

LEGAL REVIEW NOTE

Bill No.: SB 440

LC#: LC 0875, To Legal Review Copy, as
of February 17, 2023

Short Title: Revise laws relating to IOLTA
accounts

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See *Alexander v. Bozeman Motors, Inc.*, 356 Mont. 439, 234 P.3d 880 (2010); *Eklund v. Wheatland County*, 351 Mont. 370, 212 P.3d 297 (2009); *St. v. Pyette*, 337 Mont. 265, 159 P.3d 232 (2007); and *Elliott v. Dept. of Revenue*, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

SB 440, as drafted, may raise potential constitutional conformity issues associated with Article VII, sec. 2(3), of the Montana Constitution and the separation of powers doctrine.

Article VII, sec. 2, provides:

Section 2. Supreme court jurisdiction. (1) The supreme court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.

(2) It has general supervisory control over all other courts.

(3) It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.

(4) Supreme court process shall extend to all parts of the state. (emphasis added).

For example, in Gazette v. State, 2008 MT 287, the Billings Gazette was trying to obtain an attorney's disciplinary file. In denying the request the Montana Supreme Court noted:

the Montana Supreme Court "possesses original and exclusive jurisdiction and responsibility under Article VII, Section 2(3), of the 1972 Montana Constitution and the provisions of Chapter 61, Title 37, Montana Code Annotated, in addition to its inherent jurisdiction, in all matters involving . . . the conduct and disciplining of [persons admitted to practice law in Montana]."

While this case addresses the ability of the press to obtain the disciplinary files of attorneys it is also instructive with respect to SB 440 because the court unequivocally declared that under Article VII, sec. 2(3), of the Montana Constitution, the Montana supreme court has "jurisdiction in all matters. . . involving the conduct" of attorneys practicing in the state of Montana.

In another case, involving a bill before the Montana Legislature that enacted laws providing time limits on how long a district court judge had to issue a ruling, the court was equally clear that enactments of the legislature that impact rules of court directly conflict with Article VII, sec. 2(3), of the Montana Constitution.

For example, in Coate v. Omholt, 203 Mont. 488, 662 P.2d 591(1983), the Montana Legislature enacted laws setting time limits on the number of days a judge had to issue a ruling. The law was declared unconstitutional on three grounds by a District Court. The Supreme Court affirmed, and in its ruling, the court specifically analyzed Article VII, sec. 2(3):

The second sentence of subdivision (3) obviously means, without the necessity for any strained construction, that as to rules of appellate procedure and rules of procedure for other courts, such as the Montana Rules of Civil Procedure, the promulgation of such rules is subject to disapproval by the legislature.

Without question, Art. VII, § 2(3) vests in the Supreme Court the authority to adopt rules for appellate procedure and trial and appellate procedures "for all other courts." Just as clearly, the legislature is empowered to veto any such rules promulgated by this Court. However, once a legislative veto is exercised, the legislature is not empowered to fill the

vacuum by enacting its own legislation governing appellate procedure or lower court procedure.

Coate v. Omholt, 203 Mont. at 504, 662 P.2d at 600 (1983).

SB 440, as drafted, amends Rule 1.18 of the Montana Rules of Professional Conduct (MRPC), by, in essence, invalidating the Interest on Lawyer Trust Accounts Program (IOLTA) set forth in MRPC Rule 1.18. The MRPC are a set of rules prepared by the Montana supreme court that govern the professional conduct of attorneys practicing in Montana. By invalidating MRPC Rule 1.18, SB 440 changes the rules governing the conduct of attorneys in Montana by getting rid of the IOLTA program and substituting language requiring all interest earned in IOLTA accounts to be remitted to the attorney's client. Thus, SB 440 may raise a potential constitutional conformity issue with the last clause of the first sentence of Article VII, sec. 2(3), of the Montana Constitution.

Requester Comments:

The Montana Supreme Court requires lawyers deposit their clients money into a trust account where the interest on that money is not paid to the client but rather is diverted to groups the Montana Supreme Court supports. This program is called the IOLTA (Interest on Lawyer Trust Accounts). These Trust Accounts hold client money either before the attorney has earned it or before distribution to the client as an award. The Montana Supreme Court began the IOLTA in 1986 as a voluntary program but in 1992 the Supreme Court made it mandatory as reflected in Rule of Professional Conduct 1.18.

While the Montana Constitution affords the Supreme Court the power to regulate the conduct of attorneys, the money contained in IOLTA accounts is the client's, until and unless it is earned by the attorney. The client's funds must be placed into an IOLTA account, where the interest income is then taxed by the Supreme Court 100%. This money is then allocated to the Montana Justice Foundation which grants it out to organizations which the Supreme Court and the Bar Association support.

The Montana Supreme Court has taxed and spent more than \$8mil through the IOLTA since it began. Art. VIII, Sec. 2 of the Montana Constitution provides the legislature alone with the power to tax, and states that it may not be surrendered. The Montana Constitution includes very strong separation of powers doctrine that provides no branch of government shall exercise any power properly belong to either of the other branches. By taxing the interest income of client funds at a 100% tax rate, the Montana Supreme Court is unconstitutionally exercising the legislature's power to tax and spend by taxing the interest on client money.

This is an unconstitutional usurpation of the Legislatures power to tax & spend. Either IOLTA

Trust Accounts should be non-interest bearing or the interest earned on the funds should be paid to the client.