code of Professional Responsibility disciplinary rules against mishandling client funds. Mishandling of client funds is already the most common disciplinary infraction by lawyers in Louisiana.¹⁹⁵ The programs offer the potential for even more violations of what has long been the lawyers' strict fiduciary duty to protect client funds.¹⁹⁶

Disciplinary rule 9-102 requires that a lawyer deliver a client's property to the client.¹⁹⁷ Since the income earned on the client's funds is the client's property, the lawyer is under a duty to return the income to the client.¹⁹⁸ The opinion of the ABA Committee on Ethics and Professional Responsibility supports this conclusion.¹⁹⁹ The Committee found that lawyers' participation in a program would not violate the Model Code of Professional Responsibility if state law did not consider the income to be the client's property.²⁰⁰ The implication is that the programs are *unethical if under state law the income is the client's property, as it is in Louisiana.*

In addition, there is a great danger that some lawyers, whether intentionally or through sheer carelessness, would use the income from the

192. See *supra* text accompanying notes 77-117.

193. "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." CODE OF PROF. RESP. Canon 2 (1974), *supra* note 9.

194. See LA. CONST. art. I, §§ 2-4, 12, 22.

195. Hebert, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Professional Responsibility*, 36 LA. L. REV. 515, 516 (1976).

196. CODE OF PROF. RESP. DR 9-102 (1974), *supra* note 9; see *supra* text accompanying notes 16-21.

197. CODE OF PROF. RESP. DR 9-102(B)(4) (1974), *supra* note 9.

198. See *supra* text accompanying notes 46-53.

199. ABA Formal Op. 348, *supra* note 3, at 8.

200. *Id.*

trust account for their own personal benefits.²⁰¹ Suppose, for example, that a trust account contains the funds of one client. The attorney, withdrawing money from the account to cover his fee for work he has performed, discovers that the balance of the account is less than his fee. The attorney then withdraws all of the funds in the account, including the interest which under the program was to be paid to the bar association. The withdrawal of the income which under the program belongs to the bar association is a conversion of the funds. A conversion of non-client funds has been held sufficient to warrant disciplinary action.²⁰² Where the conversion of the bar foundation's income is intentional, the situation becomes even more serious.

The third problem arises in connection with a statement in the ABA Committee opinion. The Committee found that the programs were ethical on the assumption that "either a court or a legislature has authorized a program with [certain] attributes . . . , and thus, either implicitly or explicitly, has made a determination that the interest earned is not the clients' property."²⁰³ If the Louisiana legislature, by adopting such a program, "implicitly or explicitly" decided that the income was not the client's property, the Louisiana Supreme Court could strike down the law on two grounds.

The first ground could be the supreme court's disagreement with the legislature's determination that the income is not a client's property. The court could find that the program is a taking of private property without just compensation.²⁰⁴ If the legislation is unconstitutional, then participation would cease to be ethical.

The second ground for striking down the legislation would be a finding that the legislation violated the constitutional separation of powers doctrine.²⁰⁵ The rationale would be that the legislation is a regulation of the practice of law because it purports to control how lawyers deal with clients and client funds. The regulation of the practice of law is an inherent and a constitutional power of the judicial branch of state government.²⁰⁶ The Louisiana Supreme Court has exclusive and original

201. In Louisiana cases, intent is not a necessary element of a violation of disciplinary rule 9-102. It is only an aggravating factor in determining the appropriate penalty. Careless accounting habits will warrant discipline, because they give the appearance of impropriety. See *LSBA v. Edwins*, 329 So. 2d 437 (La. 1976); accord *In re Rubi*, 133 Ariz. 491, 652 P.2d 1014 (1982); see also *LSBA v. Mitchell*, 375 So. 2d 1350 (La. 1979) (technical violation); *LSBA v. Stinson*, 368 So. 2d 971 (La.), *appeal dismissed*, 444 U.S. 803 (1979) (commingling and using \$1300 in client funds in personal account for three days, even unintentionally, may warrant discipline of a serious nature).

202. *Kentucky Bar Ass'n v. Ricketts*, 599 S.W.2d 454 (Ky. 1980).

203. ABA Formal Op. 348, *supra* note 3, at 8.

204. See *supra* text accompanying notes 77-117.

205. See LA. CONST. art. II, § 2; Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765 (1977).

206. See *Singer Hutner Levine Seeman & Stuart v. LSBA*, 378 So. 2d 423, 426 (La. 1979).

jurisdiction over disciplinary proceedings against members of the bar,²⁰⁷ and the court, in the exercise of these powers, "will uphold legislative acts passed in aid of its inherent power, but will *strike down statutes which tend to impede or frustrate its authority.*"²⁰⁸ Thus, if the legislation approved of methods of dealing with client funds similar to those of other programs, and if the Louisiana Supreme Court found that those methods impeded its ability to enforce the Code of Professional Responsibility, the court could strike down the legislation. Clearly, the legislation would authorize a lawyer to violate the rules against commingling and conversion of client funds.²⁰⁹ Such authorization would impede the supreme court's powers to discipline the legal profession in Louisiana. Thus, the supreme court could strike down the legislation²¹⁰ on these grounds, as well as on federal constitutional grounds. In Louisiana at least, lawyers should be reluctant to rely on a legislative implication that participation in a program would be ethical.

A fourth problem is the potential increase in conflicts of interest violations. The program creates the possibility of a conflict between the client's interest and the bar foundation's interest, to both of which the lawyer owes a duty.

The fifth and most compelling ethical objection to the programs is that they promote the appearance of impropriety while Canon 9 requires that a lawyer avoid the appearance of impropriety. The programs are very likely to affect adversely the public's confidence in the legal profession. A recent survey showed that seventy percent of those surveyed considered lawyers' honesty and ethics to be no better than average. Twenty-seven percent rated lawyers' ethics low or even very low.²¹¹ With the public evidencing so little confidence in the legal profession, laymen are very likely to mistrust the statements of lawyers that the programs benefit the needy. The public is likely to suspect that lawyers want the programs because the programs will benefit some lawyers financially.

Indeed, some lawyers are likely to gain financially from the programs

207. LA. CONST. art. V, § 5(B); *Singer Hutner Levine Seeman & Stuart v. LSBA*, 378 So. 2d 423 (La. 1979); *Saucier v. Hayes Dairy Prods., Inc.*, 373 So. 2d 102 (La. 1978); *Hargrave*, *supra* note 205, at 799; *see* LA. SUP. CT. R. 19; *see also Ex parte Wall*, 107 U.S. 265 (1882); *Ex parte Secombe*, 60 U.S. (19 How.) 9 (1856) (both concerned with the inherent power of courts over the professional conduct of lawyers).

208. *Singer Hutner Levine Seeman & Stuart v. LSBA*, 378 So. 2d 423, 426 (La. 1979) (emphasis added). *See also Saucier v. Hayes Dairy Prod., Inc.*, 373 So. 2d 102, 115 (La. 1978).

209. *See* CODE OF PROF. RESP. DR 9-102 (1974), *supra* note 9.

210. If the program were adopted by the Louisiana Supreme Court, instead of the legislature, the legislature might argue that the judiciary had violated the Louisiana Constitution by usurping the legislative power to tax. *See* LA. CONST. art. III, § 16(B). Thus, serious separation of powers issues could arise if the judiciary and the legislature disagree on whether Louisiana should adopt a program. *See supra* note 54.

211. *Lawyers' Public Image Is Dreadful, Spurring Concern by Attorneys*, Wall St. J., Oct. 11, 1983, at 1, col. 1.

because they will receive payments for services rendered to the indigent that they would not otherwise receive. Furthermore, lawyers may stand to gain financially from the programs if funds earmarked "for the improvement of the administration of justice"²¹² indirectly find their way into lawyers' pockets. The "improvement of the administration of justice," for example, might encompass reduced fees for lawyers' continuing legal education, reduced contributions by lawyers for client security funds, grants to draft new legislation favoring lawyers economically, expense accounts for bar officials' travel, and a host of other disbursements that presently are paid from private contributions rather than public funds.

In addition to the justified criticism by laymen that some lawyers will gain financially from the programs, actual impropriety, not merely its appearance,²¹³ exists when a lawyer lends assistance to a state's violation of the federal and state constitutions. The programs take private property without just compensation²¹⁴ and violate procedural due process.²¹⁵ Furthermore, the appearance of impropriety exists when a lawyer fails to inform his client that the client's funds are to be used to generate income that the client will not receive. The position taken by program advocates that notice is not required²¹⁶ seems to be a gross violation of the trust relationship that should exist between an attorney and his client.²¹⁷

The ethical problems with these programs have led a number of lawyers to reject such programs.²¹⁸ A Maine School of Law professor flatly states that the program is an "unauthorized use by individual attorneys and the bar of other people's money."²¹⁹ Furthermore, seven states have rejected the programs: Arkansas, Georgia, Maine, North Carolina, Pennsylvania, Texas, and West Virginia.²²⁰

Thus, some lawyers, state supreme courts, and legislatures have agreed

212. The "improvement of the administration of justice" is a state objective for the use of income on lawyers' trust accounts in several programs. See, e.g., *In re Interest on Trust Accounts*, 402 So. 2d 389 (Fla. 1981).

213. See CODE OF PROF. RESP. CANON 9 (1974), *supra* note 9; MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 9, *reprinted in* 1 NAT'L REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 55 (1982). The new *Model Rules*, *reprinted in* 69 A.B.A. J. 1671 (1983), contain no corresponding provision.

214. See *supra* text accompanying notes 77-117.

215. See *supra* text accompanying notes 118-92.

216. See *supra* notes 120, 122.

217. The law leaves no uncertainty in defining the character of duty which an attorney owes to his client. The relation of attorney and client is more than a contract. It superinduces a trust status of the highest order and devolves upon the attorney the imperative duty of dealing with the client only on the basis of the strictest fidelity and honor.

Searcy v. Novo, 188 So. 490, 498 (La. App. 2d Cir. 1939), *writ denied*.

218. Rivlin, *supra* note 1, at 1040.

219. *Id.* at 1038.

220. *Id.*

that the programs should be rejected. This fact, coupled with lay criticism of lawyers' ethics, should cause the Louisiana lawyer grave concern over any attempt toward adoption of such a program in Louisiana.

Conclusion

The income earned on a lawyer's trust account containing client funds is property of the client. Therefore, the interest on lawyers' trust accounts programs should be rejected in Louisiana for three reasons: (1) The programs constitute an unconstitutional taking of a client's property without just compensation; (2) they violate procedural due process; (3) they are unethical because they violate disciplinary rule 9-102. In short, this program is not the means Louisiana should choose to provide funding for legal services to the indigent. As other lawyers have said: The "use of clients' money for any purpose, no matter how noble the cause, is wrong."²²¹

Amanda French Palmer

221. *Id.* at 1040.

