§9.7.2 *IOLTA Trusts* [Excerpted from Loring and Rounds: A Trustee's Handbook (2012)].

> *By raising the analogy of a tax or user fee the Court does, however, usefully call attention to one of the more offensive features of the takings scheme devised by the Washington Supreme Court: A tax or user fee would be enacted by a democratically elected legislature. The IOLTA scheme, by contrast, circumvents politically accountable decision making, and effects a taking of clients' funds through application of a rule purportedly regulating professional ethics, promulgated by the Washington Supreme Court. (The taking has nothing to do with ethics, of course)*—Justice Scalia, dissenting.[22]

> *At Suffolk University, after giving a lecture on his book Active Liberty, Justice Breyer was pressed by two students in Q&A about his decision on the IOLTA case. In response to their questions he stated that IOLTA may be bad policy (he remained agnostic on this question but the students' questions clearly indicated they did think it was bad policy) but that legislatures must be given wide discretion to promote public goals and it was beyond the judge's job to decide it was in fact bad policy*.[23]

All states and the District of Columbia are administering either by judicial fiat or in a few cases by statute IOLTA programs.[24] IOLTA stands for Interest on Lawyers Trust Accounts. Under an IOLTA scheme, a lawyer is compelled under threat of license suspension to commingle or pool unproductive nominal and short-term client funds that the lawyer holds in trust. The income generated by the pool is then remitted to designated charitable and professional entities. For IOLTA administration purposes, what would otherwise be an equitable duty on the part of the lawyer to obtain from the client an informed consent to the diversion is generally suspended, also by judicial fiat.

The aggregate amount of income generated by IOLTA nationwide and collectively taken from clients since 1978 is in the many billions of dollars. As we shall see, the U.S. Supreme Court has confirmed that the diversion does constitute a taking by the state.[25]

One court has ruled that common law trust principles are not applicable to IOLTA.[26] The

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[22]Brown v. Legal Found. of Wash., 538 U.S. 216 n.2 (2003) (Scalia dissent).

[23]E-mail from Benjamin Powell, Assist. Prof. of Economics, to Charles E. Rounds, Jr. (Mar. 10, 2008) (on file with the authors).

[24]*See* Rounds, *Social Investing, IOLTA, and the Law of Trusts*, 22 Loy. U. Chi. L.J. 163, 173–174 (1990).

[25]*See* Brown v. Legal Found. of Wash., 123 S. Ct. 1406 (2003).

[26]"We are not convinced that the deposit of clients' funds into IOLTA accounts transforms a lawyer's fiduciary obligation to clients into a formal trust with the reserved right to control the beneficial use of the funds as claimed by the plaintiffs." Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 974 (1st Cir. 1993). *But see* Ritchie et al., Decedents'

Federal Court of Appeals for the Fifth Circuit, however, has held that IOLTA income is the property of the client; and, on appeal, the U.S. Supreme Court affirmed, holding that, "for purposes of the Takings Clause of the Fifth Amendment," IOLTA income is the property of the client.[27] Since then, the United States Court of Appeals for the Ninth Circuit has ruled that the government appropriation of interest generated by IOLTA pooled trust accounts is not an uncompensated taking in violation of the Fifth Amendment.[28] A decision of the U.S. Court of Appeals for the Fifth Circuit, however, has held that it is.[29] The U.S. Supreme Court granted certiorari June 10, 2002, to hear an appeal of the Ninth Circuit decision that IOLTA does not effect an unconstitutional taking in violation of the Fifth Amendment. Oral arguments were heard December 9, 2002.

In 2003, the U.S. Supreme Court ruled that though gross IOLTA income constitutes the property of clients and though the gross income has been taken from them by the state, there is no compensation due them.[30] This is because, under a properly administered program, principal sums that could generate net income for a client may not be deposited in an IOLTA account.[31] Query: Would the lawyer-trustee still have a common law duty to inform the client in advance that the client's property, *i.e.*, the equitable interest, is being taken by the state under the auspices of an IOLTA program?[32] "Despite their widespread acceptance, these programs have always been controversial, in large part because they appear to deprive clients of the interest on their funds."[33] Moreover, "[t]here seem no longer to be any practical impediments to making trust funds productive, even on a temporary basis, while retaining a very high level of liquidity, whether by bank deposits or investment in money-market funds or other short-term funds."[34]

Estates and Trusts 1318 (8th ed. 1993) ("funds received by a lawyer on behalf of a client are held in trust for the client").

[27]Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996); Phillips v. Washington Legal Found., 118 S. Ct. 1925 (1998). *See also* Schneider v. California Dep't of Corr., 151 F.3d 1194 (9th Cir. 1998); Bockman v. Vail, 161 F.3d 11 (9th Cir. 1998) (each holding that interest on entrusted funds belonging to a prisoner is the property of the prisoner).

[28]Washington Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001).

[29]Washington Legal Found. v. Texas Equal Access to Justice Found., 2001 WL 1222105 (5th Cir.).

[30]Brown v. Legal Found. of Wash., 123 S. Ct. 1406 (2003).

[31]*See* Schneider v. California Dep't of Corr., 345 F.3d 716 (9th Cir. 2003) (remanding for a determination of whether an individual inmate was unconstitutionally deprived of any net interest earned on funds held in his state prison inmate trust account).

[32]*See*§6.1.5.1 of this handbook (duty to provide information).

[33]1 Scott & Ascher §2.3.8.1.

[34]3 Scott & Ascher §17.13.

Individual Liberty, Free Markets, and Peace

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Policy Analysis

IOLTA: Interest without Principle

by Charles E. Rounds Jr

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Executive Summary

IOLTA is the acronym for Interest on Lawyers' Trust Accounts, which is a program, created by state supreme courts or state legislation, whereby lawyers pool client funds--small sums and large sums held for short periods of time--into a designated interest-bearing checking account. The interest that is generated on those pooled funds is then funneled through a judicially created legal foundation to various "public interest" legal firms.

The state of Florida launched the first IOLTA program in 1981. Today, all 50 states and the District of Columbia have IOLTA programs, and those programs generate approximately $100 million per year. While IOLTA's defenders claim that those millions are earmarked for "charitable purposes," a growing body of evidence suggests that a substantial portion of the national IOLTA income stream actually underwrites political activity such as lobbying and general legislative advocacy.

IOLTA programs are unethical and unconstitutional. They are unethical because the unauthorized use of clients' money for any purpose, no matter how noble, is wrong. IOLTA programs are unconstitutional because, when the state asserts control over the equitable interest of client property without consent or just compensation, it violates the Fifth Amendment's Takings Clause. The Supreme Court should vindicate the property rights of legal clients by declaring IOLTA unconstitutional in the case of *Thomas Phillips v. Washington Legal Foundation*.

Introduction and Background

Lawyers have always had occasion to hold clients' funds. As a legal matter, the attorney is a trustee of such funds. A lawyer, for example, might hold in trust for a client a retainer, an insurance recovery, a divorce settlement, or a jury's award of damages. Those funds belong to the client and are returnable to the client upon demand to the extent that they have not been properly disbursed. When it comes to an insurance settlement, for example, an attorney will first deduct his fee and then remit the balance to his client. Such transactions occur every day in law firms across America.

Lawyers know that they must be very careful in their handling of client funds in order to avoid violating the ethical rules of the legal profession and to avoid malpractice liability. An attorney has always been required, for example, to segregate a large sum that is being held on behalf of his client for an extended period of time and to credit to the client any interest income earned thereon. It has always been considered an acceptable practice, however, for lawyers to commingle small sums or large sums held for short periods into a single non-interest-bearing checking account.

Before 1980 federal law prohibited banks from paying interest on checking accounts. In 1980, however, a change in federal banking regulations cleared the way for banks to offer interest-bearing checking accounts, which are now known as negotiable orders of withdrawal, or NOW accounts. The advent of the NOW account led in turn to the creation of Interest on Lawyers' Trust Accounts (IOLTA). IOLTA is a program created by state supreme courts or state legislation whereby lawyers pool client funds--small sums and large sums held for short periods--into a designated interest-bearing checking account. The interest that is generated on those pooled funds is then funneled through a judicially created legal foundation to various "public interest" legal firms.

A typical IOLTA program works like this: The highest court of a state uses its inherent authority to regulate the bar to compel every lawyer in the state to set up an IOLTA checking account. Small sums and large sums held for short periods are then periodically deposited into the account as transactions occur.[1] The bank remits the interest income earned on the IOLTA account, usually monthly, to a general IOLTA account maintained by the state supreme court. The court then periodically disburses the funds in the general account to certain "grantees." The grantees are often foundations closely connected with the state's bar associations and largest law firms. Thus, IOLTA has a constituency that is powerful and politically well connected. Since 1981 the IOLTA concept has spread like wildfire. IOLTA programs have been adopted in all 50 states and the District of Columbia.[2]

Not all IOLTA programs are alike. As of February 1996, 21 states plus the District of Columbia had IOLTA programs from which lawyers could "opt-out"; 26 states had "comprehensive" (compulsory) programs; and 3 states (New Mexico, Oklahoma, and South Dakota) had programs in which lawyers could participate on an "opt-in" basis.[3] As bar associations know, the more lawyers participating in an IOLTA program, the greater the revenue generated. When the Massachusetts IOLTA program converted in 1990 from opt-in to comprehensive, for example, the annual amount of IOLTA income jumped from $1 million to almost $9 million in one year. When Texas went mandatory, the yearly take of IOLTA income jumped from $1 million to approximately $10 million. In February 1995 the Virginia legislature passed a bill converting the state's comprehensive program back to opt-out, effective July 1, 1995. The Virginia program had gone comprehensive in October 1993. The take for the 12 months preceding conversion to comprehensive was $1,784,248. For the 12 months following conversion the figure was $5,046,993.[4] Needless to say, the beneficiaries (and potential beneficiaries) of those monies strongly favor IOLTA programs that mandate the participation of every lawyer in the state.[5]

IOLTA programs also have different legal bases. Thus, in six states--California, Connecticut, Maryland, New York, Ohio, and Pennsylvania--IOLTA is a creature of legislation. In the other states, IOLTA operates pursuant to rules that are promulgated by the state supreme courts.[6]

In 1993 South Dakota generated the lowest amount of IOLTA income ($101,426), Florida the highest ($10,550,079).[7] Accurate and up-to-date figures on IOLTA are very difficult to come by, but it is safe to say that significant amounts of money are involved. In recent years, IOLTA programs have generated approximately $100 million per year.[8] The total amount of IOLTA income generated since 1981 is estimated to be $1 billion.[9]

In the 1980s the Internal Revenue Service issued a Revenue Ruling that said that IOLTA income would not be taxable to clients, provided that the clients could not exercise any control over the selection of IOLTA grant recipients. That Revenue Ruling has prompted state courts to all but encourage lawyers to hide the existence of IOLTA from their clients.[10] To date, IOLTA's nondisclosure feature has proven to be an effective strategy when it comes to anesthetizing individual lawyers to the constitutional and policy issues involved. Few lawyers understand how the IOLTA program works, and almost no one outside the legal profession has an inkling as to what IOLTA stands for.

IOLTA's defenders maintain that IOLTA programs are designed to help meet the legal needs of the poor and to further the "administration of justice." There is strong empirical evidence, however, that a substantial portion of the national IOLTA income stream actually supports political activity such as lobbying and general legislative advocacy. In Massachusetts, for example, IOLTA funds are fueling initiatives to have rent control reinstated in Boston.[11] Thus, the small Boston landlord who turns over a retainer to his attorney might well be underwriting advocacy groups for tenants; or the income might even go toward subsidizing a class action lawsuit against that very landlord by his own tenants.

In recent years, IOLTA programs have been challenged in the courts on constitutional grounds. Ordinary legal clients have maintained that IOLTA programs constitute a violation of the Fifth Amendment to the U.S. Constitution, which prohibits the "taking" of private property for public use without just compensation. Such challenges were initially unsuccessful, but in September 1996 the U.S. Court of Appeals for the Fifth Circuit ruled that clients "have a valid property interest in the interest proceeds earned on funds in IOLTA accounts."[(12)] Because that holding conflicted with the holdings of other federal circuit courts, the U.S. Supreme Court has agreed to resolve the controversy by reviewing the Fifth Circuit's decision in *Thomas Phillips v. Washington Legal Foundation*.[(13)] The Court could put its imprimatur on the IOLTA program; or it could limit the program, perhaps even declare it unconstitutional. Oral argument on the takings challenge to IOLTA will take place on January 13, 1998. A ruling is expected in the case by June 1998.

The Mechanics of IOLTA

A typical IOLTA program is a confusing network of committees and foundations that would give any casual observer the impression that the entire apparatus is some amorphous body that is independent of a state's highest court. Nothing could be further from the truth. Those entities are either arms of the court or agents of the court for IOLTA matters. Except for legislatively created programs, IOLTA was created by the court. IOLTA is run out of the court. IOLTA is the court. Thus, to attack IOLTA is to attack the court. That is the stark political reality that any citizen desiring to work for IOLTA's abolition must come to realize. It is an arrangement that is particularly precarious for the state's practicing lawyers since their livelihood comes from working within the state court system.

In a typical IOLTA scheme, the highest court of a state, by rule, will establish an IOLTA foundation or committee to handle the day-to-day operations of the program. That might be called the "operations entity." The operations entity will have the appearance of independence, but it will actually be the court's arm for IOLTA administration and operations. The court, by rule, will then appoint bar foundations or a state legal services corporation, or both, to serve as the court's IOLTA income disbursing agents. Those entities might be called "conduits." The conduit then makes "grants" of the IOLTA income to a whole host of "grantee" organizations. There are, to be sure, many variations on that model. In the state of Washington, for example, the operations entity and the conduit are one and the same. In Massachusetts, they are separate, at least on paper.

In states where IOLTA is compulsory, the state supreme court will also have promulgated a rule requiring that each lawyer in the state open an IOLTA checking account at a bank that is willing to participate in the IOLTA program. Monthly, the lawyer's bank will then transfer the income that has accumulated to the court's general IOLTA account. The operations entity will then tap the general account for its fees and expenses, which include pro-IOLTA advertising, promotion, and propaganda, and then remit the balance to the conduit for disbursement to the grantees or, in the absence of a conduit, remit the balance directly to the grantees. In the 26 states where IOLTA is compulsory, lawyers must certify in their annual reregistration forms that they have established IOLTA accounts. A lawyer who does not so certify risks suspension of his license to practice law (disbarment). The State Board of Bar Overseers, which in most cases is another arm of the court, is the entity charged with enforcing attorney compliance with IOLTA.

Changes in the IOLTA rules are usually made in response to a petition to the court by the operations entity or the conduit. In essence, the court will be petitioning itself.

If a third party should seek a change in an IOLTA rule, or otherwise has problems with a rule, it will file a petition with the court. The operations entity and the conduit will then respond to the petition. In such cases, the court will be acting both as the adjudicator and, through its arms and agents, as a litigant. A Massachusetts case illustrates that very unusual proceeding. A few years ago the Worcester County Bar Foundation petitioned the Supreme Judicial Court of Massachusetts to become a coconduit.[(14)] The defendants were the justices of the Supreme Judicial Court, members of the Massachusetts IOLTA Committee (a court-appointed creature that functions as the operations entity), and the three conduits the court had earlier approved (the Boston Bar Foundation, the Massachusetts Bar Foundation, and the Massachusetts Legal Assistance Corporation). The three conduits opposed the attempt by a fourth entity to nuzzle in at the IOLTA trough. The court denied the Worcester petition without even going through the motions of offering a legal or factual basis for doing so.

Helping the Poor or Helping Political Causes?

Where do the millions of dollars in the IOLTA income stream go? The simple answer is that they go into the pockets of any lawyer, lobbyist, or legal group that has the right connections. The IOLTA community publicizes isolated hard-luck cases as proof that all it is doing is servicing the "civil legal needs of the poor." As a practical matter, however, it is very difficult to distinguish propaganda from fact. That is because there is no legal or regulatory requirement that IOLTA committees maintain any *verifiable* statistics or information on what IOLTA grantees are actually doing. There is, however, abundant empirical evidence from public sources suggesting that IOLTA funds are commonly used for political activity instead of ordinary legal work on child custody, adoption, will preparation, and divorce.

In Massachusetts, for example, the director of the Massachusetts Legal Assistance Corporation, one of the state's IOLTA conduits, has publicly admitted to and defended the use of IOLTA funds for legislative advocacy. He has asserted that engaging in such activity with IOLTA funds is appropriate because legislative advocacy is "a recognized part of the practice of law."[15] The director of Greater Boston Legal Services, an IOLTA grantee, has justified the political activity of his organization on the ground that there is a need "to think about things systemically rather than as individual cases."[16] In 1995 alone, GBLS paid $80,000 to state lobbyists. GBLS is currently litigating and lobbying to have rent control reinstated in Boston. In the past, it has lobbied the state legislature for an increase in the minimum wage.[17]

IOLTA grantees often have long histories of legislative advocacy:

- Prior to becoming an IOLTA grantee, for example, the Massachusetts Law Reform Institute was the driving force behind failed initiatives to enact a graduated income tax in Massachusetts.[18] In 1990 MLRI lobbied for a $1.6 billion increase in taxes on a range of business services.[19] In 1993 it lobbied against the Massachusetts capital gains deduction, the research and development credit, and the investment tax credit.[20]
- Similarly, the Lawyers Committee for Civil Rights of the Boston Bar Association, another IOLTA grantee, has been involved for years in legislative redistricting litigation on the local, state, and federal levels.[21] Such litigation is often designed to manipulate the shape of districts in order to enhance the electoral prospects of minorities. The Lawyers Committee was active as well in opposing judicial appointments by Presidents Reagan and Bush.[22]
- MLRI and the Western Massachusetts Legal Services Corporation, another IOLTA grantee, have advised welfare recipients who inherit large amounts of cash or win big in the lottery to "spend down" their windfalls so that they may remain on the welfare rolls.[23]
- In 1992 two Massachusetts IOLTA grantee organizations successfully challenged a statute that would have tightened the state's requirements for proving one's eligibility for welfare.[24]
- IOLTA grantees have sued the City of Lawrence for confiscating the welfare cards of drug criminals, advocated welfare for illegal aliens, opposed linking welfare to school attendance, and forced the state to spend millions to provide day care for welfare recipients.[25]
- A 1992-93 IOLTA grant of $87,000 went to the Massachusetts Advocacy Center, which "has fought court battles against tougher standards for public school administrators and for the abolition of merit-based entrance requirements for the Boston Latin School."[26]
- A $134,000 grant went to the Massachusetts Disability Law Center whose most notorious case involved helping a fired Duxbury fireman regain his job and $20,000 back pay plus 12 percent interest. The town had dismissed the man after he was found not guilty, by reason of insanity, of bludgeoning his wife within an inch of her life.[27]

Massachusetts is not alone when it comes to using the IOLTA income stream to underwrite liberal political causes. State of Washington IOLTA grantees include the National Lawyers Guild and the Fremont Public Association.[28] Seeking increased benefits for welfare recipients, the FPA has lobbied and sued various government entities.[29] Evergreen Legal Services, also an IOLTA grantee, successfully overturned a ruling by the U.S. Department of Housing and Urban Development that authorized public housing authorities to expedite eviction of tenants involved in criminal activity.[30] In 1990 it stopped the Everett Public Housing Authority from evicting a man who had tried to run over his neighbor with a car.[31]

Texas Rural Legal Aid, an IOLTA grantee, in cooperation with the Mexican-American Legal Defense and Education Fund, has successfully litigated to prevent the Texas legislature from using 1990 census figures in the apportionment of state legislative districts.[32] TRLA has also sued the state of Texas to increase spending on universities and colleges along the Mexican border, a local school district for not financing the

education of students outside the district, and another local school district because its at-large system of electing board members "dilutes" minority voting strength.[33]

In December 1996 TRLA filed a federal lawsuit challenging the right of military personnel to vote by absentee ballot in Val Verde County, Texas. TRLA alleges that the 800 absentee ballots cast by active-duty members of the armed forces unlawfully contributed to the election of Republicans Murray Kachel as county commissioner and D'Wayne Jernigan as sheriff. TRLA charges that counting the absentee ballots violates the Federal Voting Rights Act because the ballots "dilute" the voting strength of Hispanics. Were it not for the absentee ballots, TRLA claims, Democrats would have won the popular vote.[34]

It is difficult to determine how many bona fide poverty cases were turned away by IOLTA grantees because they did not have a political component. There is some anecdotal evidence, however, of some curious applicant denials. For example, in 1992 Rose Pucci, a secretary earning $23,000 a year, purchased at a foreclosure sale a rented condominium in the Beacon Hill section of Boston. Her tenant was a well-to-do lawyer at a prestigious downtown law firm. When the attorney-tenant would not leave the premises so that Pucci could move into her new home, she found herself before the Rent Board, which proceeded to take the side of the tenant. The case dragged on. Pucci became homeless and deeply in debt. She sought help from several IOLTA grantee groups but was turned away by all of them. Pucci was told by one group that it would never provide assistance to a "landlord." She was finally rescued by a private attorney who took her case pro bono. The Rose Pucci case suggests that IOLTA is more about poverty politics than about aiding the poor. In other words, the "politically incorrect" need not apply.[35]

Chester Darling, an attorney who is a solo practitioner in Boston, got a taste of what it is like to be on the "incorrect" side of a legal services lawsuit when he agreed to defend the First Amendment rights of a veterans' organization. After a hastily organized group known as the Irish-American Gay, Lesbian and Bisexual Group of Boston applied unsuccessfully to march in a St. Patrick's Day parade organized by the South Boston Allied War Veterans Council, the newly organized group sued for admission.[36] Pressed by a number of law firms and organizations closely connected with the IOLTA community, including the Gay and Lesbian Advocates and Defenders, which received IOLTA grants, the case went all the way to the U.S. Supreme Court. The Court ruled unanimously for the veterans on First Amendment grounds, stating that Massachusetts could not "require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey."[37]

Darling and the veterans won, but at great personal and financial cost, against a legal services juggernaut that was partly subsidized with IOLTA dollars. Of particular note, however, is this: during the litigation, Darling had applied to the Massachusetts Bar Foundation, an IOLTA conduit, for an emergency IOLTA grant to continue his expensive battle for the First Amendment rights of his mostly elderly working-class clients; that request was denied by the trustees of the foundation.[38]

Such politically selective funding of lawsuits cannot be cured by a more equitable distribution of money or by funding both sides of controversial lawsuits. Neither Darling nor the Gay and Lesbian Advocates and Defenders should have had access to the income earned on other people's funds. The money belongs to those people. Darling's application experience does illustrate, however, that when it comes to IOLTA, the politically incorrect seem to be ineligible. Of course, the irony of all ironies is that the little money that the veterans managed to scrape together through bake sales and the like to pay for Darling's expenses (he never was paid for his services) went into his IOLTA account. The interest income on that account was then used to subsidize groups such as the Gay and Lesbian Advocates and Defenders. The veterans were being compelled by the state to fund their own opposition!

IOLTA's defenders repeatedly invoke the plight of the poor to justify IOLTA. Thus, the *Massachusetts Lawyers Weekly* said that "IOLTA means that children will not become homeless, women and children will not be beaten, and elderly and disabled people will not be denied hard-earned Social Security benefits."[39] Such hyperbole tends to obfuscate the true nature of the IOLTA program; indeed, the facts sometimes flatly contradict assertions that "the money goes to the poor." In Louisiana, for example, IOLTA grants go to an organization that services alcoholic and drug-addicted lawyers.[40] Similar grants to the middle class have been made in Massachusetts as well. The Supreme Judicial Court of Massachusetts has even made IOLTA grants to itself, for the court's racial and ethnic bias study,[41] a blatant act of institutional self-dealing.

IOLTA: Unsound Public Policy

Before addressing the merits of the constitutional challenge to IOLTA, it is important to note at least two reasons why the IOLTA concept is objectionable as a matter of sound public policy. First, computer software advances in the banking industry have made it possible to trace small amounts of interest, a technological advance that makes IOLTA obsolete. Interest on even small sums could be paid to the clients for whom the sums are held. Second, IOLTA programs dispense with traditional lawyer-client disclosure requirements for no other reason than to accommodate IOLTA. Such a dilution of traditional fiduciary principles is not only unnecessary but dangerous.

New Technology Embarrasses IOLTA Community

IOLTA has been able to survive only because of the myth, carefully cultivated by its proponents, that small sums and large sums held for short periods cannot be cost-effectively put to work for clients.[(42)] That simply is not true. Banks in Boston, New York, and other cities offer sweep and subaccount products that make IOLTA totally unnecessary and inappropriate.[(43)] Income, right down to the last penny of interest, can be swept and subaccounted daily to various clients. Those products also offer a collateral benefit in that they all but eliminate the possibility that lawyers who use them will inadvertently commingle funds improperly.

It is unclear why banks do not publicize such products in legal circles. Perhaps they do not want to undermine IOLTA and, by doing so, incur the wrath of the IOLTA community. Certainly the bench, the organized bar, and the boards of bar overseers have an incentive to minimize any product that might threaten IOLTA. It falls then to those members of the lay public who find IOLTA a threat to their civil liberties to spread the word about sweep and subaccount products. At the very least, every legal client who finds the concept of IOLTA bizarre and abhorrent should so inform his own lawyer or law firm and demand that the interest on any funds the client may entrust to the firm be swept and subaccounted.

IOLTA Disclosure Waivers Dilute Fiduciary Principles

The lawyer is the client's agent. To the extent that he holds funds that belong to the client, he is also a trustee. In each case, the lawyer is a fiduciary. Thus, when a lawyer holds client funds, he is simultaneously involved in two distinct fiduciary relationships: principal-agent and trustee-beneficiary.

By way of background, the concept of the trust developed in the ecclesiastical court system of England after the Norman conquest, although its origins are said to predate the conquest.[(44)] In simple terms, the trustee has a duty to act solely in the interest of the beneficiary. Courts have cultivated that "duty of loyalty," shoring it up or defending it as necessary and generally keeping a watchful eye out for its maintenance. American jurist Benjamin Cardozo said it best:

A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions.[(45)]

A trustee has always had a related duty to fully disclose to the beneficiary all information relevant to the fiduciary relationship. That would include the uses to which entrusted property is put. IOLTA programs have inexplicably compromised that long-standing principle of disclosure.

Professor Orlando Delogu of the University of Maine School of Law urged Maine's highest court not to adopt an IOLTA program precisely because of its unethical nature. In a memorandum filed with the Supreme Judicial Court of Maine, Delogu argued against the IOLTA concept for the "simple reason that it is an unauthorized use by individual attorneys and the bar of other people's money."[(46)] Unfortunately, most courts, by rule, now relieve lawyers of what would otherwise have been their common law fiduciary duty to fully disclose to their clients the existence of the IOLTA scheme and the uses to which the money may be put. There appears to be no other situation in which a court has eschewed its traditional role of shoring up the fiduciary relationship and, instead, on its own motion, set about to chip away at the very foundations of that relationship. Before IOLTA, the duty to disclose had always been inviolate.

The fiduciary relationship is a private relationship of enormous utility to society. The trust, for example, provides enlightened property owners with a private mechanism for seeing to the needs of the young, the

disabled, and the elderly far more efficiently, far more cost-effectively, far more creatively, far more flexibly, far more expeditiously, and with far more dignity than the state ever could. The fiduciary relationship is the foundation of the common law trust. To weaken that relationship through the adoption of such "exceptions" as the IOLTA disclosure waiver is unwise and dangerous. That is particularly so when it comes to court-sponsored "exceptions," which set an ominous precedent in that they clear the way for additional exceptions.

IOLTA Programs Are Unconstitutional

Beyond the policy-related objections to IOLTA, there is a deeper, more fundamental problem with the IOLTA concept. The Fifth Amendment to the U.S. Constitution provides that private property shall not "be taken for public use, without just compensation."[47] Because IOLTA involves a "taking" of client property by the state without consent or just compensation, it violates the Fifth Amendment.

Proponents of IOLTA rely on two principal assertions to defend the IOLTA concept: (1) when it comes to small sums or large sums held for short periods, the interest or economic benefit "belongs to no one";[48] and (2) were it not for IOLTA, the economic benefit from such sums would remain with the banks.[49] (Note the populist assumption here, that no one would purposely want a benefit to accrue to the stockholders of a bank, or the economic assumption, that bank service fees are not already discounted in light of retained interest.)

Those two assertions are inconsistent. If the economic benefit would rest with the banks were it not for IOLTA, how then can it be said that the interest belongs to no one? Moreover, a number of questions go unaddressed. If the economic benefit belongs to no one, why should the state judiciaries (and not, say, the state legislatures) receive the interest income? If the economic benefit belongs to the banks in the first instance, is it not for the attorneys, clients, and banks to decide who should reap that benefit? How is it that the economic benefit leaves the banks and ends up in the hands of state judiciaries for appropriation? Why should the attorney and his client be shunted aside?

The Lawyer's Role as Common Law Trustee

Before undertaking a constitutional analysis of the takings issue, it is important to sort out the fundamental legal relationships that coexist in a typical IOLTA scheme. The place to begin, of course, is with the attorney-client relationship itself. As noted above, that is an agency relationship. The client is the principal and the attorney is the agent. But that relationship is only indirectly relevant to the Fifth Amendment takings issue. Two other fundamental legal relationships are directly relevant. They are the trust relationship and the contractual relationship. As previously noted, the lawyer who holds property that belongs to a client is a trustee of that property. Because those funds are deposited in a bank, the lawyer-trustee has also established a contractual relationship with the bank.

To properly analyze the takings challenge to the IOLTA concept, it will be useful to take a closer look at the trust relationship. The lawyer is a common law trustee of the client's entrusted funds. He has title to the property. The client is the creator--the technical term is "settlor"--of the trust. The client is also the beneficiary and the remainderman. (The remainderman is the person who gets the balance of the trust property outright and free of the trust once it terminates.) Because the client may demand the property back from the trustee-lawyer at any time, the client also possesses what is technically referred to as a general inter vivos power of appointment. The lawyer-trustee has only the bare legal title. The client has the economic interest, which in trust parlance is called the equitable or beneficial interest. An equitable or beneficial interest in a trust, be it vested or contingent, is an interest in property. And since IOLTA directly affects the equitable or beneficial property interest of clients, a takings claim under the Fifth Amendment must be taken seriously even if small amounts of money are involved.

In its opinion upholding the IOLTA concept, the Federal Court of Appeals for the First Circuit seemed to acknowledge that the legal relationship between the client and the lawyer with respect to IOLTA funds might be that of a trust, rather than a contract or an agency.[50] It suggested, however, that it was not a "formal" trust because there was no "formal" written trust document. The court never explained why the formality of a trust relationship should have any bearing on whether or not a client would have property rights in his entrusted property. The First Circuit also declined to offer any authority for its novel "lack-of-formality" principle. Let there be no misunderstanding: the Statute of Frauds as it relates to trusts applies only to trusts

of real estate; a trust containing intangible personal property, as is the case with an IOLTA trust, need not be in writing to be valid and enforceable. An equitable or beneficial interest in a valid and enforceable trust, be it formal or informal, is an interest in property.

It is also important to focus on the contract. The lawyer, as trustee and titleholder, has a creditor-debtor contractual relationship with the bank. The lawyer-trustee (the creditor) deposits the entrusted funds of his client in the bank (the debtor) and in return gets the bank's promise to turn the funds over to the lawyer-trustee upon demand. The funds deposited are commingled with the general assets of the bank. The lawyer holds title to the bank's promise (that is, the contractual right) in trust for the client.

IOLTA's defenders obfuscate the takings analysis with a mistaken claim that the client is in a contractual relationship with the bank. They argue that just as a depositor who puts cash in an ATM will have no say over what the bank does with his assets, so the client has no say over what is done with IOLTA deposits.[(51)] That analogy is twice mistaken. First, the *client* is not in a contractual relationship with the bank, the lawyer-trustee is; and the lawyer-trustee is in turn in a trustee-beneficiary relationship with his client. Second, the issue is not what the bank does with the deposited funds--whether deposited through a trust or directly through an ATM deposit--but rather who owns the interest on those funds. If the terms of the contract provide for the payment of interest, any interest earned belongs ultimately to the beneficiary. Stated another way, the contractual right is an asset of the trust.

The State Cannot "Take" a Client's Equitable Interest in a Trust

The nub of the Fifth Amendment IOLTA issue, then, is whether the state may take someone's equitable or beneficial interest in a trust without just compensation. May the state take the *use* of that property, or, focusing on a trust of intangible personal property of the IOLTA variety, does *income* (dividends or interest, or both) follow the trust principal?

Neither side of the IOLTA controversy has ever managed to fully appreciate the trust aspects of IOLTA. Yet it is vitally important to recognize the fact that it is the *equitable* property interest that is at stake here. Unfortunately, the courts have thus far treated the client as the legal titleholder of the funds held by the attorney, treating the attorney as an agent rather than as a trustee of the funds. The issue is then miscast as follows: Does *interest* follow principal? From a Fifth Amendment perspective, of course, these subtle distinctions between legal interests and equitable interests are irrelevant since the focus is on the fruits of the property that are actually produced. Either type of interest is property, which is what the Takings Clause is about.

When the debate narrows to whether interest follows principal, however, an important issue is lost. What about nonproductive property? Take, for example, a gold watch that is held in trust. The watch is unwound and rests in a safe-deposit box. The fact that the watch is nonproductive does not mean the state can break in and put the watch to "productive use." Ownership entails the right to control how property is used, how it is not used, and whether it is used at all. The client should be able to place his funds in a non-interest-bearing account--or in a cookie jar, for that matter--if that is his wish. Perhaps the client does not care if a bank benefits in some way from that arrangement.

In the First Circuit case, not only did the court ignore those subtleties, but the three-judge panel gave short shrift even to the straightforward Fifth Amendment takings challenge. The court ruled that because of "an anomaly created by the practicalities of accounting . . . the interest earned on IOLTA accounts belongs to no one, but has been assigned, by the Massachusetts Supreme Judicial Court, to be used by the IOLTA program."[(52)] That characterization of the issue fails to address several points. To begin with, it is fundamental that an "assignor" can only assign rights that the assignor possesses. If the IOLTA income stream belongs to no one, by what right does the court seize control of it? If the state must involve itself, does the income not belong in the state's treasury for appropriation by duly elected legislators? If the income is "found money," then why should the economic interest accrue to the state rather than the client? The First Circuit left those questions unanswered.

The Court of Appeals for the Fifth Circuit found the "belongs-to-no-one" theory fundamentally flawed:

It has been suggested that the IOLTA program represents a successful, modern-day attempt at alchemy. While legends abound concerning the ancient, self-professed alchemists who worked tirelessly towards their goal of changing ordinary metal into precious gold, modern society generally scoffs at this attempt to create "something from nothing." The defendants in this case denounce such skepticism, declaring that they have unlocked the magic that eluded the alchemists. The alchemists failed because the necessary ingredients for their magic did not exist in historical times: the combination of attorney's client funds and anomalies in modern banking regulations. According to the defendants' theory, the interest proceeds generated by Texas's IOLTA accounts exist solely because of an anomaly in banking regulations and, until the creation of the IOLTA program, that interest belonged to no one. The defendants then contend that Texas used the IOLTA program to stake a legitimate claim to these funds and that the plaintiffs cannot now seek to repossess the fruits of this magic as their own. We, however, view the IOLTA interest proceeds not as the fruit of alchemy, but as the fruit of the clients' principal deposits.(53)

The Fifth Circuit recognized that, when private funds are involved, interest has always followed principal. And when the state takes such interest, it takes property from the owner of the principal in violation of the Fifth Amendment to the Constitution.

A Supreme Court precedent supports the idea that IOLTA programs constitute an unconstitutional taking. The holding in *Webb's Fabulous Pharmacies v. Beckwith* (1980),(54) which involved funds temporarily turned over to a Florida clerk of court for safekeeping, is directly on point. In *Webb's*, the Supreme Court ruled that $100,000 in interest generated by funds held for safekeeping by the clerk of court belonged to those ultimately entitled to the funds, not to the state of Florida: "Earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."(55) The Court of Appeals for the Fifth Circuit saw no difference between the fruits of entrusted IOLTA funds and the fruits of funds temporarily placed in the hands of the Florida clerk of court and ruled accordingly.

The Fifth Circuit ruling addressed several other contentions as well. In 1987 Florida's IOLTA program withstood a constitutional challenge in the Eleventh Circuit Court of Appeals.(56) That circuit ruled that IOLTA involves only deposits that are so small or short-term that the administrative costs of maintaining an interest-bearing NOW account for that deposit would exceed any interest earned. Thus, the client had no property interest in the income generated by the court-mandated commingling of certain client funds under the auspices of IOLTA. If the client had no "expectation" interest in the IOLTA income stream, then the stream belonged, lock, stock, and barrel, to the government. The concept of an "expectation" interest was gleaned from zoning regulation controversies. In zoning, governmental regulation of the use of a person's property constitutes an unconstitutional taking if, among other things, the regulation interferes with the person's "investment-backed expectations" as they relate to that property. The Fifth Circuit rejected that legal analysis. It found IOLTA to be about confiscation, not regulation. The zoning precedents are simply not analogous.

The Fifth Circuit also made short work of the efforts of proponents of IOLTA to seek refuge in the misguided IRS Revenue Ruling that exempts IOLTA income from taxation if the client has no say over what is to be done with the fruits of his property: "We find no basis to hinge property interests on the fickle tax code."(57) Tax law provides for the taxation of certain interests in property; its function is not to define what constitutes property as a matter of constitutional law.

The Fifth Circuit also recognized the slippery-slope implications of accepting the IOLTA conception of property. Today IOLTA, tomorrow interest earned by banks during the float time of checks. "We are also hesitant to declare that . . . [IOLTA] interest is not property lest we incite a new gold rush, encouraging government agencies to dissect banking regulations to discover other anomalies that lead to 'unclaimed' interest." The court observed that "as technology continues to advance, the speed with which such transactions can occur will continue to increase, providing greater opportunities for states to try to collect the fractions of pennies that could be earned as interest during the float time of all these activities." The court predicted that "the faster the funds move, the more and more difficult it will be for individuals to make a practical claim to such funds."(58)

According to the Fifth Circuit ruling, it is up to the client to dictate how his own entrusted funds are to be put to work. If clients voluntarily decided to park their money in an IOLTA-like arrangement, after full and fair disclosure by the lawyer of all the relevant facts, no constitutional problem would exist. The Supreme Court should affirm that eminently sensible proposition.

Supreme Court Victory May Prove Illusory

IOLTA programs should be dismantled immediately. They are scandalous schemes that bring disrepute to the legal profession. The fact that some percentage of IOLTA monies may be going to worthy causes cannot justify the suspension of fundamental constitutional and fiduciary principles. The ends do not justify the means. Nor can IOLTA's defects be cured by a more equitable disbursement to "conservative" and "liberal" activist organizations of the monies collected. Even if the entire income stream were to subsidize praiseworthy causes, the basic concept of IOLTA would still be fundamentally pernicious. Making IOLTA voluntary on the part of the lawyer would be an improvement over the status quo but would constitute only a second-best solution. The money at issue belongs to the client, after all, not to the attorney.

But as the compulsory union dues controversy has demonstrated, an unconstitutional practice may not end simply because the Supreme Court declares it unconstitutional.[59] Additional measures may be necessary to fully vindicate the constitutional rights of clients. Should the Supreme Court declare IOLTA unconstitutional, state courts ought to respond in good faith by dismantling their programs. Unfortunately, that may not happen wholesale. Many states will be tempted to "restructure" their IOLTA programs around a narrow, legalistic interpretation of the Supreme Court ruling so that they can retain control over millions of dollars in revenue. Legal services groups that receive IOLTA money have already employed "restructuring" tactics to avoid congressional restrictions on the political activities of the Legal Services Corporation.[60] It would come as no surprise to see cosmetic IOLTA reforms in the wake of an adverse ruling from the Supreme Court.

Ideally, all IOLTA enabling legislation should be repealed by state legislatures. But, again, that is not likely to happen anytime soon because state legislators, many of whom are practicing lawyers, will be reluctant to pick a fight with the state supreme court and the organized bar. Moreover, the IOLTA income stream supports a small army of paid lobbyists with all the time in the world to work the halls of the statehouses to further the cause of IOLTA.

Assuming some form of IOLTA survives an adverse Supreme Court ruling, it will be up to individual lawyers, on their own initiative, to use bank sweep and subaccount products on behalf of their clients. And it will be up to clients, on their own initiative, to eschew the services of lawyers who fail to subaccount. At a minimum, attorneys and law firms should do the right thing and voluntarily assume the responsibility of fully disclosing to their clients all the uses, including the political uses, to which client funds might be put. Each lawyer should fully disclose to his clients any direct or indirect association he may have with groups that benefit from the IOLTA subsidy.

Since banks are not required to participate in the IOLTA scheme, bank shareholders should give consideration to pressuring bank directors not to squander bank assets on IOLTA. When a bank subsidizes IOLTA accounts, there ought to be a hue and cry; there is nothing to prevent depositors from taking their business away from banks that service IOLTA and doing so with as much fanfare as possible.

Should the Supreme Court find IOLTA unconstitutional, yet the programs continue, Congress would have a clear legal basis for exercising its power under section 5 of the Fourteenth Amendment to require banks to get out of the IOLTA business. That would go a long way toward vindicating the constitutional rights of clients.[61]

IOLTA has operated all too long in the shadows. It is incumbent upon those who value liberty and the rule of law to ask probing questions of the judiciary and the bar about IOLTA and to spread the word about how it erodes constitutional rights. We must challenge the self-serving propaganda of the IOLTA community and not accept at face value the bald assertion that IOLTA simply helps the poor. Because bar associations and IOLTA recipients are engaged in pro-IOLTA promotion, propaganda, and legislative lobbying, it will not be easy to get the truth out about IOLTA. But the truth must be told.

Conclusion

IOLTA programs are inappropriate, unethical, and unconstitutional. They are inappropriate because IOLTA is premised on the notion that it is impossible to trace interest earnings on small sums and large sums held for short periods of time. Advances in computer software, however, have made it possible for banks to offer subaccounting products that can trace small amounts of interest. Attorneys can now maintain one master

checking account with an unlimited number of client subaccounts. That technological advance makes IOLTA obsolete.

IOLTA programs are unethical because the unauthorized use of clients' money for any purpose, no matter how noble, is wrong. The legal profession adhered to that principle before IOLTA; it should now recognize that the creation of an IOLTA "loophole" was a serious mistake.

IOLTA programs are unconstitutional because they interfere with the rights of legal clients to control how their property is to be used, how it is not to be used, and whether it is to be used at all. When the state takes the equitable interest of client property without consent or just compensation, it violates the Fifth Amendment. The Supreme Court should vindicate the property rights of legal clients by declaring IOLTA unconstitutional.

Notes

1. Note that IOLTA programs have nothing to do with situations in which an attorney acts as an executor of an estate, trustee of a family trust, or guardian of someone's property. It is also important to note that IOLTA programs do not affect the criminal justice system.

2. See Brennan J. Torregrossa, "*Washington Legal Foundation v. Texas Equal Access to Justice Foundation*: Is There an Iota of Property Interest in IOLTA?" *Villanova Law Review* 42 (1997): 189, 191.

3. Ibid., pp. 192-93 n. 9. An attorney in an opt-out state will be automatically registered to participate in the IOLTA program unless he takes the affirmative step of notifying the entity governing the IOLTA program that he does not wish to participate. In an opt-in (or so-called voluntary) state, the process is just the reverse; that is, no attorney participates in the IOLTA program unless he has taken the affirmative step of notifying the entity that governs the program that he wishes to participate. Ibid.

4. See "Virginia State Bar Council Resolves to Keep Comprehensive Program," *IOLTA Update* 11, no. 1 (1995): 4.

5. According to one writer, the movement to convert voluntary IOLTA programs to mandatory programs "was spurred by the [American Bar Association] Commission on IOLTA, which in late 1987 initiated a resolution for the ABA House of Delegates urging conversion from voluntary to comprehensive IOLTA programs. The Commission then saw to the passage of the measure--known as Resolution 101--in February 1988." Arthur J. England Jr., "Modern Day Alchemy: Interest on Lawyers' Trust Accounts," in *Civil Justice: An Agenda for the 1990s*, ed. Esther F. Lardest (Chicago: American Bar Association, 1989), p. 566. See also Gregory A. Hearing, "Funding Legal Services for the Poor: Florida's IOTA [sic] Program--Now Is the Time to Make It Mandatory," *Florida State University Law Review* 16 (1988): 337.

6. See "IOLTA Program Files," *IOLTA Update* 7, no. 1

(1990): 5.

7. See "Projected IOLTA Income 1993-1994," *IOLTA Update* 10, no. 3 (1994): 8.

8. See Jill Schachner Chanen, "Not with My Money You Don't," *ABA Journal*, November 1997, p. 42.

9. See Frances A. McMorris, "Ruling May Undermine Programs That Fund Legal Services for Poor," *Wall Street Journal*, September 30, 1996, p. B12.

10. Charles E. Rounds Jr., "Social Investing, IOLTA and the Law of Trusts: The Settlor's Case against the Political Use of Charitable and Client Funds," *Loyola University of Chicago Law Journal* 22 (1990): 163.

11. In 1995 rent controls were abolished through a statewide initiative. With respect to the involvement of IOLTA grantees in the effort to reinstate rent controls in Boston, see the April 2, 1996, letter from James M. McCreight, attorney with Greater Boston Legal Services, to Boston City Council member Maura Hennigan, who chairs the Committee on Housing. On file with the author.

12. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996, 1004 (1996).

13. Case no. 96-1578, certiorari granted, 65 U.S.L.W. 3860 (1997).

14. See *In re Petition to Amend Supreme Judicial Court Rule 3:07*, filed by the Worcester County Bar Foundation, Inc., January 1991.

15. Lonnie A. Powers, MLAC executive director, quoted in Dick Dahl, "Mandatory IOLTA Faces Constitutional Challenge," *Massachusetts Lawyers Weekly*, April 29, 1991, p. 1.

16. Robert Sable, GBLS executive director, quoted in "Neighborhood Legal Services, Greater Boston Legal Services Name New Executive Directors," *The Reporter* (a quarterly of the Massachusetts Legal Assistance Corp.), May 1991, p. 1.

17. See Diane E. Lewis, "Drive on to Lift Mass. Minimum Wage," *Boston Globe*, February 3, 1995, p. 35.

18. See Warren Brookes, "Scandal Brewing in LSC under Carter," *Boston Herald*, September 11, 1983.

19. See Elsa C. Arnett, "50 Groups Weigh In on Service Tax," *Boston Globe*, July 14, 1990, p. 1.

20. See Cindy Mann, staff attorney with the Massachusetts Law Reform Institute, "Sunset Provisions for Tax Expenditures," Testimony for the Joint Committee on Taxation (Massachusetts), June 9, 1993.

21. See Wayne Woodlief, "Redistricting Drive Mounted," *Boston Herald*, December 22, 1989, p. 5.

22. See Robert Schmults, "Lawyers' Money Pool May Not Hold Water," *Insight*, January 4, 1993, p. 12.

23. See "Looking Out for Their Welfare," *Massachusetts Lawyers Weekly*, December 6, 1993, p. 30.

24. See "Judge King's Welfare Law," editorial, *Boston Herald*, August 23, 1992, p. 26.

25. See Renee Graham, "Lawrence Mayor's Tactics on Drugs Stir Rights Fears," *Boston Globe*, June 27, 1989, p. 13;

M. E. Malone, "Welfare Benefit Cuts Draw Advocates' Fire," *Boston Globe*, September 3, 1989, p. 25; and Renee Loth, "Cool Reaction Faces Bill Linking Welfare, School," *Boston Globe*, April 18, 1990, p. 26. On advocacy of welfare for illegal aliens, see *Joseph v. INS*, 909 F.2d 605 (1990). See also Diego Ribadeneira, "Weld's Cuts in Child Care Ruled Illegal," *Boston Globe*, November 21, 1992, p. 1.

26. Schmults.

27. Ibid.

28. See complaint filed January 1, 1997, in *Washington Legal Foundation v. Legal Foundation of Washington*, U.S. District Court for the Western District of Washington, C97-01462.

29. Ibid., p. 15.

30. See *Yesler Terrace Community v. Cisneros*, 37 F.3d 442 (1994).

31. See *Housing Authority of the City of Everett v. Terry*, 789 P.2d 745 (1990).

32. See *Richards v. Mena*, 907 S.W.2d 566 (1995).

33. See *Richards v. League of United Latin American Citizens*, 868 S.W.2d 306 (1993); *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (1989); and *Del Valle Independent School District v. Lopez*, 845 S.W.2d 808 (1992).

34. See Robert Elder Jr., "South Texas Showdown," *Texas Lawyer*, January 20, 1997, p. 1.

35. For additional background information on the Pucci story, see *Case Studies of Rent Control in Boston* (Front Royal, Va.: American Association for Small Property Ownership, 1994), p. 51.

36. See Paul Walkowski and William Connolly, *From Trial Court to the United States Supreme Court: Anatomy of a Free Speech Case* (Boston: Branden, 1996).

37. *Hurley v. IrishAmerican Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 559 (1995).

38. Letter from Donna M. Turley, executive director, Massachusetts Bar Foundation, Inc., to Chester Darling, dated September 22, 1993, denying the South Boston Allied War Veterans Council an IOLTA grant to continue its First Amendment litigation. On file with the author.

39. "IOLTA Grant Awards," *Massachusetts Lawyers Weekly*, October 7, 1991, p. 15.

40. Schmults.

41. For background on the political nature of these "racial bias" studies, see Laurence H. Silberman, "The D.C. Circuit Task Force on Gender, Race, and Ethnic Bias: Political Correctness Rebuffed," *Harvard Journal of Law and Public Policy* 19 (1996): 759. See also Stephan Thernstrom, "Racial Bias in the Federal Courts?" *Wall Street Journal*, March 22, 1995, p. A17.

42. "The premise underlying IOLTA is ingenious and compelling--nominal and short-term client trust funds constitute an economic resource that can be used to create income *that would not otherwise exist*." Emphasis added. Doreen D. Dodson, chair, ABA Commission on IOLTA, letter to the editor, *Regulation* (Fall 1992): 2.

43. For more information on the subaccounting practices of banks, see Hearing, pp. 354-55.

44. See Charles E. Rounds Jr. and Eric P. Hayes, *Loring: A Trustee's Handbook* (Gaithersburg, Md.: Aspen, 1997).

45. *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (opinion of Cardozo, C. J.).

46. Quoted in Gary Rivlin, "IOLTA Gains Momentum Nationwide," *ABA Journal*, August 1983, p. 1036.

47. The Fifth Amendment's guarantee against federal takings applies against state takings through the Fourteenth Amendment. See Robert J. Reinstein, "Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment," *Temple Law Review* 66 (1993): 361.

48. "According to the [Texas Equal Access to Justice Foundation's] theory, the interest proceeds generated by Texas's IOLTA accounts exist solely because of an anomaly in banking regulations and, until the creation of the IOLTA program, that interest belonged to no one." *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* at 1000. See also *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 980 (1993) (opinion of Breyer, J.).

49. Attorney Charles Keller, who served on an American Bar Association Task Force on IOLTA, put the matter bluntly: "The legal profession has two choices, and two choices only. . . . We can do nothing, and let banks be the beneficiaries of this money, or we can adopt I.O.L.T.A. and have a new-found source of money for a variety of public service projects." Quoted in Rivlin, p. 1040. See also Betsy Borden Johnson, "'With Liberty and Justice for All': IOLTA in Texas--The Texas Equal Access to Justice System," comment, *Baylor Law Review* 37 (1985): 728 n. 15.

50. See *Washington Legal Foundation v. Massachusetts Bar Foundation*.

51. See, for example, Dodson, pp. 2-3.

52. *Washington Legal Foundation v. Massachusetts Bar Foundation* at 980.

53. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* at 1000.

54. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

55. Ibid. at 164.

56. See *Cone v. Florida Bar*, 819 F.2d 1002 (1987).

57. *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* at 1004 n. 47.

58. Ibid. at 1003, 1004.

59. See Charles W. Baird, "The Permissible Uses of Forced Union Dues: From *Hanson* to *Beck*," Cato Institute Policy Analysis no. 174, July 24, 1992.

60. See James T. Bennett and Thomas J. Dilorenzo, "Poverty, Politics, and Jurisprudence: Illegalities at the Legal Services Corporation," Cato Institute Policy Analysis no. 49, February 26, 1985. See also *Legal Services Horror Stories* (McLean, Va.: National Legal and Policy Center, 1997).

61. For a scholarly discussion of the history and scope of section 5 of the Fourteenth Amendment, see Matt Pawa, "When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment," *University*