

CHAPTER THREE

THE INTEREST ON LAWYER ACCOUNT FUND OF THE STATE OF NEW YORK (IOLA)

**Stephen G. Brooks, Esq.
Joseph S. Genova, Esq.***

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The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. . . . Does the lawyer ask, who is my neighbor? I answer—the poor man deprived of his just dues.

*Charles Evans Hughes, Chief Justice of the United States, Governor of New York and President of the New York State Bar Association*¹

[3.0] I. BACKGROUND

Many persons and institutions act as trustees for others and may hold various forms of property in trust, including real estate, securities, negotiable instruments or forms of chattel. An attorney, in the context of an attorney-client relationship, often receives funds transferred to the attorney by a client, or by a third party on behalf of a client, to be held for a particular purpose or purposes.

These funds may be a retainer, an advance deposit to be held against future disbursements, settlement proceeds, money judgments or awards, real estate closing funds or other client funds held by specific agreement. Generally, an attorney deposits these funds in a bank account at a financial institution of the attorney's choosing. The account is known as an attorney's trust account. If the funds are large enough and are to be held long enough to earn net interest, the lawyer and client discuss where and how the funds should be held, with the client usually obtaining the benefit of any interest earned.

Sometimes, however, the funds are too small, or will be held too briefly, to generate interest in excess of the costs of opening and maintaining an account for the client's benefit. For many years, in those circumstances, attorneys deposited such funds in non-interest-bearing checking accounts, separate from their operating accounts, but commingled with other, similar funds held in trust by the attorney. The aggregate balance of all the deposits in such trust accounts could be quite large, yet, no interest accrued because the funds were held in a checking account. Neither the attorney's client nor the attorney—*never* the attorney, for ethical reasons—received interest income from these deposits. They were, in effect, free loans to the attorney's banking institution.

¹ Speech to the American Bar Association (August 1920) as quoted at <http://www.equaljustice.library.cnhost.com/notablequotes.asp?category=3+action=2>.

In 1983, after Congress authorized payment of interest on checking accounts, the New York State Bar Association became the principal legislative advocate of a change in the procedure for handling small client deposits in New York. That change was to create a new type of attorney trust account that would allow attorneys to pool small client deposits in one interest-bearing checking account. The interest income from accounts that previously benefited only the banking institutions would be harvested to provide funds for civil legal assistance to low-income New Yorkers. That was the beginning of the “Interest on Lawyer Account Fund of the State of New York,” or the IOLA Fund.²

IOLTA programs have consistently won the highest acclaim from the organized bar. At a Web site jointly sponsored by the National Association of IOLTA Programs and the American Bar Association’s Division of Legal Services, www.iolta.org, IOLTA programs are applauded as effective vehicles for generating greatly needed funding for civil legal services programs:

Interest on Lawyers Trust Accounts (IOLTA) is a unique and innovative way to increase access to justice for individuals and families living in poverty and to improve our justice system. Without taxing the public, and at no cost to lawyers or their clients, interest from lawyer trust accounts is pooled to provide civil legal aid to the poor and support improvements to the justice system.

A lawyer who receives funds that belong to a client must place those funds in a trust account separate from the lawyer’s own money. Client funds are deposited in an IOLTA account when the funds cannot otherwise earn enough income for the client to be more than the cost of securing that income. The client—and not the IOLTA program—receives the interest if the funds are large enough or will be held for a long enough period of time to generate net interest that is sufficient to allocate directly to the client.

In 2003, state IOLTA programs generated more than \$133.8 million nationwide. These funds, together with

² All states, the District of Columbia and a number of territories or protectorates have programs like New York’s IOLA, which most call IOLTA (Interest on Lawyers’ Trust Accounts). IOLTA is a generic term for such programs. Through a non-significant quirk of legislative nomenclature, New York’s IOLTA is called IOLA.

state and federal appropriations as well as private grants and donations, enable non profit legal aid providers to help low-income people with civil legal matters such as landlord/tenant issues, child custody disputes and advocacy for those with disabilities.

Every state in the U.S. operates an IOLTA program. Between 1991 and 2003, IOLTA generated more than \$1.5 billion nationwide to ensure justice for our country's most vulnerable residents.³

Without IOLTA funds, legal aid to the poor would be jeopardized nationally. There are poor persons everywhere in this country with serious legal needs. Given the current climate, in which the legal needs of the poor are rapidly increasing while aggregate funding to meet those needs is stagnant or decreasing, IOLA is as important as ever to indigent New Yorkers.

[3.1] II. THE IOLA STATUTE; PARTICIPATION MANDATORY

By statute, N.Y. Judiciary Law § 497 defines an IOLA account as “an unsegregated interest-bearing deposit account with a banking institution,” where an attorney must deposit “qualified funds”⁴ unless those funds are placed in an account that will pay interest to the client.

“Qualified funds” are moneys received by an attorney in a fiduciary capacity⁵ . . . which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner.⁶

3 *What is IOLTA?*, available at <http://www.iolta.org/grants>.

4 N.Y. Judiciary Law § 497(1) (“Jud. Law”).

5 Jud. Law § 497(2-a):

“Funds received in a fiduciary capacity” are funds received by an attorney from [or on behalf of] a client or beneficial owner in the course of the practice of law, including but not limited to funds received in an escrow capacity, but not including funds received as trustee, guardian or receiver in bankruptcy.

6 Jud. Law § 497(2).

The decision as to whether funds are nominal in amount or expected to be held for a short period of time rests exclusively in the sound judgment of the lawyer or law firm. Ordinarily, in determining whether to deposit funds in an IOLA or non-IOLA account, a lawyer takes into consideration the following factors: (1) the amount of interest the funds would earn during the period they are expected to be deposited; (2) the cost of establishing and administering the account, including the cost of the lawyer's or law firm's services; and (3) the capability of the banking institution, through sub-accounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.⁷

Judiciary Law § 497 further provides that an attorney shall have discretion, “in accordance with the code of professional responsibility” (now the New York Rules of Professional Conduct (the “Rules”), effective April 1, 2009), to determine whether qualifying funds shall be deposited in an IOLA account or an interest-bearing account. If, in the judgment of an attorney, moneys received are qualified funds, such funds shall be deposited in an IOLA account, unless they are deposited in (1) a separate interest-bearing account for the particular client or client's matter on which the interest will be paid to the client; or (2) an interest-bearing trust account, with provision for computation of interest earned by each client's funds and the payment thereof to the client.⁸

Participation in New York's IOLA program is mandatory in two senses. First, every New York lawyer who handles client funds must maintain an IOLA account. Second, the lawyer must use an IOLA account for qualifying funds, unless he or she uses an account that will generate, compute and pay net interest to the client.

A New York lawyer may *not* place qualifying funds in a non-interest-bearing account. If a client's deposit is large enough or will be held long enough to earn interest for the client (net of banking charges and administrative costs), IOLA does not govern the handling of the funds. Such

⁷ Jud. Law § 497(4)(b). For a discussion of the practical and ethical risks of using sub-accounting for client funds, see Joseph S. Genova, *Handling Client's Funds—Guidelines from a Texas Judge*, The New York Prof. Resp. Rep. (July 2000).

⁸ Jud. Law § 497(4)(a), (c).

funds should ordinarily be deposited in an individual trust account for the benefit of the client and managed in accord with fiduciary rules.⁹

Determining whether the client's funds are likely to earn interest net of the bank's fees and the cost of the lawyer's or law firm's related services involves knowing what those costs and fees will be. A lawyer may or may not have a good grasp of his or her own costs, properly charged to the client, for administering a client's interest-bearing account. Moreover, banking costs are complicated. Effective interest rates and fees vary from bank to bank and at the same bank over time, and depend on many circumstances, such as the size of the deposit and the date on which the deposit will begin earning interest. The determination also involves predicting several future events: How long will the funds be held? How many transactions will there be? Will interest rates stay the same, rise or fall?

Deciding whether particular client funds are, or are not, "qualifying" is more of an art than a science. New York has a statutory hold-harmless provision. New York attorneys shall neither be liable in damages nor held to answer for a charge of professional misconduct because of a deposit of moneys into an IOLA account, pursuant to the attorney's good-faith judgment that such moneys were qualified funds.¹⁰ This part of the "hold-harmless" provision has been upheld by courts.¹¹

If a lawyer errs by placing non-qualified client funds in an IOLA account, or if the initial decision was correct but subsequent events suggest that the funds are no longer qualifying, the lawyer can remove the funds at any time by writing a check from the IOLA account to an appropriate other account.

New York's statute specifically provides for the refund of interest earned by IOLA upon application of any aggrieved party. The statute further provides that IOLA shall neither pay interest on the proceeds (interest

9 ABA Committee on Ethics and Professional Responsibility Formal Opinion #348 (1982) ("ABA Op."): "The law of agency and trusts governs when a lawyer has a fiduciary duty to invest a client's funds. A trustee may be liable for lost earnings on funds left with the trustee for investment and kept uninvested for an unreasonably long time" (citations omitted). To the same effect is NYSBA Committee on Professional Ethics, Opinion #554 (1983) ("NYSBA Op."): "Where a lawyer holds a sum for a client which is sufficient to earn interest, the lawyer has a fiduciary obligation to invest the sum."

10 Jud. Law § 497(5); 21 N.Y.C.R.R. § 7000.8(b).

11 *Takayama v. Schaefer*, 240 A.D.2d 21, 669 N.Y.S.2d 656 (2d Dep't 1998), discussed in detail at III.C. "New York Decisions Concerning IOLA Accounts" [§3.7].

on the interest earned while the principal is in an IOLA account) nor deduct any service charge.¹²

[3.2] III. LEGAL AND ETHICAL ASPECTS

[3.3] A. The Lawyer as a Fiduciary

Analysis of the propriety of a lawyer's participation in an IOLTA program begins with the proposition that a lawyer holding client funds is a fiduciary. The lawyer may charge the client the reasonable costs of handling those funds, but may not profit by virtue of holding the funds, either directly or indirectly (e.g., by enjoying any accommodation provided by the bank in consequence of the lawyer's placing client funds there). If it is reasonable for the lawyer to cause the client to earn net interest on the client's funds consistent with other obligations to the client (protecting the principal, maintaining availability, etc.), the lawyer has a fiduciary obligation to cause the client to earn that interest, pursuant to directions sought and received from the client. A lawyer, however, is not an investment manager and is under no obligation to maximize the client's return. A lawyer is not required to shop around for the best deal, moving client accounts every time a new entrant in the trust banking business offers a higher rate or lower fees.

The ethical underpinnings of IOLTA programs must be examined against the background of the lawyer's fiduciary duty. The ABA Committee on Ethics and Professional Responsibility, Formal Opinion 348 (1982), titled "Placing Clients' Funds at Interest," was the original ethics opinion on IOLTA. The opinion reviewed lawyers' practices regarding handling client funds, noting and approving the prior practice of placing such funds in a commingled non-interest-bearing account where the earning potential of the funds in relation to the administrative costs would not justify investing the funds. It also noted the correlative practice of placing funds in a separate account "where the amount and expected holding period *make it obvious* that the interest earned will exceed the administrative costs."¹³ The ABA Ethics Committee addressed the question of ownership of interest last: "assuming that either a court or a legislature . . . , either implicitly or explicitly, has made a determination that the interest

¹² State Fin. Law § 97-v(5); 21 N.Y.C.R.R. § 7000.10(j).

¹³ ABA Op. 348 (1982) (emphasis added).

earned is not the clients' property, participation in the program by lawyers is ethical."¹⁴

Every ethics opinion addressing IOLTA programs has approved them on one of two grounds, or both. The first ground was the one stated by the ABA Ethics Committee. If lawful authority had determined that the interest was not the client's property in the first place, IOLTA programs were ethical. But, in *Phillips v. Washington Legal Foundation*,¹⁵ a Fifth Amendment challenge to the Texas IOLTA program, the U.S. Supreme Court held that

the interest income generated by funds held in IOLTA accounts is the "private property" of the owner of the principal. We express no view as to whether these funds have been "taken" by the State; nor do we express an opinion as to the amount of "just compensation," if any, due respondents. We leave these issues to be addressed on remand.¹⁶

This decision obviously undercut the first ground for finding IOLTA programs both ethical and constitutional.

There was, however, a second ground in ethics opinions for upholding IOLTA programs. The second ground essentially answered the *Phillips* question about just compensation. It said IOLTA did not violate the Fifth Amendment because clients did not lose anything of value. Only funds that could not earn interest net of administrative costs could be placed in IOLTA accounts. This ground has been upheld by the Supreme Court.¹⁷

IOLTA is ethically acceptable for the same reason that it is constitutionally acceptable. Clients have no reasonable expectation of receiving net interest on the small or briefly held sums to which IOLTA applies and, by definition, the costs and charges would equal or exceed the gross inter-

¹⁴ *Id.*

¹⁵ 524 U.S. 156 (1998).

¹⁶ *Id.* at 172.

¹⁷ In *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003), the U.S. Supreme Court decided a constitutional challenge to the Washington State IOLTA program. *Brown* laid to rest any question about the legality of IOLTA programs under the Fifth Amendment and effectively endorsed the second ground underpinning the ethics opinions. The Court held that, even assuming IOLTA programs "took" interest, such a taking was for a valid public use and the amount of compensation due was zero, because absent the deposit of a client's funds in an IOLTA account the amount of interest that could be earned would be zero.

est. Neither the IOLTA concept nor the lawyers who follow the applicable IOLTA rules take anything of economic value from their clients.

Lawyers should not hesitate, on legal or ethical grounds, to use IOLTA accounts for “qualified funds.” There is every reason for lawyers to do so whenever the qualified/non-qualified analysis is “too close to call.” A lawyer’s good-faith error in putting a client’s funds in an IOLTA account can be corrected retroactively. In those circumstances, the client can be compensated because the IOLTA program will return all the interest that the program earned on the money erroneously deposited.

As previously discussed, New York’s IOLA program has just such a rule to protect clients if a lawyer makes a good-faith error by putting “nonqualified” client funds in an IOLA account.¹⁸ The statute also protects the lawyer against claims arising from such an error. The statute does *not* protect a lawyer, however, who erroneously places qualifying funds in an interest-bearing account that ends up generating more costs than interest (especially after taxes), so that the client’s principal is, in effect, diminished.¹⁹

A New York lawyer should make a good-faith determination as to whether the client’s funds are “qualified funds.” When it is just too close to call, an IOLA account is the safest course for the lawyer and the client. Moreover, since lawyers have a professional obligation to support the provision of civil legal services to poor persons, and since IOLA is absolutely critical to that effort, lawyers should be vigilant in its protection and active in its promotion.

¹⁸ Jud. Law § 497(5); 21 N.Y.C.R.R. § 7000.8(b).

¹⁹ In the authors’ opinion, such a lawyer may be liable to his client for that loss.

[3.4] B. Federal Insurance**[3.5] 1. Banking Institutions Other Than Credit Unions**

The Federal Deposit Insurance Corporation (FDIC)²⁰ insures net deposits²¹ at most banking institutions²² up to a specified limit²³ per beneficial owner, per banking institution.²⁴ A lawyer or law firm is merely the title owner of a Special, Attorney or Escrow account, including an IOLA account, and not the beneficial owner. The beneficial owner is usually a

20 The authors of this chapter wish to acknowledge the work of Texas attorney J. Chrys Dougherty, who explained FDIC coverage in a very useful memorandum. Memorandum from J. Chrys Dougherty to Texas Equal Access to Justice Foundation, Re: FSLIC and FDIC Protection of IOLTA Accounts (Mar. 3, 1989).

21 When a banking institution fails, the FDIC takes over all of its assets and is responsible for certain of its liabilities. In computing the net deposit (a liability of the bank to the beneficial owner of the deposit) the FDIC is entitled to set off that beneficial owner's debts to the bank (an asset of the bank) against the face amount of the deposit. So a depositor with a single \$100,000 savings account in, and \$100,000 in current credit card debt (only) owed to, the same financial institution, may have no net deposit to be insured. This is true of any attorney trust account or any account maintained by the client at the same banking institution. It is not peculiar to IOLA accounts. The FDIC has discretion to deal with a beneficial owner's debts to the bank in ways that may enable the beneficial owner to claim some, or greater, insurance, up to the applicable limit.

22 Section 32 of New York State's Banking Law requires all banks, trust companies, savings banks, savings and loan associations, and credit unions organized under or subject to the Banking Law to have "insurance of deposits and share accounts, as the case may be" unless the institution does not receive such deposits or share accounts from the general public. For credit unions, the insurer is the Administrator of the National Credit Union Administration, and for all others, it is the FDIC, except that the superintendent may approve terms and conditions under which a banking organization may procure insurance from another source. To determine if your banking organization is insured by the FDIC, you may call (877) ASK-FDIC or use the FDIC Institution Directory on the Internet *available at* www.fdic.gov.

23 Effective October 3, 2008, Congress "temporarily" raised the limit from \$100,000 to \$250,000. The increase is "temporary" because, if Congress takes no further action, the limit will return to \$100,000 as of midnight on December 31, 2013. In addition, effective October 14, 2008, the FDIC offered, through its Transaction Account Guarantee (TAG) Program, unlimited coverage of non-interest-bearing accounts, as well as IOLA accounts and certain NOW accounts with interest rates no higher than 0.5%. Unlimited insurance through the TAG Program comes at a price to the financial institution, so they were permitted to opt out, which means that the limit is still \$250,000 for deposits in many financial institutions. Lawyers may find the list of New York financial institutions that opted out at www.fdic.gov/regulations/resources/tlgp/optout.html. The TAG Program will expire on June 30, 2010, and the limit will again be \$250,000 for IOLA accounts and other trust accounts alike, until December 31, 2013, when it is scheduled to return to the pre-October 2008 level of \$100,000.

24 The limit applies to the aggregate of all funds of a beneficial owner deposited at a particular banking institution, even if those funds are held in multiple accounts at one branch, or even at multiple branches of that institution. However, a beneficial owner is insured for the full amount, up to the limit, at *each* banking institution where she has an account or accounts.

client or party to an escrow agreement. Any other deposits of the lawyer or law firm at the same banking institution do not count against the limit applicable to such beneficial owner, provided the lawyer follows the required steps, set forth below. However, all deposits by or for the benefit of the beneficial owner at the same banking institution will be aggregated for purposes of applying the limit.²⁵ The appropriate steps include the following:

1. The account must be designated as a trust account so the role of the law firm as trustee or agent is disclosed.²⁶
2. The lawyer or law firm must maintain records in good faith and in the normal course of business that clearly establish each client's or beneficial owner's claim to funds in the account. (This is already true of a properly administered IOLA account.)
3. The client's claim to the funds must not be subject to any contingency that makes it impossible to calculate the exact amount of the client's claim.

[3.6] 2. Credit Unions

Under certain circumstances, funds held in a lawyer's IOLA account at either federal or state-chartered credit unions may be insured. Currently, the limit is \$250,000. But, the insuring agency, the National Credit Union Administration, through its National Credit Union Share Insurance Fund (NCUSIF),²⁷ insures only member accounts. Therefore, generally, client

25 For example, a client may have her own account at a particular banking institution, and her lawyer may be holding funds in an IOLA or escrow account at the same institution. Generally, the two deposits will be aggregated for purposes of applying the limit; and the same is true for additional direct or beneficial deposits—they are all aggregated. Until June 30, 2010, however, there is no limit on the coverage for deposits in IOLA or certain other accounts (*see* note 23, above), so they do not count against the limit at all. There are some circumstances in which a single beneficial owner will have the protection of separate insurance on different accounts. For example, if an individual has a \$250,000 deposit in an account in her name, and she and her spouse have \$500,000 in a joint account (but no other relationship with the financial institution), all \$750,000 will be insured. Explanation of the application of the FDIC rules to all permutations is beyond the scope of this book. Interested attorneys should call (877) ASK-FDIC or consult with www.fdic.gov to learn how the rules would apply to a specific circumstance.

26 This is automatic for an IOLA account. *See* VII. "Opening and Administering an IOLA Account" [§3.15].

27 NCUA Legal Opinion 08-0840, Oct. 8, 2008. Legal opinion from Sheila A. Albin, Associate General Counsel, NCUSIF to Mary Hoeft Smith, Trust Account Program Administrator, Supreme Court of Wisconsin, Office of Lawyer Regulation, *available at* http://www.ncua.gov/resources/regulationsopinionslaw/opinion_letters/2008/08-04.pdf.

funds in an IOLA account are insured by the NCUSIF only for the clients of an attorney who are members of the same credit union to which the lawyer belongs. If a credit union is designated as “low-income,” however, it can accept nonmember funds, and for purposes of NCUSIF coverage, nonmembers are considered members so their funds in an IOLA account are insured. To determine if a credit union is designated as “low income,” a lawyer may inquire of the credit union or contact the National Credit Union Administration.²⁸ The possibility that a lawyer’s client’s funds will not be insured is a significant trap for the unwary. In addition, unlike financial institutions insured by the FDIC, credit unions do not have access to “unlimited” insurance, even temporarily.

In the event of a credit union’s liquidation, the amount of a client’s funds in an IOLA account is generally added to funds in any other individual account of the client at the credit union to determine the amount that is subject to the \$250,000 coverage, which expires on December 31, 2013. As in the case of the FDIC insurance, there are complicated rules governing circumstances in which a single beneficial owner may have the protection of separate insurance on different accounts at a single credit union. Again, a complete explanation is beyond the scope of this book.²⁹

[3.7] C. New York Decisions Concerning IOLA Accounts

Attorney trust accounts in general, and IOLA accounts in particular, are rarely the subject of reported decisions outside the context of a disciplinary proceeding. Three such cases, however, provide valuable guidance as to a lawyer’s responsibilities.

Two of these cases—*Takayama v. Schaefer*³⁰ and *Mann v. Skidmore*³¹—address the limits of the IOLA statute’s hold-harmless provision when a lawyer deposits funds in an IOLA trust account instead of an interest-bearing trust account. The third case, *Bazinet v. Kluge*,³² addresses that issue and a provision of the General Obligations Law eliminating any obligation to earn interest for clients in certain circumstances.

28 The National Credit Union Administration’s Consumer Hotline is (800) 755-1030. *See also* www.ncua.gov.

29 Interested lawyers should consult www.ncua.gov.

30 240 A.D.2d 21, 669 N.Y.S.2d 656 (2d Dep’t 1998).

31 2 Misc. 3d 50, 774 N.Y.S.2d 252 (App. Term 2d Dep’t 2003).

32 196 Misc. 2d 231, 764 N.Y.S.2d 320 (Sup. Ct., N.Y. Co. 2003), *rev’d in part*, 14 A.D.3d 324, 788 N.Y.S.2d 77 (1st Dep’t 2005).

It also addresses FDIC insurance and the effect of a bank failure, and the ability of an attorney to insulate himself from liability as an escrow agent through exculpatory provisions in contracts.

[3.8] 1. *Takayama v. Schaefer*

In *Takayama v. Schaefer*,³³ the seller's attorney served as escrow agent in a real property transaction, placing a \$12,000 deposit in his IOLA account. That decision was not challenged. The court also noted that it was almost immune from challenge under the hold-harmless provision, Judiciary Law § 497(5). The buyer failed to obtain a mortgage. Litigation over the right to the deposit was resolved nearly four years later, during which time the funds remained in the IOLA account. The civil court entered judgment against both the attorney and the seller for \$12,000 plus statutory interest and costs. The issue on appeal was whether, absent instructions in the escrow agreement, "an escrow agent . . . must deposit the funds in court pursuant to CPLR 1006 to avoid liability for interest and costs."³⁴

The majority concluded that the attorney

simply continued to keep the funds secure in his escrow account while awaiting a court order, and in so doing accomplished the functional equivalent of an interpleader. We know of no case in which an attorney has ever been held personally liable under these circumstances, and given the existence of Judiciary Law § 497(5) and the other circumstances of this case, we see no occasion to make this the first such instance.³⁵

A strongly worded dissent would have limited the hold-harmless protection to the initial decision to place the funds in an IOLA account. The dissent argued that the lawyer had an independent fiduciary duty to place the funds at interest when delay became apparent, and speculated that "if

³³ 240 A.D.2d 21.

³⁴ *Id.* at 22.

³⁵ *Id.* at 25.

the funds held in escrow had belonged to the [attorney], he would have taken whatever actions were necessary to maintain their productivity.”³⁶

[3.9] 2. *Mann v. Skidmore*

In *Mann v. Skidmore*,³⁷ Skidmore was the attorney for a mother (Mann) and her two minor children in connection with the sale of Mann’s mother’s home. Skidmore placed \$84,613.92 of the proceeds attributable to the minor children in his IOLA account pending court authorization to pay the money to them, which took 18 months.

Mann sued Skidmore in Nassau County District Court to recover interest she alleged her children’s money would have earned had Skidmore placed it in an interest-bearing account. The District Court rejected Skidmore’s defense that, when he received the funds, he thought they would remain in his hands for three months or less. The court found that the amount of the funds and the period of time they were actually held took the case outside the IOLA hold-harmless provision validated in *Takayama* and held the attorney liable for the interest.³⁸

The Appellate Term reversed:

[P]laintiffs failed to establish that defendant lacked good faith either in depositing the funds at issue in a non-interest-bearing attorney IOLA account in the first instance, or in failing to transfer the funds to an interest-bearing account at some later time (*see Takayama v. Schaefer*, 240 A.D.2d 21 [1998]). The clear language of Judiciary Law § 497(5) mandates that a determination, made in good faith, that funds are “qualified” . . . to be placed in an IOLA account, is not actionable. Plaintiffs complained only of defendant’s poor judgment in depositing proceeds from a real estate transaction into an IOLA account. This is insufficient to establish lack of good faith (*Takayama v. Schaefer*, 240 A.D.2d at 26) and in fact represents the

36 *Id.* at 28; *see* The Association of the Bar of the City of N.Y. Committee on Professional and Judicial Ethics, Op. 1995-6 (Apr. 5, 1995) (lawyer had deposited \$4,000 in client funds in an IOLA account; but now, anticipating a delay in disbursement, was instructed to open a separate account if delay would be one year or more).

37 2 Misc. 3d 50, 774 N.Y.S.2d 252 (App. Term, 2d Dep’t 2003).

38 *Mann v. Skidmore*, 193 Misc. 2d 340, 749 N.Y.S.2d 379 (Dist. Ct., Nassau Co. 2002), *rev’d*, 2 Misc. 3d 50.

very questioning of professional judgment that Judiciary Law § 497(5) was intended to forestall. Contrary to the assertion of the court below, the present case is indistinguishable from *Takayama* in that regard.

Furthermore, the proper inquiry into defendant's initial determination as to whether the funds were "qualified" is prospective. Defendant's assertion that he expected the funds to be disbursed within two or three months was un rebutted.³⁹

[3.10] 3. *Bazinet v. Kluge*⁴⁰

In December 2000, Kluge agreed to sell Bazinet two co-op apartments. As specifically provided in the contract, which included an escrow agreement, Kluge's attorney, Reiser, placed the \$1.45 million deposit in an IOLA account at CBC bank. That contract never closed due to a dispute over permitted alterations. Kluge then agreed to sell the apartments to Stryker. The Stryker contract provided that the deposit (\$1.28 million) be placed in the same IOLA account at the same bank pursuant to the same form of contract/escrow agreement. At the June 2002 Stryker closing, Reiser attempted to withdraw the Stryker deposit from the account. The bank had failed two days earlier and the Federal Deposit Insurance Corporation had been named receiver: \$2.73 million in Bazinet and Stryker deposits were presumptively lost.

Bazinet sued Kluge for the deposit in New York County Supreme Court and included a claim against Reiser for "negligence/breach of fiduciary duty," alleging that Reiser "owed a duty of care" to client Kluge and escrow party Bazinet as "the beneficial owners of the funds." Bazinet alleged specifically that Reiser breached his duty by

depositing the funds [in] a bank known to be unstable to obtain a personal pecuniary benefit, failing to conduct due diligence of the bank, failing to timely deposit the monies in an interest bearing account, failing to deposit the monies in fully-insured accounts, and failing to take

³⁹ *Mann*, 2 Misc. 3d at 51.

⁴⁰ 196 Misc. 2d 231, 764 N.Y.S.2d 320 (Sup. Ct., N.Y. Co. 2003), *rev'd in part*, 14 A.D.3d 324, 788 N.Y.S.2d 77 (1st Dep't 2005).

prompt corrective action upon learning of the potential for failure of the bank.⁴¹

Bazinet agreed to stay the claim against Reiser pending determination of the Bazinet/Kluge claim to the deposit.

Kluge asserted eight cross-claims against her lawyer, Reiser, alleging malpractice, negligence and gross negligence. The first accused Reiser of mishandling the escrow funds, entitling Kluge to indemnification/contribution in the event Bazinet recovered against Kluge.⁴² The second claimed legal malpractice in failing to place the deposit in “some form of interest-bearing account or instrument that would have been covered by FDIC insurance, [or otherwise to ensure its] preservation.”⁴³ The third alleged gross negligence, based on the same failures.⁴⁴ The fourth alleged breach of fiduciary duties, based on the same failures.⁴⁵ The fifth through seventh claims, in connection with the Stryker deposit, tracked the second through fourth claims (malpractice, gross negligence and breach of fiduciary duties). The eighth claim alleged a disadvantageous and negligent miscalculation of the Real Property Transfer Tax.

Reiser moved to dismiss all eight cross-claims on the pleadings. He relied on a common contractual exculpatory provision: “escrowee ‘shall not be liable for any error in judgment or for any act done or step taken or omitted in good faith, or for any mistake of fact or law, except for escrowee’s own gross negligence or willful misconduct.’”⁴⁶ He also relied on IOLA’s hold-harmless provision.⁴⁷

The supreme court analyzed the contractual exculpatory defense in the context of the malpractice claim, and made short shrift of that defense.⁴⁸ By its terms, the court said, the exculpatory provision only applied to Reiser’s duties other than as attorney (i.e., to his duties as escrow agent),

41 Second Amended Complaint at ¶ 47, *Bazinet*, 196 Misc. 2d 231 (Nov. 5, 2002).

42 *Id.* at ¶¶ 115–117.

43 *Id.* at ¶ 120.

44 *Id.* at ¶ 128.

45 *Id.* at ¶¶ 132–133.

46 *Bazinet v. Kluge*, 196 Misc. 2d 231, 233, 764 N.Y.S.2d 320 (Sup. Ct., N.Y. Co. 2003), *rev’d in part*, 14 A.D.3d 324, 788 N.Y.S.2d 77 (1st Dep’t 2005).

47 See Jud. Law § 497(5); 21 N.Y.C.R.R. § 7000.8(b); II. “The IOLA Statute; Participation Mandatory,” [§3.1].

48 *Bazinet*, 196 Misc. 2d 231.

so it was not relevant to the malpractice claim. In the alternative, if it applied to his duties as attorney, it was ethically unenforceable as a prospective limit on malpractice liability.⁴⁹

The court also rejected reliance on Judiciary Law § 497(5), concluding, in effect, that no lawyer could make a “judgment in good faith” that these funds, capable of grossing \$2,000 per month and expected to be held for about three months, were appropriate for an IOLA account. That left Reiser outside the hold-harmless protection of the IOLA statute and responsible for “advising” Kluge to put the deposits in non-interest-bearing accounts. The court held that Kluge should be allowed to attempt to prove that such advice fell below professional standards, constituting malpractice. Accordingly, the court denied Reiser’s motion to dismiss the second and fifth cross-claims based on malpractice. The court did dismiss the claims for breach of fiduciary duty (fourth and seventh claims) and the claim for indemnity (first claim) on the ground that they were “duplicative” of the malpractice claim. Finally, the court held that the conduct alleged was not “gross negligence,” so it dismissed the third and sixth cross-claims.

The First Department, *per curiam*, reversed the trial court’s refusal to dismiss the second and fifth cross-claims, based on malpractice:⁵⁰

There is no allegation that Reiser violated any statute or regulation, much less that he breached the escrow provisions of the contracts. There is no requirement imposed by law that an attorney-escrow agent place escrow funds in an account fully insured by the FDIC (*see* General Business Law § 778-a; 22 NYCRR §1200.46 [b][1]⁵¹), and there are no allegations that Reiser knew that CBC was in danger of closing. The proximate cause of Kluge’s injury, if any, was CBC’s unforeseen demise.⁵²

49 Rule 1.8(h)(1).

50 *Bazinet*, 14 A.D.3d 324.

51 The former DR 9-102 is superseded by the substantively identical Rule 1.15.

52 *Bazinet*, 14 A.D.3d at 325. It is only technically correct, of course, that there were no allegations that Reiser knew that CBC was in danger of closing. The above-quoted language from *Bazinet*’s direct claim against Reiser makes that allegation and more. But since *Bazinet*’s direct claim was stayed and Kluge’s malpractice claims did not allege actual knowledge of CBC’s financial weakness—and why should they, since such knowledge was not a necessary element of the malpractice claim—the court was technically, if narrowly, correct. The language of the case before this quotation contained no such allegations.

The court cites N.Y. General Business Law § 778-a (GBL), titled “Contracts Requiring Down Payments in Escrow,” in the context of FDIC insurance, as discussed below, but the real significance of GBL § 778-a is subsection (4): “Unless the contract provides otherwise, an escrow agent shall not be required to deposit the down payment in an interest-bearing bank account.”⁵³

The court’s application of GBL § 778-a leaves several questions unanswered. Bazinet said Reiser failed her by preparing a contract that directed the deposits be placed in a non-interest-bearing account. The GBL says that an escrow agent is permitted to use a non-interest-bearing account “[u]nless the contract provides otherwise.” But the client does not prepare the contract, the attorney does. Does the GBL relieve the attorney of obligations to his client in his capacity as her attorney when he drafts the document failing to “provide otherwise”? And consider this additional caveat:

The provisions of this section are not exclusive and do not relieve a buyer, seller or escrow agent from compliance with all other applicable provisions of law, or from civil or criminal liability imposed by other applicable provisions of law.⁵⁴

Rule 1.15 does not mention the obligation to make a client’s funds productive. However, the ethics opinions are legion that say because a lawyer is a fiduciary (which Rule 1.15 says very clearly), a lawyer may have that obligation in certain circumstances.⁵⁵ Is the common law of fiduciary duty or the ethical rule that incorporates it “applicable provision of law,” displacing GBL § 778-a? Or, should we read the First Department’s decision and reference to GBL § 778-a as negating those principles, at least for residential down payments? *Bazinet*, released in January 2005, is the first court to cite the 1991 GBL provision. It remains to be seen if other courts give that provision such potentially expansive application.

53 The subsection goes on to say: “If the escrow agent is an attorney admitted to practice in this state, a bank account authorized by section four hundred ninety-seven of the judiciary law shall be a lawful depository for down payments held by the attorney in escrow.” GBL § 778-a(4). Jud. Law § 497 is, of course, the IOLA statute.

54 GBL § 778-a(6).

55 See ABA Formal Op. 348 (1982): “The law of agency and trusts governs when a lawyer has a fiduciary duty to invest a client’s funds. A trustee may be liable for lost earnings on funds left with the trustee for investment and kept uninvested for an unreasonably long time” (citations omitted). To the same effect is NYSBA Op. 554 (1983): “Where a lawyer holds a sum for a client which is sufficient to earn interest, the lawyer has a fiduciary obligation to invest the sum.”

Bazinet was also the first New York case to deal with FDIC insurance.⁵⁶ Kluge claimed that Reiser should have assured that the deposits would be fully insured by the government when CBC failed. The court disagreed but its only authority was GBL § 778-a and DR 9-102,⁵⁷ and that is negative authority. The court suggests that the failure to assure FDIC insurance is not malpractice because neither of those authorities requires FDIC insurance. The court does not, and could not, say that those authorities specifically excuse the failure to assure FDIC insurance. On the other hand, Rule 1.15 is quite clear about the lawyer's obligation to *preserve* client property, even while being silent about making that property productive. Indeed, lawyers are held responsible for the bad acts of third parties (e.g., dishonest office managers) if even a small error of omission or commission on the lawyer's part leads to the loss of client property.

Here, if Reiser did not know and should not have known of the problems at CBC, the result seems just. Surely the court was correct to conclude that an attorney with no actual or constructive knowledge of an impending bank failure should not be a guarantor of the bank.

But did the First Department go too far? Did it suggest that FDIC insurance could be ignored altogether? Does the *Bazinet* opinion open the door for lawyers to place client funds in accounts that are completely uninsured? If the risk of noninsurance is ethically acceptable, what level of risk is not?

Practical considerations may have forced the court to rule that FDIC insurance was not required because the opposite holding—that all the money held by an attorney had to be fully FDIC insured—would greatly burden attorneys. Not only would they have to separate large deposits into portions small enough to be FDIC-insured and spread them around to different institutions, they would have to use institutions not already (or subsequently) used by their clients, since the money held by the attorney would be aggregated with the client's other money for purposes of applying the insurance cap.⁵⁸

Attorneys should not draw extensive comfort from *Bazinet*, which is the law of only one department and ultimately may be limited to its facts. As to an attorney's failure to earn interest for clients on funds clearly

56 See III.B. "Federal Insurance," [§3.4].

57 The former DR 9-102 is superseded by the substantively identical Rule 1.15.

58 See III.B. "Federal Insurance" [§3.4].

capable of earning net interest, *Bazinet* and GBL § 778-a provide no protection, even in the First Department, if the funds are not a buyer's down payment in the purchase of a home being held by the lawyer as escrow agent. Moreover, there may be circumstances in which the court will conclude that the attorney should have drawn an escrow agreement providing for an interest-bearing account, something GBL § 778-a clearly contemplates.

As to the failure to assure FDIC insurance, the lack of both actual or constructive knowledge of the impending bank failure and the lack of any practical way to be certain the entire amount would be insured, may save a First Department lawyer from a malpractice claim. Would the result be the same if the deposit was \$249,000 and an attorney placed it in an institution with no FDIC insurance? In that circumstance—where the only reason that a client's funds were not fully insured was the attorney's unilateral decision to deposit them in an institution lacking FDIC insurance—*Bazinet* may not save the attorney from a malpractice claim.

Malpractice claims are not an attorney's only worries. There are many reasons why a client may not pursue a malpractice claim. It is possible to escape a malpractice claim based on conduct that nevertheless supports a disciplinary complaint. The "standard of proof for a determination of professional misconduct in an attorney's disciplinary proceeding is a fair preponderance of the evidence."⁵⁹ This is the same standard used in civil actions. Loss of a malpractice case, therefore, may be collateral estoppel against the attorney in a disciplinary proceeding. Victory in the malpractice case, however, does not guarantee that there can be no disciplinary proceeding, since the disciplinary committee is not bound by collateral estoppel (although proceedings in such circumstances are rare).

[3.11] D. The Lessons of *Takayama*, *Mann* and *Bazinet*

Takayama might have been a much shorter opinion had the case arisen after *Bazinet*, because GBL § 778-a puts the interest question to rest in the context of a down payment on a residential purchase.⁶⁰ Outside that context, however, attorneys should be mindful of the lesson, best articulated in *Bazinet* (but *dicta* there because of the GBL), that the IOLA statute's

⁵⁹ *In re Capoccia*, 59 N.Y.2d 549, 551, 466 N.Y.S.2d 268 (1983).

⁶⁰ We do not know for certain that GBL § 778-a would have applied to *Takayama*, because the Second Department's opinion does not tell us whether the "real property" was a home. We know GBL § 778-a would not have applied to *Mann* because the funds in that case were the proceeds of a sale, not a down payment.

hold-harmless provision is not available unless the attorney makes a good-faith judgment that the funds are “qualified” (such judgment having been made in *Takayama* and *Mann* but not in *Bazinet*). Moreover, both *Takayama* and *Mann* suggest that, once made, such a judgment must be revisited if circumstances change. Finally, while the attorney may not be a guarantor of the financial performance of the institution in which the money is deposited, *Bazinet* has not terminated the attorney’s role as fiduciary and fiduciaries must exercise appropriate care.

[3.12] IV. ADMINISTRATION

The IOLA Fund is a fiduciary fund in the custody of the state comptroller.⁶¹ A board of trustees (the “Board”) administers the fund. The Board consists of 15 members appointed by the governor. All members must be New York State residents. They must be knowledgeable about, and supportive of, the delivery of civil legal services to the poor and the improvement of the administration of justice. At least eight of the members must be attorneys licensed to practice law in New York. Two members are appointed upon the recommendation of the temporary president of the Senate, at least one of whom must be an attorney; two members are appointed upon the recommendation of the speaker of the Assembly, at least one must be an attorney; one member is appointed upon the recommendation of the minority leader of the Senate; and one member is appointed upon the recommendation of the minority leader of the Assembly. Finally, two attorney members are appointed upon the recommendation of the Court of Appeals. The governor designates one of the members of the Board as chairperson.⁶² The term of office of each trustee is three years; trustees receive no compensation for their services.⁶³

The Board has the power to receive, hold and manage any moneys and property received from any source. It is required to distribute funds as grants and contracts to not-for-profit tax-exempt entities for the purpose of delivering civil legal services to the poor and for purposes related to the improvement of the administration of justice. These purposes include, but are not limited to, the provision of civil legal services to groups currently underserved, such as the elderly and the disabled; and the enhancement of civil legal services to the poor through innovative and cost-effective

61 N.Y. State Finance Law § 97-v(1) (“State Fin. Law”).

62 State Fin. Law § 97-v(2).

63 State Fin. Law § 97-v(2)(a), (b).

means, such as volunteer lawyer programs and support and training services.⁶⁴

At least 75% of the total funds distributed by the Board in any fiscal year must be allocated according to the geographical distribution of poor persons throughout the state, based on the latest available figures from the U.S. Department of Commerce, Bureau of Census.⁶⁵

[3.13] V. BANKING RELATIONSHIPS

In 2009, New York attorneys maintained more than 48,000 IOLA accounts at 200 banking institutions in the state. IOLA's relationship with banks and their administration of IOLA accounts is governed by statute.

The rate of interest payable on any IOLA account shall be not less than the rate paid by the banking institution on similar accounts maintained at that institution, and the banking institution shall not impose on such accounts any charges or fees greater than it imposes on similar accounts maintained at that institution.⁶⁶

The banking institution shall:

- (i) Remit at least quarterly any interest earned on the account directly to the IOLA fund, after deduction of service charges or fees, if any, are applied.
- (ii) Transmit to the IOLA fund with each remittance a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of net interest remitted from such account.
- (iii) Transmit to each attorney or law firm that maintains an IOLA account a statement showing at least the name of the account, service charges or fees deducted, if any, and the amount of interest remitted from such account.
- (iv) Be permitted to impose reasonable service charges for the preparation and issuance of the statement.

64 State Fin. Law § 97-v(3)(a).

65 State Fin. Law § 97-v(3)(b).

66 Jud. Law § 497(6)(b).

(v) Have no duty to inquire or determine whether deposits consist of qualified funds.⁶⁷

[3.14] VI. OPENING A NON-IOLA ACCOUNT

An attorney may have a client that wishes the attorney to hold a sum of money in trust that the attorney expects *will* earn interest income in excess of bank charges and an amount that the attorney deems to equal the attorney's administrative costs.⁶⁸ If so, the attorney may open a non-IOLA attorney trust account in which to deposit such sum. Any bank or bar association can provide guidance. The attorney must consult the New York State Lawyers' Fund for Client Protection at (800) 442-FUND, or www.nylawfund.org, to determine if the bank complies with the Dishonored Check Reporting Rule and is approved to offer attorney trust accounts. When using a non-IOLA trust account, the attorney must remit to the client any interest earned and arrange for appropriate income tax reporting regarding such income.

[3.15] VII. OPENING AND ADMINISTERING AN IOLA ACCOUNT

If the client wishes the attorney to hold a sum of money in trust that the attorney expects will *not* earn net interest in excess of the above-referenced guideline, the attorney should deposit such funds in an IOLA account.

To open an IOLA account, the attorney may go to one of the banks in New York that offer them. Each New York attorney who (or law firm which) will have occasion to handle client funds must establish an IOLA account at one of those banks.⁶⁹ For a complete list of banks offering IOLA accounts, consult the IOLA Web site available at www.iola.org.

To open an IOLA account, an attorney or law firm should take the following steps:

1. Select a bank offering IOLA accounts.
2. Ask the bank for an IOLA enrollment form entitled "Lawyer's or Law Firm's Notice to Financial Institution to Establish an IOLA

⁶⁷ Jud. Law § 497(6)(c).

⁶⁸ 21 N.Y.C.R.R. § 7000.8.

⁶⁹ *Id.*

Account (Interest On Lawyer Account).” If the bank does not have one, download a copy of the form from the IOLA Web site (www.iola.org) or call the IOLA Fund at (800) 222-IOLA. A staff member will fax the form to the lawyer.

3. Direct the bank to open an IOLA account. Designate it as “[Name of Attorney/Law Firm].” Include one of the following phrases in the title: “Attorney Special Account/IOLA,” “Attorney Trust Account/IOLA” or “Attorney Escrow Account/IOLA.” For example, the title of the account could be: “John Doe, Attorney Trust Account/IOLA.”
4. Complete the IOLA enrollment form accordingly. Leave the upper portion of the form with the bank. Within 30 days of establishing the account, notify the IOLA Fund of the account number and name and the address of the bank where the account is located *by mailing the bottom portion of the enrollment form to IOLA at the address shown on its Web site.*

Participating banks remit the interest earned on IOLA accounts directly to the Fund under the Fund’s tax identification number. No interest is earned by the attorney or client. Consequently, neither has taxable income or accounting or tax reporting responsibilities with respect to the interest.

A bank may neither assess service charges on IOLA accounts that exceed those on comparable accounts at the bank nor calculate interest at less favorable rates than those applied to comparable accounts at the bank. Under IOLA’s regulations, a bank has a choice of options for meeting the comparable interest rate requirement, subject to approval by the IOLA Fund.⁷⁰ The Fund, not the lawyer or the client, pays the basic, non-discretionary service charges for an IOLA account.⁷¹

There is considerable variation among banking institutions with regard to interest rates and service charges. Lawyers, in the discharge of their obligations to support the provision of civil legal services to poor persons, should seek to use banking institutions that treat IOLA favorably, and should urge whatever banking institutions they use to do so.

70 21 N.Y.C.R.R. §§ 7000.2(b), (d), 7000.9.

71 The Fund does not pay the cost of printing checkbooks after the initial one or charges for fees related to any special service, non-routine activity or event—including, but not limited to, wire transfers, cashier’s checks, certified checks, stop payment orders, account reconciliation services, overdrafts, NSF’s (non sufficient funds) or returned checks.

Lawyers who shop for a bank providing the best net yield to IOLA help the Fund increase the availability of civil legal services. Lawyers will find guidance as to the yields each bank provides to IOLA on the Fund's Web site.

[3.16] VIII. GRANTMAKING AND CIVIL LEGAL ASSISTANCE

In 2008, IOLA awarded nearly \$25 million in grants to nonprofit organizations located throughout the State that deliver civil legal services to low-income New Yorkers. For the 15 months from January 2009 through March 2010, it awarded grants at the same annualized level.

Data from IOLA's grantees show that in 2007 they provided direct assistance to 429,539 low-income people, winning over \$204 million for them.

An additional 345,677 received community legal education, assistance with self-representation in court and other essential legal services.

Another 150,736 were assisted through Hotlines. Many more obtained information from grantees' Web sites.

Ten thousand one hundred twenty-one attorneys donated pro bono services through grantees' programs and contributed 388,842 hours of uncompensated time, helping 11,687 people. At a conservative value of \$200 per hour, the value of their donated services was \$77,768,400.

The following examples are representative of the work of IOLA's grantees:

- After appearing without counsel at an impartial hearing and losing her case, a parent sought the services of Partnership for Children's Rights (PFCR). For several years, the Department of Education (DOE) had provided porter services, carrying a multiply-handicapped child, in his wheelchair, up and down the stairs from his fifth-floor apartment to and from the school bus, which transported him to his barrier-free school. With virtually no notice and without providing an explanation, the DOE terminated these services, leaving the child unable to attend school. The reason provided by the impartial hearing officer in denying the parent's request for reinstatement for these services was that it was prohibited by the Americans with Disabilities Act. An attorney from PFCR reviewed

the case and determined that an impartial hearing officer had misapplied the law and that the parent had a viable claim. The attorney filed an appeal, and within days the New York City Law Department decided not to defend and agreed to reinstate the porter services. *Partnership for Children's Rights, New York City.*

- Ms. M. worked for nine years as an office manager at two different dry cleaning businesses owned by the same employer. She generally worked six days per week, averaging over 50 hours each week. She had received no complaints about her work. Ms. M. became pregnant in January and informed her employer that she was due to give birth in early October. She discussed working until she gave birth, and then taking a three-month, unpaid maternity leave. Her employer agreed to this proposal. In early August, after a brief hospitalization, Ms. M. was fired with no reason given. She then applied for unemployment insurance, which her employer contested, claiming Ms. M. had quit her job. Ms. M. then gave birth prematurely. MFY Legal Services represented Ms. M. in her Unemployment Insurance hearing and the Department of Labor found that she had, in fact, been fired from her job. Based on a number of remarks made by her employer about her pregnancy and the timing of the termination, Ms. M. believed she was unlawfully fired due to her pregnancy. MFY then filed a discrimination claim with the Equal Employment Opportunity Commission (EEOC), which resulted in a \$13,750 settlement for Ms. M. *MFY Legal Services, New York City.*
- Central American Legal Assistance (CALA) won asylum for a Colombian family of four. In Columbia, the father had been a union leader who received death threats from paramilitaries who viewed his union activities as a threat to their power. Hundreds of trade unionists have been killed in Colombia in recent years. The family fled with their nine-year-old daughter because they had visas. They had to leave their four-year-old child behind because he had no visa, and it takes nearly one year to obtain one. CALA succeeded in getting the immigration judge to move the hearing up so the four-year-old could, if they won, be processed for a visa. They did win, and their son joined them in New York, after a separation of about a year and a half. *Central American Legal Assistance, New York City.*
- Katie is a 26-year-old mother of three young children, ages 4, 3, and 9 months. She was a tenant of federally subsidized housing in

Schenectady County, where she complained for several months about uninhabitable conditions. These included infestations of insects and slugs, mold and severe water damage due to defective plumbing. Despite Katie's complaints and the threat of prosecution by the local code enforcement office, the landlord failed to make necessary repairs. Katie began withholding rent, and her landlord commenced a summary proceeding for non-payment. The Legal Aid Society of Northeastern New York (LASNNY) represented Katie in court and she received a 100% rent abatement. LASNNY also worked with a community partner to obtain a decent and affordable apartment for Katie and her family. *Legal Aid Society of Northeastern New York, Albany.*

- Mr. W was out of state when he had a severe accident. The providers who treated him did not recognize his Medicaid Managed Care Plan and billed Mr. W directly for over \$118,000 worth of services, all of which should have been covered by his plan. Following time spent in a coma, reconstructive surgery, and months of convalescence in a nursing home, Mr. W filed the appropriate claims with his plan to have the charges covered. His claims were rejected for numerous reasons, ranging from untimely filing of claims (which could not have been avoided due to the severity of Mr. W's injuries and the length of his recovery time) to failure to obtain pre-authorization for ambulance services (which is not needed for emergencies and which was not possible, given the severity and urgency of the situation). When Mr. W could no longer get anywhere on his own, he approached The Legal Aid Society for help. A member of the Society's Health Law Unit gathered the appropriate documents, advocated with the managed care plan, and was ultimately successful in having the plan accept the claims and pay the providers. The attorney contacted each one of the numerous providers individually to apprise them of the situation and explain that federal law prohibited them from billing any balance amount to Mr. W. *The Legal Aid Society, New York City.*

[3.17] IX. CONCLUSION

IOLA is a crucial mechanism for the support of civil legal services for the poor. Lawyers should, at a minimum, assiduously follow its statutory and regulatory guidelines for handling "qualifying" client funds. Beyond that, lawyers should support IOLA's mission of funding civil legal assistance for low-income New Yorkers by opening their accounts at those banks that provide the highest yield for the Fund.