

STATE OF WISCONSIN
SUPREME COURT

In the Matter of:

The Petition of the Wisconsin Trust Account Foundation, Inc.
for a Rule Assessing Members of the State Bar of Wisconsin,
For an Annual Sum to Support Organizations
that Provide Civil Legal Services to the Indigent of this State,
in the in the Manner that Assessments are Presently Made
to Support the Office of Lawyer Regulation and the Board of Bar Examiners.

PETITION FOR SUPREME COURT RULE

To: The Honorable Justices of the Wisconsin Supreme Court

The Wisconsin Trust Account Foundation, Inc. (WisTAF), by its attorney John S. Skilton of the firm of Heller, Ehrman, White & McAuliffe, LLP., and Deborah M. Smith, its President, and Patrick F. Norris, its Executive Director, petitions this Honorable Court to adopt a rule establishing an annual assessment of each member of the State Bar of Wisconsin in the amount of Fifty Dollars (\$50.00), or such other appropriate amount as the Court may determine, to augment the insufficient funds received from Interest on Lawyers Trust Accounts (IOLTA) for the support of civil legal services for persons who cannot afford a lawyer.

(Proposed) Chapter SCR 14

Public Interest Legal Service

SCR 14.01 Public interest legal service fund: creation and purpose; definitions. (1) A public interest legal service fund of the state bar of Wisconsin is created to fund direct legal services to persons of limited means in non-criminal matters.

(2) In this chapter:

- (a) “Attorney” means a person who is a member of the state bar of Wisconsin, except a person who is an inactive member.
- (b) “Wisconsin Trust Account Foundation” means the entity created pursuant to SCR 13.01.
- (c) “Fund” means the public interest legal service fund of the state bar of Wisconsin.
- (d) “Board” means the board specified in SCR 13.02(1).

SCR 14.02 Administration. (1) The fund shall be operated and administered by the board of the Wisconsin Trust Account Foundation, Inc.

(2) The board may make grants of available funds to eligible programs for the purpose specified in SCR 13.03(2)(a)1.

SCR 14.03 Assessment of attorneys; enforcement. (1) Annual assessments. Commencing with the state bar’s July 1, 2005 fiscal year, every attorney shall pay to the fund an annual assessment, to be determined by the Court, to augment Interest on Lawyers Trust Account (IOLTA) revenues as granted and administered by the Wisconsin Trust Account Foundation Inc. pursuant to SCR Chapter 13. The initial assessment shall be \$50.00. An attorney whose annual state bar membership dues are waived for hardship shall be excused from the payment of the annual assessment for that year. An attorney shall be excused from the payment of the annual assessment for the fiscal year during which he or she is admitted to practice in Wisconsin.

(2) Collection: Failure to pay. The annual assessments shall be collected at the same time and in the same manner as the annual membership dues for the state bar are collected. An attorney who fails to timely pay the annual assessment shall have his or her right to practice law suspended pursuant to SCR 10.03(6).

The grounds for this petition are as follows:

WisTAF Has Limited Authority And Resources Are Scarce.

1. Except for IOLTA, the pro bono efforts of local practitioners, bar associations and private donations to agencies providing civil legal services there are no other funds raised in this State for representation of the indigent in civil matters.

2. WisTAF has also served as a conduit for funds obtained by the Equal Justice Foundation, Inc. and for a \$400,000 grant by the Wisconsin Legislature of Temporary Aid for

Needy Families (TANF) that was administered over four years beginning in 1999. There are two agencies in the State that receive federal LSC funds, but they are also dependent on WisTAF grants of IOLTA funds as well as other private donations.

3. WisTAF revenues are completely dependent upon the rise and fall of interest rates and the changing custom and practice of lawyers with respect to trust accounts. Interest rates are at a 45-year low, and there are more and more private practitioners who, for competitive reasons, no longer can demand an up-front client retainer. Rather, lawyers favor billing clients monthly resulting in a shrinking principal base for IOLTA funds.

4. WisTAF revenues have declined from more than \$2.1 million in fiscal year 2000-2001 to approximately \$1.01 million for the fiscal year ended 2003. As a result, WisTAF has been forced to cut grant levels as revenues have declined. In 2000, WisTAF granted more than \$1.98 million to 14 agencies. For calendar year 2004, WisTAF has promised grants of \$1.11 million to 12 agencies. This decline of more than \$875,000 is a 44 percent reduction from the year 2000 to 2004 that translates directly to a material decline in the ability of grantees to serve the needs of their clients in obtaining access to justice. Currently WisTAF projects only \$850,000 of IOLTA revenue for fiscal year 2004. The continued erosion of revenue will mean that WisTAF will have to further cut its operating expenses (staff) as well as its grants. There will be no one available to administer IOLTA grants other than at a very basic level. No resources would be available to seek alternative revenue sources other than IOLTA. The impact on the future provision of civil legal services for low-income persons in Wisconsin will be disastrous. Access to justice will be put even further out of reach for the poor.

A Quantitative Analysis of the Decline in 1986 Dollars.

5. The Wisconsin Supreme Court created the Wisconsin Trust Account Foundation, Inc. in 1986 to administer the IOLTA program in Wisconsin. The creation of WisTAF was a statement by the Court of a social policy supporting civil legal services to the poor by creating a mechanism to do so. Our existing mechanism has been unable to maintain the level of support the Court and WisTAF's grantees enjoyed in 1986.

6. In 1986 the Consumer Price Index (CPI), according to the Federal Reserve Bank of Minneapolis, was 109.6. The CPI was created to quantify the effects of inflation and interest rates in order to compare U.S. dollar values over time. At the time WisTAF was created by the court the Discount Rate (the rate at which commercial banks can borrow reserves from the Federal Reserve) was 5.5 percent. The discount rate is important to this analysis because it is the practical base of short-term rates in U.S. markets. It is an index that is used by the Federal Reserve to implement monetary policy and as the discount rate moves so do other short-term rates like Treasuries and Federal Funds. Most commercial banks will set the interest rates they pay on deposits at some factor over the discount rate. Their decision of what to pay on deposits is also a function of the bank's need for deposits or other competitive factors.

8. In 1986 the discount rate was 5.5 percent. In 2002 it was down to 1.75 percent. In 2003 it reached a low of 0.75 percent (the lowest in 45 years.) The average rate paid on IOLTA deposits at the present in Wisconsin is 0.65 percent.

9. The significant decline of WisTAF revenues in real dollars is striking. The 1986 CPI was 109.6. The CPI in 2003 was 183.8. At the end of WisTAF's first formal fiscal year revenues were approximately \$888,000. Restatement of that amount in terms of 2003 dollars is computed by multiplying the conversion factor ($183.8/109.6= 1.68$) times the 1986 dollars.

\$888,000 (1.68)= \$1.4 million in 2003 dollars. The actual revenues for 2003 were \$1.01 million. The difference is a decline of \$480,000 (or 32 percent). Using anticipated 2004 revenues of \$850,000, the decline (with a 2004 est. CPI of 1.9) is \$837,000 (or 56 percent).

IOLTA in 2004 is less than half of the amount the court meant to provide for civil legal services when WisTAF was created.

Other States Have Met The Scarcity Of Funds In A Number Of Ways.

10. The funding or coordination of access to legal services for the indigent including the creation of a viable pro-bono program and fiscally sound staff programs have not been issues that have been addressed or resolved by the Wisconsin Legislature, the State Bar of Wisconsin¹ or the Wisconsin Supreme Court.

11. Many of our sister states have developed alternative sources of revenue for providing access to justice for indigent citizens. The States of Minnesota, Michigan, Illinois, Ohio, Pennsylvania, New York, Florida and California have integrated into a single organization the management of IOLTA funds as well as private fund-raising and educational programs. Such organizations have access to funds and grants that WisTAF, with its limited mandate, does not have.

12. Those states have generated from three to twelve times the amount of dollars that IOLTA has provided to Wisconsin residents for indigent representation, because those states have avoided the vulnerability of relying on one source of funds to support legal services for persons of limited needs.

¹The State Bar of Wisconsin is mounting a pilot project to increase pro bono service by lawyers.

13. The majority of money obtained by those organizations comes from sources other than IOLTA, including assessments of licensed members of the Bar, filing fees, escheats, private donations and gifts from private foundations.

14. Five states have adopted an assessment on lawyers to assist in funding legal services for the poor. In three states (Minnesota, Ohio, and Illinois), the decision was made by the Supreme Courts. In one state (Missouri), the decision was made by its mandatory state bar association and in one state (Texas) the assessment was imposed by the state legislature.

- (a) In 1997, the Minnesota Supreme Court increased the registration fee by \$50.00 for attorneys admitted more than three years and \$25.00 for attorneys admitted three years or less with a 50 percent discount for attorneys with adjusted gross income under \$25,000. That came about as a result of a recommendation by a blue ribbon committee charged by the Minnesota Supreme Court with meeting the long-term funding needs of civil legal services for the poor. Ultimately, the General Assembly of the Minnesota State Bar Association (a voluntary bar) strongly endorsed the assessment.

In the year 2002, the Minnesota equivalent of WISTAF received more than \$10.6 million to fund civil legal service providers and provide legal education resources. \$1.6 million came from IOLTA; \$1.03 million came from attorney assessments of \$50.00 and the bulk of the remainder of \$6.86 million came from State of Minnesota general revenues.

- (b) In 1998, the Ohio Supreme Court increased the attorney registration fee by \$50.00 generating an additional \$1.75 million. The Court has consistently allocated some - but not all - of those funds to the Ohio Legal Assistance Foundation (OLAF): \$375,000 in 1998 and 1999, \$500,000 in 2000 and 2001 and \$1 million in 2002. The 2002 increase was made because of the serious reductions in funding from the Legal Services Corporation and the reduction of IOLTA funds. The Court recently approved an additional \$12.50 increase in the fee which will be allocated to help OLAF in its effort to stabilize the annual grant at \$1 million.

The Ohio Supreme Court made the decision to provide the funding over the opposition of the Ohio State Bar Association, a voluntary bar association.

- (c) In the fall of 2002, the Board of Governors of the Missouri Bar (a mandatory bar) increased bar dues by \$20.00 for every member eligible to practice law in Missouri. The dues increase was precipitated by a reduction in Legal Services Corporation revenue due to the 2000 census redistribution, an over 50 percent decrease in IOLTA revenues and an anticipated elimination of appropriated money by the Missouri legislature.
- (d) In late 2002, the Illinois Supreme Court, on its own motion, authorized an attorney registration fee increase of \$42.00 for the purpose of civil legal services providers. That fee produced \$2.4 million in 2003.

- (e) Michigan generated approximately \$8 million for civil legal service providers in 2002. \$1.5 million of that came from IOLTA but approximately \$6 million came from filing fees which are earmarked for legal services for the poor. Michigan does not assess members of the Bar, but it has a very active initiative among practitioners that has raised \$4 million over two years for an endowment designed for civil legal services.
- (f) In 2003, the Texas Legislature increased bar dues by \$65.00. The money generated will be split evenly between civil legal assistance and innovative criminal indigent defense projects. The legislation is scheduled to sunset in four years.

Wisconsin Has Not Met The Legal Needs Of The Poor.

15. In 1996, a Wisconsin State Bar Commission on Delivery of Legal Services concluded that Wisconsin's civil legal service programs were so grossly underfunded that they served only a fraction of low income people needing legal assistance. More important, the Commission concluded that Wisconsin lawyers had fallen far behind their colleagues in other states where the private bar was successfully implementing different strategies to raise funds for legal services. The State Bar of Wisconsin allocated \$75,000 to organize a private campaign called the Equal Justice Coalition to raise funds. Fund-raising began in 1997 with a goal of raising \$5 million over three years: \$2.5 million from lawyers and law firms and \$2.5 million from foundations and corporations. At the end of the three-year campaign in June of 2000, the Equal Justice Coalition had raised about \$1.2 million with \$330,000 coming from law firms, \$250,000 from corporations and foundations and \$620,000 from individual attorneys and other

individuals. These gifts came from only 900 donors, mostly individual attorneys. Less than five percent of Wisconsin licensed attorneys contributed. In short, the effort to raise a large sum of money as an endowment to support legal services programs into the future was not successful. Instead the funds were slowly exhausted as they were distributed to legal assistance organizations. Recently, the Equal Justice Coalition closed its office and terminated all of its full time employees as its board of directors reassesses the strategic direction of the organization.

16. A comment from the campaign literature put out by the Equal Justice Coalition in March of 2001 as it attempted to encourage lawyers to solicit annual giving is as instructive today as it was then:

[W]e learned some important general things about lawyers' giving to legal services. We learned that prospective lawyer and law firm donors were largely uninformed about Wisconsin's provision of civil legal services to the poor and the need for the private bar's support....

EJC Memo to 2001 Campaign Committee Members, 3/5/01.

17. In July of 2002, the *ABA Journal* carried an article describing the profession's lack of commitment to pro bono work. The article quoted Gene R. Nichol, Dean of the University of North Carolina School of Law in Chapel Hill:

Study after study shows about 80 percent of the legal needs of the poor are unmet.

* * *

Less than one percent of our total expenditure for lawyers goes towards services for the poor, but legal aid budgets are capped at levels making effective representation of the poor a statistical impossibility.

* * *

We leave the poor unrepresented in the most crushing problems of life: divorce, child custody, domestic violence,

housing and benefits disputes. What passes for civil justice among the have-nots is stunning.

* * *

I can report from personal experience that bar associations have fought mandatory pro bono requirements with the zeal and passion unsurpassed. Sometimes we act exactly like a self-regulated monopoly would be expected to.

Margaret Graham Tebs, "Lag in Legal Services," *ABA Journal*, July 2002, p. 67.

18. On March 21, 2003, the Board of Governors of the State Bar of Wisconsin by a vote of 30 to 7 rejected a resolution to support mandatory pro bono reporting for a limited four-year period.

19. The 2000-2001 Annual Report for the Equal Justice Coalition Fund asserts that over 500,000 Wisconsin residents live in poverty.

Because of their financial situation, they cannot afford a lawyer when faced with pressing legal problems, such as domestic violence, eviction, loss of child support, discrimination, termination of government benefits, and seizure of property or wages.

Fortunately, Wisconsin's civil legal services programs are able to provide 20,000 low-income people with legal assistance each year. However, legal services programs often must turn away many more families because they lack the resources to help all of those who need legal help.

20. A May 2001 article appearing in the *Wisconsin Lawyer* made the case as follows:

In Wisconsin, civil legal funding available for legal services is \$13.47 per low income citizen, placing Wisconsin as the 38th lowest of the 50 states for such funding.

Hannah C. Dugan, "Who's Providing Legal Counsel to Wisconsin's Poor?," *Wisconsin Lawyer*, May, 2001, pp. 10, 13.

21. In 1995, the Wisconsin Supreme Court denied a petition by the Dane County Bar Pro Bono Trust Fund for a mandatory reporting of pro bono activities. Then Chief Justice Heffernan enclosed a letter in the 1995 dues statement requesting lawyers to voluntarily report their pro bono activities in order to confirm the Wisconsin Supreme Court's belief that a substantial amount of undocumented pro bono work is being done in Wisconsin.

22. Only three percent of the Wisconsin lawyers responded to the Chief Justice's request making the verification of what is actually being provided still a matter of mere conjecture.

23. For the profession as a whole, the following laudable statements have been largely ineffective:

(a) The attorney's oath:

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice.

(b) SCR 20:6.1 Pro Bono Publico Service:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities or improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

- (c) April 15, 1989 State Bar of Wisconsin Board of Governors Resolution:
1. The State Bar of Wisconsin is committed to expanding civil legal services for low-income residents of Wisconsin.
 2. The State Bar of Wisconsin recommends that all attorneys in the State of Wisconsin voluntarily and resolutely agree to perform or contribute to legal services in one or both of the following ways:
 - A. Representation of low-income client(s) without a fee or at a substantially-reduced fee for at least 25 hours per year through:
 1. Participation in an organized pro bono panel or project; or
 2. Appointment by a state or federal court in civil cases; or
 3. Serving of counsel or otherwise providing legal services directly to or for an organization whose primary purpose is to serve the needs of low-income persons; or
 4. Accepting as clients low-income persons whose civil legal needs would otherwise be unmet.
 - B. Contribution of a dollar amount equivalent to 25 hours per year to an organization or project for the providing of civil legal services for services for low-income persons.

WisTAF's Goal.

24. With 17,500 members of the Wisconsin Bar paying full dues, an assessment of \$50.00 would produce \$850,000 a year in additional income (beginning in July of 2005). This funding would allow WisTAF to maintain existing grant levels and give WisTAF time to expand its efforts to seek alternative sources of revenue. If the Court would see fit to rule on the petition in the spring of 2005 the assessment could go out with the Bar dues statements in May of 2005.

25. WisTAF's goal in seeking these funds is not to ensure WisTAF's continued existence; the purpose is to further the goal for which WisTAF was established: the continued funding of the provision of civil legal services for the people of Wisconsin who have a desperate need but cannot afford a lawyer. Access to counsel for the majority of the poor in this state is effectively denied given the lack of resources.

26. The problems surrounding the need for legal services to Wisconsin residents are deep and complex, but they deserve attention now. The need is imperative and immediate. Funding the provision of civil legal services needs to be addressed with a long-term strategy with input from the Court, the Bar, the Legislature and those in need. The request of this petition does not even bring WisTAF back to 1986 funding levels.

27. The request for a \$50.00 assessment is an amount less than asking a Wisconsin Lawyer for the value of one billable hour per year.

28. WHEREFORE, the petitioners request the Court to adopt proposed SCR Chapter 14 and for such other and further relief as the Court may deem necessary.

Dated at Madison, Wisconsin this 28th day of May, 2004.

HELLER, EHRMAN, WHITE & McAULIFFE, LLP.

By: _____
Attorney John S. Skilton
State Bar No. 1012794

WISCONSIN TRUST ACCOUNT FOUNDATION, INC.

By: _____
Deborah M. Smith, President
State Bar No. 1008970

By: _____
Patrick F. Norris, Executive Director
State Bar No. 1012749