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The funding of legal services has been a major problem since the inception of legal aid programs. The problem today remains severe: President Nixon is in the process of attempting to dismantle the Office of Economic Opportunity, while legislation to create an independent legal services corporation has thus far been frustrated.[1] And widespread political opposition on the state and local levels remains.[2] The need for innovative methods of funding legal services is clear.

This article will propose a scheme for funding legal services which has received little attention in this country. The discussion is based on a plan which has been in operation in British Columbia since 1970. The funding plan will be introduced, described, and then analyzed chiefly in terms of the practical, ethical, legal and political problems that might arise by implementation of such a plan in this country.

Norman Mueller

The basic feature of the funding method now in operation in British Columbia is the interest-bearing clients' trust fund.[3] Clients' trust funds consist of those monies paid to attorneys by clients which the attorneys, in turn, pay out on behalf of the client. During the varying periods of time these monies are held by the attorneys as trustees for clients, they are deposited in trust accounts, to be paid out for a wide variety of purposes: payments in connection with mortgages, contracts, the settlement of tort suits or anti-trust actions, and court costs.

The clients' trust fund, then, is a device which facilitates the practice of law. A lawyer very often desires quick access to his client's funds because it is often hard to predict when a transaction will be completed or a settlement reached. Immediate access to a client's funds is often crucial to the conclusion of a transaction, because the lawyer is able to guarantee immediate payment.

It is evident that attorneys handle clients' monies for a wide range of purposes and that the length of time which a particular client's money is in the possession of the attorney may vary from a period of a few days to many months. It is common practice in the United States for an attorney to place his clients' monies in a non-interest-bearing demand account where they can easily be withdrawn when the attorney needs to make payments on behalf of the client. Exceptions are made in the case of the corporate or individual client who pays large amounts to the lawyer or whose money will not be paid out for a length of time. In these cases, the lawyer will usually put the money in a separate interest-bearing account, with the interest being paid to the client. Here, the interest income to the client is substantial enough to justify the special arrangement made by the lawyer on his behalf.

The potential value of the pooled clients' trust account is obvious. While the time differential between client pay-in and lawyer pay-out may be short for a particular client and the sum involved may be small, over time the aggregate sum of clients' monies in the account remains more or less constant. This sum is a potential source of substantial interest.

In the past, in British Columbia, the clients' trust account has been permitted to be interest-earning; since 1972 it is required by law to be interest-bearing.[4] A statute passed in 1969 in British Columbia provides for the use of this earned interest in law-related areas, including financing of legal aid programs.

The British Columbia statute creates a corporation called the Law Foundation[5] to which is paid the interest earned on clients' trust funds. The system established is voluntary on the part of the client, permitting a client who does not wish to participate to make an agreement with the attorney to put the client's funds in a separate account, with the interest accruing to the client.[6]

Otherwise the clients' funds go into the pooled trust account which earns interest credited to the attorney.[7] It is then the responsibility of the attorney to remit this interest to the foundation.[8]

The Law Foundation is administered by a
281 seven-member Board of Governors.[9] This governing panel has virtually complete discretion in the use of funds accumulated by the Law Foundation. The statute does mandate the maintenance of "a fund to be used for the purposes of legal education, legal research, legal aid, law reform, and the establishment, operation, and maintenance of law libraries."[10] But within these parameters the Board has total discretion in the application of funds.[11] The Board of Governors, as trustee, may invest the foundation funds in order to raise more capital. And the Board also has the power to draft by-laws[12] to provide for the operation of the foundation, the designation of officers and employees, and salaries.

The economic feasibility of such a funding scheme in this country depends on such factors as the number of lawyers participating and the size of their clients' trust funds; whether the plan is enacted on a national, state, or local level; and finally, the amount of money required to finance the particular legal services program. All of these factors will have to be analyzed in the context of the facts of specific cases. But the experience in British Columbia is encouraging. Until November, 1972, participation on the part of lawyers was voluntary. An approximate 30% participation in both 1971 and 1972 netted \$200,000 a year for the Foundation. And although legal aid is only one of five purposes of the Foundation, it received approximately \$100,000 in each of those years.[13] Participation is now mandatory[14] for lawyers and this should substantially increase the amount of funds flowing to the Law Foundation.

At first blush, then, the application of such a scheme to a state in this country seems simple: put clients' trust funds in an interest-bearing account, have that interest paid to a foundation, and then have the foundation fund a legal services program. But upon closer examination it becomes evident that serious obstacles exist to such an application. First, the possibility exists that such a funding scheme would be interpreted as in violation of the Code of Professional Responsibility. Secondly, existing banking regulations which effectively prohibit interest-bearing demand accounts constitute a major hurdle in the implementation of such a scheme. Finally, objections of constitutional dimensions can be raised by the claim that the proposed funding scheme constitutes the taking of property without due process of law.

2 The Possible Ethical Problem: The Code of Professional Responsibility

Historically, the Canons of Ethics governing the conduct of attorneys has proscribed the commingling of clients' funds with the funds of the attorney. Also proscribed has been the use by attorneys of interest earned on clients' funds. These standards regulating the handling of clients' funds could hamper implementation of the proposed funding scheme.

The Code of Professional Responsibility, adopted on August 12, 1969, by the American Bar Association and effective on January 1, 1970, delineates the standard of conduct to be adhered to by those engaged in the practice of law. The relevant parts of the Code dealing with clients' trust funds provide only that there be no commingling of clients' money with an attorney's money.[15] While this is the only explicit mandate of the Code of Professional Responsibility regarding clients' trust funds and would appear to present no barrier to the implementation of the proposed funding scheme it must be remembered that the Code is new and lacking in authoritative interpretation. It will be helpful in determining the possible scope of the Code's provisions on clients' trust funds to look at the Canons of Professional Ethics which were adopted in 1908 and continued in effect until replaced by the Code of Professional Responsibility.

Canon 11 of the Canons of Professional Ethics provides in part:

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

On May 5, 1962, the Standing Committee on Professional Ethics of the American Bar Association rendered Informal Opinion #545. This opinion held that there would be a violation of Canon 11 if a client's money were placed in an interest-bearing account and the interest earned by that account was kept by the lawyer for his own use. Later that same year, on November 26, the committee ruled in Informal Opinion #621 that Canon 11 makes it "mandatory upon the lawyer to maintain a separate trust account for trust funds in his possession." On July 3, 1967, in Informal Opinion #991, the Committee reaffirmed its absolute stand against interest being earned on clients' trust accounts and being used by attorneys. In that opinion the Committee ruled that interest earned on clients' trust funds could not even be used to pay the expense of maintaining the trust account.

The requirements under the Canons of Professional Ethics with regard to clients' trust funds were thus quite clear. Clients' trust funds were to be kept separate from the attorney's accounts. There was to be no commingling of funds whereby the separate identity of the funds would be lost, in which case they could be subject to use for the attorney's personal expenses or be subject to claims of his creditors. And no interest was to be earned on the clients' trust account for use by the attorney.

The Code of Professional Responsibility has dropped the wording 'used by him' and thus seems to establish a less strict standard than Canon 11. It is possible that the ABA Opinions just discussed are now obsolete. [16] But it can be argued that the opinions should remain in effect as long as they are not inconsistent with the wording of the Code of Professional Responsibility. But even if the opinions are held to be consistent with the new wording of the Code of Professional Responsibility there would still appear to be no real difficulty. As in the British Columbia plan, the clients' funds being used to earn interest would not be in use for the benefit of the lawyer. Although the interest would be credited to the lawyer, it would not be for his use. Rather, the use of the interest, and thus of the funds, would be for the benefit of the foundation.

The argument could be advanced that use of the clients' funds for the benefit of the foundation involves an ethical problem. The Code of Professional Responsibility, however, says nothing about the use of clients' funds except that the funds are not to be put in a position where they might be depleted. Placing the funds in an interest-bearing account separate from the attorney's accounts does not so endanger the clients' monies. This fact, plus the fact that such use of the funds would be authorized by a legislature, seems to indicate that if there is a problem here, it involves due process, rather than ethical considerations of the bar. Those due process problems will be discussed in a later section.

3 The Mechanical Problems: Some Banking Law

The major hurdle in the implementation of the British Columbia funding scheme in the United States, whether on the national or state level, appears to be the banking regulations which relate to interest-bearing demand accounts. The type of account essential for use in the proposed funding scheme, is, of course, the interest-bearing demand account. It must be a demand account to serve the purpose of a clients' trust fund; that is, a lawyer must have quick access to the client's monies, so that he may pay out those monies on behalf of the client when necessary. And the account must earn interest, for it is this factor which is at the heart of the funding scheme.

Banking regulations in the United States effectively prohibit interest-bearing demand accounts in most commercial banks. They also make the use of savings banks inconvenient and thus impractical. The hurdle imposed by such regulations is formidable but does not constitute an absolute bar to the proposed funding scheme. An examination of these regulations in comparison with the situation in British Columbia, will hopefully show that the hurdle can be overcome, albeit not without some difficulty.

Banking in Canada is subject exclusively to federal law. [17] The federal government has assumed a benevolent attitude toward banking while attempting to establish an economically powerful banking system that can compete favorably with other financial institutions. [18] The result has been a paucity of regulation on banking as banks are permitted to perform such business "as pertains to the business of banking." [19]

In Canada, there is no restriction on the amount of interest that banks can charge their customers or pay their creditors. The lack of regulation in this area means that the two essential criteria of the clients' trust account—that they be demand accounts and that they be interest-bearing—can be fulfilled without any statutory authorization. There is no federal regulation on what type of accounts can bear what rate of interest. And there are no conflicting provincial regulations to confront. The demand for interest-bearing demand accounts is created by the Law Foundation statute, and there is no regulation or restriction on the market to prevent it from fulfilling that demand.

It is a different story in the United States. Banking is strictly regulated by the federal government and states impose varying degrees of additional regulations. State and national commercial banks as well as savings banks are regulated on both the federal and state levels. At first blush, these regulations appear to limit drastically the number of banks capable of providing the type of account needed for the proposed legal services funding scheme. It is to consideration of these regulations that we now turn.

National banks are required to join the Federal Reserve System,[20] whose members are not allowed to pay any interest on demand deposits: "No member bank shall, directly or indirectly, by any device whatsoever, pay any interest on any deposit which is payable on demand."[21] National banks are corporate entities owning their existence to federal law, yet states can regulate national banks on the basis of their police power, as long as that regulation does not interfere with the federal function of the bank. But the explicit proscription of interest-bearing demand accounts prevents any state action creating such an account.

It is evident that the proposed funding scheme if involving interest on demand accounts, could not involve national banks if enacted on the state level. And if the funding scheme were to be enacted on the federal level, an amendment to the banking statutes repealing the prohibition on interest-bearing demand accounts could well have ramifications in the finance world that would make such a step impractical or even undesirable.[22]

State banks are not only subject to state laws under which they are incorporated, but most state banks are also subject to federal regulations. Any state bank that is a member of the Federal Reserve System or that is insured by the Federal Deposit Insurance Corporation is subject to certain federal regulations. And those regulations restrict such state banks from paying interest on demand accounts. "No member bank of the Federal Reserve System shall, directly or indirectly, by any device whatsoever, pay any interest on any demand deposit."[23] Likewise, any non-member[24] bank insured by the Federal Deposit Insurance Corporation is precluded from paying interest on a demand account.[25]

Savings banks are creations of state law, yet they also may join the Federal Reserve System or be insured by the Federal Deposit Insurance Corporation.[26] Thus, those state savings banks that join the Federal Reserve System or that are F.D.I.C.-insured are subject to the same prohibition on interest-bearing demand accounts as are regulated state commercial banks.

It thus appears that many state commercial banks and state savings banks would not be able to participate in the proposed funding scheme without a change in the federal regulations. This fact precludes the funding scheme from being enacted on the state level unless there are alternative methods of providing interest-bearing demand accounts.

One possible alternative concerns those state commercial banks and state savings banks which are not members of the Federal Reserve System and are not insured by the Federal Deposit Insurance Corporation.[27] But in some cases there are state laws proscribing the payment of interest on demand accounts by state commercial banks. And lawyers may be reluctant to place clients' funds in uninsured banks since they offer less protection to their funds than do insured banks.

Many states also provide by statute that saving banks may require anywhere from 30 to 90 days notice of withdrawal.[28] If such notice requirements are enforced by a savings bank no demand account is possible. But even if notice of withdrawal requirements is not enforced[29] an account in a savings bank seems impractical for use in the funding scheme. This is because there is no negotiable instrument by which funds in savings bank can be transferred. For funds to be withdrawn from a savings bank, the depositor or his representative must personally make the withdrawal.[30] This inconvenience seems to make the use of savings banks impractical for purposes of a clients' trust account. What is needed is an interest-bearing checking account.

A savings bank in Massachusetts, by developing the Negotiable Order of Withdrawal, may have provided just such an account. In the same form as a check, the Negotiable Order of Withdrawal (also known as NOW) fulfills the requirements of negotiability under the Uniform Commercial Code.[31] When signed by the drawer and depositor, money is payable by the savings bank on demand. Yet the account is a regular savings account, bearing the normal rate of interest. In terms of its practical function, NOW constitutes an interest-bearing checking account.

There are differences, however. The orders of withdrawal are available to the depositor on his agreement that they are subject to such notice requirements as may be adopted by the bank or the bank commissioner.[32] Although institution of a notice requirement would damage the efficacy of the Negotiable Order of Withdrawal as a vehicle in the proposed funding scheme, it would appear that the market system would prevent notice of withdrawal from being required. Any savings bank which began requiring notice of withdrawal would promptly lose any clients' trust accounts to savings banks which did not have such requirements. Since a lawyer usually does not have the capability of predicting when he will pay out clients' money, withdrawal notice requirements are simply too restrictive for a functioning clients' trust account.

The Negotiable Order of Withdrawal also involves a service charge of fifteen cents per order. This would not appear to be a restrictive cost as the lawyer could pay it from the interest earned on the fund.[33] The interest earned by the account minus the cost of maintaining the account would then be paid into the foundation.

The Massachusetts Supreme Judicial Court held the Negotiable Order of Withdrawal to be legal in *Consumer Savings Bank v. Commissioner of Banking.*[34] The court held that Massachusetts law does not proscribe such a withdrawal method in savings banks and that establishment of withdrawal methods is a matter for the individual banks. The decision turned on the general wording of Massachusetts law which the Court held did not require the exclusive use of passbooks for the withdrawal of deposits from savings banks. Negotiable Orders of Withdrawal may not be legal in states where statutes require the use of a passbook for savings bank withdrawal.[35]

The number of financial institutions capable of providing the interest-bearing demand account necessary for the proposed funding scheme thus appears to be limited. National banks are precluded from paying interest on demand accounts as are state commercial banks and state savings banks which are either members of the Federal Reserve System or are insured by the Federal Deposit Insurance Corporation. This leaves only non-member, non-insured state commercial banks in those states which have no restrictions on interest being paid on demand accounts and non-member, non-insured state savings banks in those states where a Negotiable Order of Withdrawal would be legal. It is thus apparent that in some states statutory amendment of banking law will be necessary in conjunction with the implementation of the proposed funding scheme.

There is, however, one alternative which requires no amendment to any banking regulation. Lawyers could maintain two trust accounts in a commercial bank; one an interest-bearing account and the other a demand account from which payments on behalf of clients would be made. Such an arrangement could require that lawyers audit rather closely the amount of funds in the demand account so that this account will always be able to meet any possible payment demand.[36] However, banks do have the capacity to make daily audits of accounts and to transfer funds from one account to another. It is quite possible that banks could be convinced to transfer funds from the interest-bearing account to the demand account as need dictates. Such an arrangement would appear to encounter no legal prohibitions. It is conceivable, however, that a court could hold that the arrangement was a sham and that such automatic transfer of funds created a prohibited interest-bearing demand account.

Banking regulations clearly present a major hurdle to the implementation of the British Columbia funding scheme in this country. The use of two accounts in a commercial bank appears to be the path of least resistance, since no amendments to any banking regulation would be required. But if commercial banks fail to respond to the demand for the dual account arrangement or if the courts pierce the veil of the dual account and hold that an illegal interest-bearing demand account is operating, the problem of implementation becomes more severe. Unless the NOW account spreads to other states, it would then become necessary in most cases to amend the banking regulations in order to provide the necessary interest-bearing demand account.

4 The Due Process Question

A major argument that can be advanced in opposition to the proposed funding scheme is of constitutional dimensions. It is the client's money, so why shouldn't the client be receiving the interest? A client's property is used to earn interest, and the fruits of that use
285 are paid not to the client, but to the Law Foundation. Doesn't the proposed funding scheme constitute the taking of property without due process of law?

One method of confronting the argument is to follow the example of the British Columbia model: participation in the funding scheme could be voluntary on the part of each client. The British Columbia statute stipulates that it is not to "affect any arrangement in writing, whenever made, between a solicitor and his client as to the application of the client's money or interest thereon; or apply to money deposited in a separate account for a client at interest that shall be and remain the property of the client." [37] Any client who so desires may make an arrangement with his attorney and receive the interest that his funds earn while they are in the clients' trust account. The voluntary nature of the scheme ought to answer any due process objections that may be advanced.

From the initial experience under the British Columbia model, it seems likely that such a voluntary arrangement will have little effect on the manner in which clients' trust funds operate in this country. That is, it seems safe to predict that few clients who would not normally have separate interest-bearing accounts established would exercise the option to earn interest on their funds paid into the pooled clients' trust account of their lawyer. As has been mentioned previously, it is the common practice that corporate and individual clients who pay large sums into these accounts, sometimes for extended periods of time, usually have their money placed in separate interest-bearing accounts. It is the aggregate of the nominal and moderate amounts paid to lawyers by many clients which presently ends up in the non-interest-bearing demand account. Under the proposed funding scheme with voluntary client participation, it is certain that the clients who must pay in large sums will continue to request that the interest on those monies be paid to them. And on the basis of the British Columbia experience it seems safe to predict that those clients paying in nominal and moderate amounts will not make the necessary arrangements with their lawyers to effect payment to themselves of the earned interest. [38] This is because the interest will usually be so nominal that the client will not bother to make the necessary arrangements with his attorney, especially if they involve a degree of red tape, as does the British Columbia model, which requires an agreement in writing. For example, it means little to the ordinary client whether or not he receives the interest earned on several thousand dollars paid into a clients' trust account pursuant to a real estate contract, when that several thousand dollars earns very insignificant interest in the ten days which it is in the account. Yet it is just these types of transactions which when taken in the aggregate, yield a substantial amount of interest. [39]

To assure the voluntariness of the system, adequate notice must be given to the client. When a client pays money into a clients' trust account, he must be informed of his right to receive the earned interest. Similarly, the exercise of that right must not be so burdensome to the client that a court would hold the system to be involuntary. Presumably, a written agreement as provided in the British Columbia plan would suffice.

The due process objection becomes a critical problem if the client's participation is mandatory. A system which would make it mandatory that all interest earned on clients' trust accounts be paid to the Law Foundation would certainly meet objections that there was deprivation of property without due process of law. A clients' property is used and the fruits of that use are taken by the Law Foundation without the consent of the property owner. A client's money, while deposited in a clients' trust account, remains the property of the client: it is the client's money which is earning the interest. If that interest is taken without the client's consent, a strong argument that there has been a taking of property without due process can be advanced.

One possible method of attacking the due process problem which arises in a mandatory scheme is to institute the system in the form of a tax on the bank rather than as a collection of earned interest from clients' funds. A tax would be imposed on banks on the basis of the number of clients' accounts serviced by the bank and the amounts of these accounts. Such an approach would also eliminate the problems arising with respect to interest-bearing accounts. Yet under *McCulloch v. Maryland* [40] and progeny, states are not allowed to tax national banks unless expressly authorized by Congress, so the use of national banks would be precluded under a taxation approach. If enacted on the state level, the funding scheme would thus necessarily involve state taxation of state banks.

Banks are recognized as quasi-public institutions and thus, are subject to governmental supervision and even discriminatory regulation. [41] Governmental regulation is justified as being in the public interest but must meet standards of reasonableness. [42] An excise tax on banks on the basis of the clients' trust accounts serviced by a bank would appear to be reasonable regulation on the part of the state.

The proposed excise tax would be a uniform and equal tax. All banks holding clients' trust accounts would be taxed on the basis of the same formula. The tax would be imposed at a rate equal to the rate of interest the account would be earning if it was an interest-bearing account.

At the present, banks have the use of monies from clients' trust accounts, indeed all demand accounts, and pay nothing for the use of those monies. Banks have this free use of money as a result of governmental action, that is, the imposition of the prohibition against interest-bearing demand accounts. A tax on clients' trust accounts is thus a tax on a transaction which is beneficial to the bank because of governmental regulation. The tax does not prevent a bank from conducting this activity or even from realizing a profit on the use of the money. But the tax does make the bank pay for a benefit in the nature of a windfall, which results from regulations imposed for reasons other than the provision of this benefit for banks.[43]

The due process objection, then, does not seem to present a major hurdle if the participation of clients is voluntary, and if the notice to clients and the method by which clients exercise their right to receive the earned interest guarantees voluntariness. If participation of clients is mandatory, however, problems arise. While a mandatory scheme would probably yield more interest than a voluntary arrangement, the additional problems created make the mandatory scheme undesirable. The courts could well find that a mandatory scheme violated due process of law. To overcome this objection, a mandatory scheme would have to be enacted in the form of a tax on banks, thus creating more political opposition from the banks. Finally, a mandatory scheme would hamper the functioning of clients' trust funds, for the individual and corporate clients' paying large sums to their attorneys could not afford not to earn the interest on their money. If such clients could not afford to use clients' trust accounts, many lawyers will find their practice hampered and inconvenienced. The result would be more opposition from the bar.

5 Some Political Considerations

Once the problems involving the mechanics of the funding scheme are solved and any due process hurdles overcome, serious political difficulties remain. It is not within the scope of this paper to deal at length with such considerations, but the problem areas will be mentioned.

One of the major questions that will arise when a funding scheme such as the British Columbia plan is presented concerns the purposes for which the foundation can distribute funds. The British Columbia model provides that distribution of funds can occur for a variety of purposes: legal education, legal research, legal aid, law reform and the establishment, operation, and maintenance of law libraries.[44] Allowing such a diverse expenditure of funds, with that expenditure controlled by the governing board, the majority of which were selected by the bar association, would certainly lessen opposition from the organized bar to such a plan.

The argument can be made that funds earned by the proposed plan should accrue only to the benefit of a legal aid organization. Indeed, it can be argued that it is not even necessary to establish a foundation and that earned interest should be paid directly to existing legal aid organizations.[45] But such a plan is certain to encourage more political opposition than the British Columbia model. Some lawyers view legal aid as competition and would oppose such a plan on grounds of self-interest. Similiarly, a funding scheme benefitting only legal aid programs would provide a focus for those who oppose legal aid on political or racial grounds. The British Columbia model, on the other hand, by permitting use of funds on a broader scale benefitting a larger group of people, would diffuse some of this opposition.

The undisputable fact is that the statutory definition of the spending functions of the foundation will be a source of severe political conflict. Legislators may want to define the spending powers more precisely than does the British Columbia statute. Indeed, the whole question is raised of what limits could be placed on the use of these funds. Could earned interest from clients' trust accounts be paid to a foundation established to fund *medical* services to the poor? It seems doubtful that there would be any legal restraints if a legislature enacted such a plan. But the British Columbia plan does appear to derive its justification from the fact that the existing legal apparatus is being used to bear the cost of providing legal services to a greater number of people. Such action, it can be argued, is a mandate of the Code of Professional Responsibility[46] and also, in the end, will benefit the legal profession by introducing people to legal services who, in the future, will use legal services again.

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Another aspect of the funding scheme which will be disputed concerns the composition of the governing board and the method of selection. The British Columbia model provides that the seven-member governing board will be comprised of the Attorney General, a non-lawyer appointed by the Attorney General, and five members of the Law Society (the equivalent of a bar association) appointed by the Benchers (the governing board of the Law Society). Such a selection process, if enacted in the United States, would prevent political control by the state government. The State Bar Association would be in control of selecting the majority of the governing board. But such a process contains one glaring inadequacy. It seems paradoxical to put a legal services funding scheme under the control of the organized bar, segments of which have in the past provided opposition to legal aid programs. Similarly, the executive branches of many state governments have been opposed to state funding of legal aid programs.[47] If the foundation is controlled by these two segments and a variety of spending functions is permitted by statute, the result could well be that the foundation monies will be spent on grants to graduate students and professors for research, and legal aid programs will be ignored.

One answer to this dilemma, if the spending power of the foundation is not narrowed to encompass only legal aid, is to provide for a legal aid representative to be on the governing board. But this raises the same type of problems as do proposals for public interest representatives on the board of directors of a corporation. Who is qualified as a legal aid representative? And who would have the power to select such a representative? If there are some existing legal aid programs in a state, one possibility would be to give the directors of these programs power to appoint someone to serve on the governing board of the foundation. But it is evident that even if a state legislature was persuaded to include a legal aid representative on the governing board, assuring that a bona fide representative of legal aid is selected is not an easy task.

One final problem area concerns the participation of lawyers and law firms. When the British Columbia plan was first enacted, participation on the part of lawyers was voluntary.[48] The result was about thirty per cent participation.[49] As of November 20, 1972, participation became mandatory for lawyers. While there would seem to be no due process problems with a mandatory system of participation on the part of lawyers,[50] such a system is more likely to evoke opposition from the organized bar than would a voluntary system.

1 See Kantor, ***Lobbying for Legal Services: An Interview with Michael Kantor,*** 3 Yale Review of Law and Social Action 19 (1972).

2 See Soler, Mark, ***Legal Assistance is Dying in New Haven,*** 3 Yale Review of Law and Social Action 9 (1972), and Bennett and Cruz, ***California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice,*** 1 Chicano Law Review 1 (1972).

3 Chapter 214, Revised Statutes of British Columbia

Law Foundation

71E. Upon their appointment as provided in section 71F, the members are constituted a corporation with the name "Law Foundation" (hereinafter called the "foundation"), and the foundation may acquire, hold, mortgage, dispose of, and otherwise deal with real and personal property for the purposes of the foundation.

Board of Governors.

71F. (1) The foundation shall be administered by a Board of Governors (hereinafter called the "board") comprising seven members, of whom
(a) one shall be the Attorney-General or his appointee; and
(b) one shall be a person, not a member of the Society; appointed to the board by the Attorney-General; and
(c) five shall be members of the Society appointed by the Benchers.
(2) Members of the board other than the Attorney-General shall hold office for two years or until their successors are appointed.
(3) Of the members referred to in clause (c) of subsection (1), one shall, by the instrument of his appointment, be appointed as chairman of the board.
(4) Where a vacancy occurs in the office of a member, the person or body by whom he was appointed may appoint to the vacant office any person eligible to be appointed to that office by that person or body under subsection (1), and the person so appointed shall hold office for the residue of the term for which he is appointed, or until his successor is appointed.
(5) A quorum of the board shall consist of four members thereof.
(6) The continuing members of the board may act notwithstanding any vacancy in the board.
(7) No act done by the authority of the board shall be invalid in consequence of any defect that is afterwards discovered in the appointment of the members.
(8) An appointed member of the board may resign from office upon giving one month's notice in writing to the board of his intention to do so, and his resignation shall take effect upon the expiration of the notice, or upon its earlier acceptance by the board.
(9) The office of an appointed member of the board shall be vacated if
(a) he ceases to hold the qualifications necessary for his appointment; or
(b) he becomes a mentally disordered person; or
(c) he becomes bankrupt.

Purpose and application of fund.

71G. (1) The purpose of the foundation is to establish and maintain a fund to be used for the purposes of legal education, legal research, legal aid, law reform, and the establishment, operation, and maintenance of law libraries.
(2) The board shall apply, and cause to be applied, the funds of the foundation, in such manner as the board may decide, for the purposes of the foundation.
(3) No part of the income of the foundation shall be payable to or otherwise available for the personal benefit of any member of the board of the foundation, or of the Law Society of British Columbia or any member thereof.
(4) The funds of the foundation shall consist of all sums paid to the foundation by solicitors as provided in section 71I, interest accruing from investment of the funds of the foundation, and any other moneys received by the foundation.
(5) There shall be paid out of the funds of the foundation the costs, charges, and expenses involved in the administration of the foundation, and the costs, charges, and expenses incurred by the board in carrying out the purposes of the foundation.
(6) All moneys of the foundation shall, pending investment or application in accordance with this section, be paid into a bank in the Province to the credit of a separate account to be called the "Law Foundation Account," and that account shall be used for the purposes of the foundation.
(7) Any moneys that are not immediately required for the purposes of the foundation may be invested in the name of the foundation by the board in any manner in which trustees are authorized to invest trust funds, if the investments are in all other respects reasonable and proper.
(8) The accounts of the foundation shall be audited annually by a chartered accountant appointed for the purpose by the Benchers.

By-laws.

71H. The board may, subject to the provisions of this Act, make by-laws for purposes relating to the affairs, business, property, and objects of the foundation, and, without limiting the generality of the foregoing, may make by-laws regarding
(a) the number and designation of officers of the foundation;
(b) the appointment of and terms of office of officers of the foundation and all matters relating to their offices;
(c) the resignation or removal from office of officers of the foundation;
(d) the number and designations of employees of the foundation other than officers, and their terms and conditions of employment;
(e) the remuneration, if any, of officers and employees of the foundation; and
(f) the operation of the Law Foundation Account.

Payment of interest to foundation.

71I. (1) A solicitor shall not be liable, by virtue of the relation between solicitor and client or by virtue of the relation between the solicitor as trustee and a cestui que trust, to account to any client for interest received by the solicitor or moneys deposited in a bank or a trust company being moneys received or held for or on account of his clients generally.
(2) A solicitor who is credited by a bank or trust company with interest on moneys received or held for or on account of clients generally shall be deemed to hold the interest in trust for the foundation, and shall remit the interest to the foundation, in accordance with the rules of the Society, and the Society shall make rules to ensure that all interest so credited to the solicitor be paid to the foundation.
(3) Nothing in this section or in the rules made pursuant to this section shall
(a) affect any arrangement in writing, whenever made, between a solicitor and his client as to the application of the client's money or interest thereon; or
(b) apply to money deposited in a separate account for a client at interest that shall be and remain the property of the client.

4 This difference is the result of the differing banking regulations in effect in the United States and British Columbia. These regulations will be discussed in part III of the Article.

5 § 71 E. *supra.*

6 § 71 I(3) (a) & (b), *supra.*

7 § 71 I (1), *supra.*

8 The statute does not provide a means to assure that attorneys pay the interest earned to the foundation. Rather, the statute places the responsibility for devising such a plan on the Law Society (the British Columbia equivalent of the Bar Association).

9 § 71 F.(1),*supra.*

10 § 71 G (1), *supra.*

11 § 71 G (2), *supra.*

12 § 71 H, *supra.*

13 Annual Report, 1972, of the Law Foundation of British Columbia. Also, letter to the author from Mr. Frank Mackzo, Director of Legal Aid Society of British Columbia.

14 The reason for the 1972 amendment requiring that all clients' funds held by a solicitor be placed in an interest bearing account, is because many solicitors, particularly those dependent upon business from banks, had feared a loss of that business would result if they deposited clients' funds in interest bearing accounts. This competitive incentive has now been eliminated and the scheme is mandatory as far as attorney's use of interest bearing accounts is concerned.

15 Ethical Consideration 9-5 and Disciplinary Rule 9-102(a), Code of Professional Responsibility.

16 Cady, *Canons to the Code of Professional Responsibility,* 2 Conn. Law Review 222, 248.

17 Baum, *Banking in Canada*, 59 Georgetown Law Review, 1129 (1970-71).

18 *Id.*

19 Bank Act, Vol. 1, Revised Statutes of Canada (1970), Chapter B-1, § 75 (1)(e).

20 12 U.S.C. § 282.

21 12 C.F.R. § 371a.

22 If commercial banks provided interest-bearing demand accounts, the competitive balance between savings banks and commercial banks would be altered. More dollars would flow from savings banks to the commercial banks because of their increased convenience. Yet the money that savings banks earn from savings accounts helps subsidize the interest rate charged on home mortgage loans. A decrease in revenue from savings accounts will result in an increased interest rate on those loans.

23 12 C.F.R. § 217.2.

24 Non-member bank means non-member of the Federal Reserve System.

25 12 C.F.R. § 392.2.

26 12 C.F.R. § 208.1. Mutual savings banks are included as well as savings banks with capital stock.

27 *Symposium on Banking Regulation,* 31 Law and Contemporary Problems, 635, 640 (1966). At the end of 1965, there were only 221 state commercial banks uninsured by F.D.I.C.

28 A summary of the banking law in the various states is found in J. Fonseca, *Encyclopedia of Banking Law.* Savings banks also often have limits on the amount of deposit that can be made in a savings account. But the maximum amount allowed should seldom prove to be a problem.

29 From interviews with officials associated with savings banks, it seems to be the general practice that notice of withdrawal requirements are never enforced.

30 It also appears to be the general rule that the by-laws of a savings bank require that a passbook be presented when withdrawals occur. This requirement does not appear to be strictly enforced in practice, but if enforced, would constitute additional inconvenience.

31 See Uniform Commercial Code, § 3-104(1). See also *Consumers Savings Bank v. Commissioner of Banks,* 282 N.E.2d 146 (1972).

32 This possibility may exempt the account from technically being considered a demand account. Thus, even a state savings bank which is a member of the Federal Reserve System or is insured by the Federal Deposit Insurance Corporation may be able to provide such an account.

33 This would appear to be precisely the situation described in Opinion # 991, discussed in section II. Yet it can argued that the attorney is incurring the cost of maintaining this account solely as a result of legislative activity. That is, this is not an ordinary operation expense, but is a legislatively created cost. There are thus no ethical problems with having the proceeds of the account pay for the maintenance of the account.

34 282 N.E.2d 416 (1972).

35 See R. Fonseca, *Encyclopedia of Banking Law, supra* note 24 for relevant laws in the various states.

36 If the attorney is responsible for auditing the accounts and maintaining adequate funds in the demand account, it is likely that most attorneys would keep a large sum in the demand account, which would result in less interest being earned in the interest-bearing account.

37 §71 I (3) (a), *supra.*

38 Phone conversation with Frank Maczko, Director of the Legal Aid Society of British Columbia,.

39 It should be made clear at this point that the proposed funding scheme, as it has been discussed in this paper, has its greatest impact on banks. Those few clients who now have their funds placed in separate accounts will continue to have that option. Those clients whose funds will be earning interest for the law foundation are not *now* receiving any interest on their money paid into the clients' trust account. But the banks, which now have use of these funds and are required to pay no interest, must, under the proposed funding scheme, pay for the use of those funds. Banks therefore could well provide one of the main sources of opposition to this plan.

40 *McCulloch v. Maryland* 17 U.S., 316 (1819). The Court of Appeals of New Mexico, however, has departed from this tradition. In *1st National Bank of Santa Fe v. Commissioner,* 80 N.M. 699, 460 P.2d 64 (1969), the court upheld a state tax on fees received by a national bank for data processing services performed for other banks. The court reasoned that the data processing services are outside the scope of the banking powers specified in 12 U.S.C.§24 and therefore the receipts are not immune under 12 U.S.C.§548. It is doubtful, however, that a similar rationale could be applied here, for there is little about a bank's involvement with clients' trust funds which is outside the scope of banking powers. Daily, *Taxation of National Banks: A Novel Approach in the New Mexico Courts,* 10 Natural Resources Law Journal 615 (1970).

41 *Rainey v. Michel,* 6 Cal. 2d 259, 57 P.2d 932. See also 111 ALR 141.

42 *Farmers & Merchants Bank v. Federal Reserve Bank,* 262 U.S. 649 and *Little v. American State Bank,* 263 Mich. 645, 249 N.W. 22 (1933).

43 Since there are constitutional provisions applicable to taxes, it is sometimes desirable to define a particular imposition as a fee. However, a fee charged for the sole purpose of raising revenue cannot escape constitutional requirements on taxes. *Murdock v. Pennsylvania,* 319 U.S. 105 (1943).

44 § 71 G (1), *supra.*

45 Such a scheme would not appear to affect the tax exempt status of a legal aid association. A legal aid association, e.g., New Haven Legal Assistance, is exempt as a charitable institution under § 501 (c) (3) of the Internal Revenue Code.
Receiving state funding is permissible for a charitable institution. Funding under the proposed method, either as a tax or as a collection of interest, would appear to be state funding since the capital is both raised and allocated on the basis of a procedure specifically authorized by statute.
This also raises the question of tax considerations if the Law Foundation is used in the funding scheme. If the method of raising capital is held to be state funding, the Law Foundation would not qualify as a private foundation under §509 (a) (1). It would, however, appear to qualify as a charitable institution under § 501 (c) (3). If a legal aid association receives income from a charitable institution, here the foundation, its own exempt status as a charitable institution is not affected.

46 Canon 2 of the Code of Professional Responsibility: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."

47 *Supra,* n. 2.

48 Phone conversation with Frank Maczko, Director of the Legal Aid Society of British Columbia.

49 Phone conversation with Maczko, *supra.*

50 No property of a lawyer is involved here. Mandatory participation seems to be permissible state regulation.