STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO MAINE BAR RULES

Docket No. SJC-51

Effective January 1, 2008

A majority of the Justices concurring therein, the following amendments to the Maine Bar Rules are hereby adopted, to become effective on January 1, 2008.

1. Maine Bar Rule 3.6(e) is amended to read as follows:

3.6 Conduct During Representation

. . . .

(e) Preserving Identity of Funds and Property.

(1) All funds of clients paid to a lawyer or law firm, other than retainers and advances for fees, costs and expenses, shall be deposited in one or more identifiable accounts maintained in the state in which the law office is situated at a financial institution authorized to do business in such state. No funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(i) Funds reasonably sufficient to pay institutional service charges may be deposited therein; and

(ii) Funds belonging in part to a client and in part presently or potentially to a lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive ~~it~~ the funds is disputed by the client; in that event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(2) A lawyer shall:

(i) Promptly notify a client of the receipt of the client's funds, securities, or other properties;

(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe-deposit box or other place of safekeeping as soon as practicable;

(iii) Maintain complete records of all funds, securities and other properties of a client coming into possession of the lawyer and render prompt and appropriate accounts to the client regarding them; and

(iv) Promptly pay or deliver to the client, as requested by the client, the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(3) Unless the client directs otherwise, when a lawyer or law firm reasonably expects that client funds will earn ~~net~~ interest or dividends for the client in excess of the costs incurred to secure such income, ~~as defined in paragraph (7) of this subdivision,~~ such funds shall be deposited in a client trust account that may be either

(i) A separate~~, insured, interest-bearing~~ trust account for the particular client or client's matter, ~~the net interest~~ on which the earnings net of any transaction costs or other account-related charges will be paid or credited to the client; or

(ii) A pooled~~, insured, interest-bearing~~ trust account with subaccounting~~, by the financial institution or the lawyer or law firm,~~ which will provide for computation of ~~the interest earned by~~ earnings accrued on each client's funds and the payment thereon, net of any transaction costs or other account-related charges ~~or crediting of each client's net interest~~ to the client.

~~(4) Unless a lawyer practicing alone, or a law firm, has made an annual election, or holds United States government funds, as provided in paragraph (5) of this subdivision, all funds of any client held by the lawyer or law firm that the lawyer or law firm reasonably and in good faith expects will not earn net interest as defined in paragraph (7) of this subdivision shall be deposited in one or more pooled, insured, interest-bearing accounts, each of which shall be subject to the following conditions:~~

~~(i) The financial institution in which the account is established shall be authorized to do business in Maine and shall be insured by either the~~

~~Federal Deposit Insurance Corporation or the National Credit Union Administration Share Insurance Fund.~~

~~(ii) Funds deposited in the account shall be subject to withdrawal upon request and without delay.~~

~~(iii) The lawyer or law firm shall file with the Board of Overseers of the Bar an order directing the financial institution to remit any net interest that may accrue on the account to the Maine Bar Foundation, a nonprofit corporation incorporated under the laws of the State of Maine that has in force a determination letter from the Internal Revenue Service that it qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 as from time to time amended. Such an order shall be filed by July 31, 1994, for any account maintained by the lawyer or law firm under this paragraph (4) as of July 1, 1994, and within 30 days after the subsequent opening of any account that is to be maintained hereunder.~~

~~(iv) No interest on the account shall be paid to the lawyer or law firm, and the lawyer or law firm shall not receive any direct or indirect pecuniary benefit by reason of the remittance of interest in accordance with subparagraph (iii).~~

~~(v) The lawyer or law firm shall give the public notice, by a prominently displayed sign or other reasonable means, of the lawyer's or firm's standing practice to use such an account and that the Maine Bar Foundation is the recipient of the net interest therefrom.~~

(4) All funds of any client held by the lawyer or law firm that are small in amount or held for a short period of time so that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income shall be deposited in an Interest on Lawyer's Trust Account (IOLTA) account and shall be subject to the following conditions:

(i) The financial institution in which the account is established shall be authorized to do business in Maine, shall be insured by the Federal Deposit Insurance Corporation or National Credit Union Share Insurance Fund, and shall be an eligible institution selected by the lawyer in the exercise of ordinary prudence. "Eligible Institution" is one determined by the Maine Bar Foundation in accordance with Rule 6(a)(2), (3) and (4);

(ii) Funds deposited in the account shall be subject to withdrawal upon request and without delay;

(iii) Within 30 days after the opening of any IOLTA account that is to be maintained hereunder, the lawyer or law firm shall file with the Board of Overseers of the Bar an order directing the financial institution to remit any net interest or dividends that may accrue on the account to the Maine Bar Foundation, a nonprofit corporation incorporated under the laws of the State of Maine that has in force a determination letter from the Internal Revenue Service that it qualifies as an exempt organization under Section 501(c)(3) of the Internal Revenue Code of 1954 as from time to time amended;

(iv) No interest or dividends on the account shall be paid to the lawyer or law firm, and the lawyer or law firm shall not receive any direct or indirect pecuniary benefit by reason of the remittance of interest in accordance with subparagraph (iii); and

(v) The determination of whether funds are small in amount or held for a short period of time so that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income, shall rest in the sound judgment of the lawyer or law firm. No lawyer shall be charged with an ethical impropriety or other breach of professional conduct based on the good faith exercise of such judgment.

(5) ~~A lawyer practicing alone, or a law firm, may elect to deposit all client funds that are reasonably and in good faith not expected to earn net interest, as defined in paragraph (7) of this subdivision, in one or more insured, non-interest bearing accounts, instead of in the interest-bearing account or accounts required by paragraph (4) of this subdivision. Such election shall be effective only upon written notice to the Board of Overseers of the Bar given not later than July 31, 1994, and thereafter annually in conjunction with the filing of the list of trust accounts required by Rule 6(a)(2).~~ A lawyer ~~practicing alone,~~ or a law firm, holding funds of the United States government that by law may not earn interest, shall deposit those funds in one or more insured, non-interest bearing accounts, whether or not the lawyer or firm has made the election provided by this paragraph for other client funds.

(6) If the circumstances on which a lawyer or law firm has based a determination to deposit client funds in an account under ~~either~~ paragraph (4) ~~or paragraph (5)~~ of this subdivision change, so that ~~net~~ interest or dividends in excess

of costs may reasonably be expected to be earned on such funds, the lawyer or law firm shall transfer the principal amount originally deposited to the appropriate account established under paragraph (3) of this subdivision.

(7) For purposes of this rule, the term "~~net~~ interest or dividends in excess of costs" means the net of interest or dividends earned on a particular amount of one client's funds over the administrative costs allocable to that amount. In estimating the gross amount of interest or dividends to be earned, the lawyer or law firm shall consider the principal amount involved; available interest or dividend rates; and the time the funds are likely to be held, taking into account the likelihood of delay in any relevant proceeding or transaction.

(8) For purposes of this rule, the term "administrative costs" means that portion of the following costs properly allocable to a particular amount of one client's funds paid to a lawyer or law firm:

(i) Financial institutional service charges for opening, maintaining, or closing an account, or accounting for the deposit and withdrawal of funds and payment of interest or dividends.

(ii) Reasonable charges of the lawyer or law firm for opening, maintaining or closing an account; accounting for the deposit and withdrawal of funds and payment of interest or dividends; and obtaining information and preparing or forwarding any returns or reports that may be required by a revenue taxing agency as to the interest or dividends earned on a client's funds.

2. Maine Bar Rule 6(a)(2), (3) is repealed and replaced as follows:

RULE 6. REGISTRATION; LIST OF TRUST ACCOUNTS

. . . .

~~(2) *List of Trust Accounts*. A lawyer or law firm that maintains one or more trust accounts in accordance with either Rule 3.6(e)(4) or Rule 3.6(e)(5) shall, not later than July 31, 1994, file with the Board a list of all such accounts maintained as of July 1, 1994, indicating the account number of each account and the financial institution where it is maintained. Thereafter, annually in conjunction with the filing of the annual registration statement, a lawyer or law firm maintaining an account or accounts under Rule 3.6(e)(4) shall report to the Board the account number and financial institution of any account added to or deleted~~

~~from the list of accounts during the preceding 12 months; and a lawyer or law firm maintaining an account or accounts under Rule 3.6(e)(5) shall file with the Board a list of all such accounts maintained as of July 1 of the current year, indicating the account number and financial institution of each.~~

(2) *IOLTA Accounts*. Every lawyer admitted to practice in this State shall annually certify to the Board of Overseers of the Bar in connection with the annual renewal of the lawyer's registration, that:

(A) To the lawyer's knowledge after reasonable investigation

(1) the lawyer or the lawyer's law firm maintains at least one IOLTA account, and

(2) the lawyer has taken reasonable steps to ensure that all client funds are held in client trust accounts meeting the requirements of these Rules, or

(B) That the lawyer is exempt from maintaining an IOLTA or other trust account because the lawyer:

(1) is not engaged in the private practice of law;

(2) does not have an office within the State of Maine;

(3) is (i) a judge or other judicial officer employed full time by the United States Government, the State of Maine or another state government, (ii) on active duty with the armed services, or (iii) employed full time as an attorney by a local, state, or federal government, and is not otherwise engaged in the private practice of law;

(4) is counsel for a corporation or non-profit organization or a teacher or professor employed by an educational institution, and is not otherwise engaged in the private practice of law;

(5) has been exempted by an order of the Court which is cited in the certification; or

(6) holds no client funds other than retainers or advances for fees, costs and expenses.

(3) *IOLTA Account Defined*. An IOLTA account is a pooled trust account earning interest or dividends at an eligible institution in which a lawyer or law firm holds funds on behalf of client(s), which funds are small in amount or held for a short period of time such that they cannot earn interest or dividends for the client in excess of the costs incurred to secure such income and the account is:

(A) an interest-bearing checking or share draft account;

(B) a money market account with or tied to check-writing;

(C) an account whose funds are invested solely in repurchase agreements; or

(D) an account whose funds are invested solely in qualified money market funds.

A "qualified money market fund" is an open-end investment company registered under the Investment Company Act of 1940 that is regulated as a money market fund under Rule 270.2a-7 thereof (or any successor regulation) and that, at the time of the investment, has total assets of at least $250,000,000, substantially all of which are invested in U.S. Government Securities. A "repurchase agreement" is a daily overnight repurchase agreement which must be fully collateralized by U.S. Government Securities and may be established only with a bank or other depository institution that is deemed to be "well capitalized" or "adequately capitalized" under applicable regulations of the Federal Deposit Insurance Corporation and National Credit Union Share Insurance Fund. U.S. Government Securities, for the purpose of this section, include securities of Government Sponsored Entities, including but not limited to Federal National Mortgage Association Securities, Government National Mortgage Association Securities, and Federal Home Loan Mortgage Corporation Securities.

(4) *Account Qualifications*. An IOLTA account must meet all of the following conditions:

(A) the account is held in an eligible institution which is required to:

(i) remit the interest and dividends on this account, net of any allowable reasonable fees, at least quarterly to the Maine Bar Foundation;

(ii) transmit with each remittance a report on a form approved by the Maine Bar Foundation that shall identify each lawyer or law firm for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest and dividends applied, the amount of interest and dividends, the amount and type of account-related charges deducted, if any, and the average account balance for the period in which the report is made; and

(iii) transmit to the depositing lawyer or law firm a report in accordance with normal procedures for reporting to its depositors.

(B) the account meets the requirements of paragraph 3 above as a client trust account.

(C)(1) An "Eligible Institution" for IOLTA accounts is a bank, trust company, savings bank, credit union, or savings and loan association authorized by federal or state law to do business in Maine, the deposits of which are insured by an agency of the federal government, and which has been designated by the Maine Bar Foundation as meeting the conditions of this subsection (C).

(2) To qualify as an eligible institution, the institution must pay on IOLTA accounts interest or dividends no less than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers on accounts having similar minimum balances and other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, an institution may consider in addition to the balance in the IOLTA account, factors customarily considered by the institution when setting interest rates or dividends for its non-IOLTA customers, provided that such factors do not discriminate between IOLTA accounts and other accounts and that these factors do not include the fact that the account is an IOLTA account. The eligible institution shall calculate interest and dividends in accordance with its standard practice for non-IOLTA customers. The eligible institution may choose to pay the higher interest rate or dividend on an IOLTA account in lieu of establishing it as a higher rate product. Nothing contained in this Rule will be deemed to prohibit an institution from paying a higher interest rate or dividend on IOLTA accounts than required by this Rule or from electing to waive any fees and service charges on an IOLTA account. Lawyers may only maintain IOLTA accounts at eligible institutions which meet this Rule's requirements, as determined from time to time by the Maine Bar Foundation.

(3) Eligible institutions may comply with the rate requirements of this Rule by electing to pay an amount on funds which would otherwise qualify for the options noted above, equal to 65% of the Federal Funds Target Rate in effect on July 1 of each year, which rate remains in effect for twelve months, and which amount is deemed to be already net of allowable reasonable fees. The Federal Funds Target Rate as of January 1, 2008, shall be in effect until July 1, 2008.

(4) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, sweep fees, a fee in lieu of a minimum balance, federal deposit or share insurance fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the amount.

(5) *Maine Bar Foundation Actions.*

(A) The Maine Bar Foundation shall publish annually a list of eligible institutions that may hold IOLTA accounts.

(B) By March 1 of each year, beginning in 2009, the Maine Bar Foundation shall complete a financial report of the IOLTA funds received and distributed by it for the previous calendar year. The financial report shall be conducted according to generally accepted accounting principles and shall include indication of the purposes for which IOLTA funds have been expended in the previous year. Copies of the financial report shall be provided to the Court.

~~(3)~~(6) *Receipt of Voluntary Contributions*. As part of its notification to attorneys to file annual registration statements, the Board may invite attorneys to make a voluntary contribution to the Campaign for Justice to assist in the funding of legal services for low income individuals. The Board may also provide a means for making the voluntary contribution at the same time that the annual fee is paid and is authorized to utilize its administrative staff and facilities to receive these voluntary contributions and forward them to the Campaign for Justice.

3. These amendments shall take effect January 1, 2008.

Dated: September 21, 2007.

S/_____
Leigh I. Saufley, Chief Justice

*_____
Robert W. Clifford, Associate Justice

*_____
Donald G. Alexander, Associate Justice

S/_____
Susan Calkins, Associate Justice

S/_____
Jon D. Levy, Associate Justice

S/_____
Warren M. Silver, Associate Justice

S/_____
Andrew M. Mead, Associate Justice

* Justice Clifford and Justice Alexander do not join this rule amendment. A separate statement by Justice Clifford and a separate statement by Justice Alexander follow.

SEPARATE STATEMENT OF NON-CONCURRENCE IN AMENDMENTS TO THE BAR RULES BY CLIFFORD, J.

Prior to the changes in the Rules promulgated today, participation in the IOLTA Program by members of Maine's bar has been voluntary. The changes in the Rules eliminate the existing opt-out provision and make participation mandatory.

The use of funds generated from such a mandatory program should properly be limited to the provision of legal services, and I would prohibit the use of any funds generated by a mandatory IOLTA program from being used for purposes of legislative advocacy at the state, local, or federal level.

The use of any such funds generated from bank accounts of attorneys and their clients for political purposes, with which many of those attorneys or clients may disagree, is coercive and, in my view, improper. Accordingly, I cannot support any changes in the rules that make participation in the IOLTA program mandatory, unless the use of those funds is limited to the provision of legal services.

SEPARATE STATEMENT OF NON-CONCURRENCE IN AMENDMENTS TO THE BAR RULES BY ALEXANDER, J.

The Rule amendments adopted today make participation in the IOLTA Program mandatory for those lawyers who maintain client trust accounts. The

amendments also assure that banks, credit unions, and other financial institutions maintaining IOLTA accounts pay interest on those accounts at rates comparable to similar commercial accounts. These actions are a further demonstration of the Court's and the Bar's commitment to improve the quality of legal services for Maine's poor and disadvantaged populations. I support the goals of the mandatory IOLTA program, but not the Rule amendments that will undermine opportunities for innovation, compel contributions to support political and lobbying activities, and provide no assurance of openness and accountability in spending decisions.

Supporters of the mandatory program estimate that it may nearly double IOLTA funds, adding as much as $1 million to efforts to improve access to justice for our poor and disadvantaged populations. That prospective dramatic increase in resources presented a unique opportunity to engage the courts, the bar, the legal services community and the public in a creative reexamination of what we mean by access to justice, what are our priority needs, and how best to support those needs to assure that legal services funds are spent most productively. The opportunity for creative reexamination would be fostered by recommendations for many new initiatives that are currently being developed by the Justice Action Group. The Court's action today forfeits the opportunity for creative reexamination, because it assures that no significant pool of funds will be available to support new initiatives that the Justice Action Group or others may recommend.

Over $11 million of IOLTA funds have already spent by the Maine Bar Foundation. These funds have been generated from voluntary contributions by the members of the Maine Bar who maintain trust accounts and choose to participate in the IOLTA Program. The six legal services groups for whom 80% of the IOLTA funds are earmarked have been selected through an ill-defined process with little or no public visibility or participation, and only limited accountability to assure that funds are spent effectively. Such a closed process may be appropriate for a private charity, but this is no longer a private, voluntary charitable venture.

The Court's action making the IOLTA Program mandatory fundamentally changes the nature of the program. Effective January 1, funding for the program will be generated as a result of a State government mandate, imposed by the Judicial Branch through this rule making.

In early July, the Maine Bar Foundation sent to the Court its proposed rules change to adopt mandatory IOLTA. The draft included no provisions to assure public participation, openness or accountability. It proposed no restriction on use of Court mandated funds for political activity and lobbying. It included no suggestion that the anticipated dramatic expansion in funding be accompanied by any innovative review to better define "access to justice," identify needs and priorities for funding, and assure that spending will be focused on serving the most urgent needs of Maine's poor and disadvantaged populations.

In letters to the Court and at the public hearing to consider its proposal to make IOLTA mandatory, the Bar Foundation confirmed its opposition to any change in practices for distributing IOLTA funds and any controls to assure openness, public participation and accountability in its spending decisions.

In effect, the Bar Foundation told the Court, mandate IOLTA, give us the money, but Court and public oversight as to how we spend that money is not welcome. Today the Court grants the Bar Foundation its wish. I do not concur. When publicly mandated funds are spent to serve important public purposes, public participation, openness and accountability should be welcomed, not scorned. Use of publicly mandated funds for political activity and lobbying to advance particular social viewpoints and oppose others should be prohibited. Innovation should be encouraged.

The Court hands the Maine Bar Foundation the $2 to $2.5 million that it estimates will be generated annually as a result of the court-mandated IOLTA Program. It allows the Maine Bar Foundation to spend IOLTA funds just as it has in the past, with 80% of the funds, old funds and new funds, already earmarked for current programs of the same six specially affiliated groups. In so doing, the Court ends any hope for significant IOLTA funds to start up new legal services programs that JAG or others might recommend.

A. Missed Opportunity for Innovation

In discussion of the access to justice needs of Maine's poor and disadvantaged populations, it is often suggested that current programs can serve only approximately 20% of the needs for access to justice. If only 20% of the needs are currently being met, it necessarily follows that many needs are going unmet, and that within available resources, there must be a continuing, innovative effort to identify highest priority needs and direct resources to those needs. The JAG study, to be finalized later this fall, may provide that innovative review of needs and priorities and make suggestions for change.

While many would agree that most programs supported by the Maine Bar Foundation are directed to high priority needs of Maine's poor and disadvantaged populations, there are a number of important needs that, at least in my judgment, appear largely unaddressed in the current fund distribution processes. Those needs include, in a listing that does not suggest any particular order or priority, the following:

1. Better support for children and parents separating as a result of divorce, parental rights, and protection from abuse proceedings: Family structure fractures occurring in divorce, parental rights, and protection from abuse proceedings often have significant, long-term adverse effects on separating parents and the children caught in these proceedings. Despite these impacts, most low-income and poor

parents proceed through such actions without legal assistance. Improved access to legal services in these difficult cases would have long term benefits for the parties involved and for society, limiting or avoiding problems resulting from poorly informed self-representation in family matters. A draft of the JAG report suggests that JAG may recommend an important new initiative to provide court based aid for separating families, a program that will require significant new resources.

2. Training for trial and appellate advocacy for indigent clients: Our Constitution guarantees court-appointed counsel for trial and appellate advocacy for indigent citizens facing jail as a result of criminal charges, or facing loss of children in child protective and termination of parental rights proceedings. Case specific costs and fees relating to such proceedings are paid, although not necessarily paid well, by the court system. However, the case specific payment system has no method to pay for generalized training and support for trial and appellate advocacy. The current access to justice programs provide little or no support for trial and appellate advocacy training programs to support the constitutional right to counsel in these critical areas.

3. Credit and collections counseling and advocacy: Problems with credit, debts, and financial obligations are a frequent cause for people falling into and staying in poverty. Many people respond, with over-enthusiasm, to very generous invitations to become indebted provided by banks and other financial institutions.

They then become caught in a spiral of bank fees, late fees, and other problems paying their credit obligations that induce or perpetuate a cycle of poverty. Such credit difficulties are particularly problematic in a heavily rural state such as Maine where a vehicle and minimal financial resources are essential to obtain and retain a job. The current access to justice programs supported by IOLTA and other funds provide little or no support for credit counseling and, if necessary, advocacy in the courts or administrative agencies for individuals caught in the easy credit, tough repayment cycle.[1] What credit counseling there is, is often provided by creditor-supported institutions and entities that may not counsel consistent with what may be the debtor's best interest and are not available to go to court to challenge legally questionable credit agreements and arrangements. *See Credit Counseling Centers, Inc. v. City of South Portland,* 2003 ME 2, 814 A.2d 458.

4. A landlord-tenant conciliation and dispute resolution program: In Maine a significant portion of the rental housing stock available to poor people is owned by individuals who, themselves, are not wealthy and do not have easy access to legal services. Many elderly people, living on fixed incomes, may own one or a few apartment buildings, living in one unit and renting out the others. They depend on the income from these units to maintain their own existence. When a

[1] This year the Maine Bar Foundation is providing a one-time grant of $35,000 to support a program to aid homeowners victimized by predatory mortgage lending practices. It appears that past short term programs to aid victims of domestic violence were reduced to support this program. Funding was not reduced for any of the six programs that receive the bulk of Bar Foundation support.

tenant fails to pay the rent, causes disturbances that disrupt the lives of others, or damages the unit, the landlord may seek to evict the tenant, but may not be able to afford an attorney to assist with an eviction. As a result, in some proceedings, a tenant resisting eviction may have counsel, whereas a landlord does not. Many such matters might be resolved by proceedings short of a full court hearing and decision that could achieve resolution of a matter in a way somewhat acceptable to both the tenant and a landlord.

The Legislature recently adopted and provided basic funding for a mediation program in forcible entry and detainer matters.[2] However, a broader conciliation and dispute resolution program, supported by access to justice funds, may be beneficial to many under-funded tenants and landlords in such situations.

Are current programs that are guaranteed funds more important than improved legal services for victims of domestic violence, support for poor families who are separating, or assistance for people caught in the easy credit trap? Perhaps yes; perhaps no. But at least we should have asked the question and given ideas for new programs a chance to receive support from mandatory IOLTA funding. I decline to join an order that forfeits our chance to consider providing significant support for new initiatives through an engaged, innovative study of needs and priorities for access to justice funding. Innovation is not promoted by handing

[2] P.L. 2007, chap. 246, enacting the mediation program as 14 M.R.S. § 6004-A, effective January 1, 2008, and providing program support of $11,250 in FY '08 and $22,500 in FY '09.

more money to the same groups that presently receive funds so that they can expand and quickly absorb the larger amount of funds that will become available.

B. Accountability

The decision to make the IOLTA Program mandatory fundamentally changes the nature of the program. It is now a government-mandated program with money to be accumulated and distributed in accordance with the government mandate. The Court considered and rejected several proposals to require that the Maine Bar Foundation engage in open and accountable decision-making. The rejected proposals were similar to those that the Court has recently imposed on the companion Maine Civil Legal Services Fund Commission. Among the limitations rejected were:

1. A conflict of interest provision that would have prevented board members and decision makers associated with the Maine Bar Foundation from also being board members or employees, or having immediate family members who were board members or employees, of an organization receiving or requesting IOLTA funds.

2. A requirement that the Maine Bar Foundation publish eligibility criteria and publicly solicit applications for new programs and program renewals on at least a bi-annual basis.

3. A requirement that Bar Foundation meetings to discuss and make decisions about priority setting and awards of IOLTA funds, be held in public, with adequate public notice, preceding public deliberation and selection of those entities and programs to receive IOLTA funds.

4. A requirement that needs for legal services and allocations of funds be reviewed on at least a bi-annual basis to assure that the goals of currently funded programs are being met and that funds are being utilized either in existing or new programs to meet the highest priority identified needs.

These minimal public participation, openness and accountability requirements, imposed on the companion Maine Civil Legal Services Fund Commission, should have been equally imposed upon the Maine Bar Foundation. I decline to join an order that does not impose such minimal, but necessary, openness and accountability requirements on spending of government mandated funds.

C. Political Action and Lobbying

Our rule governing the companion Maine Civil Legal Services Fund includes a prohibition on use of that fund for political action and lobbying. The Court rejected a proposal for a similar prohibition on use of mandatory IOLTA funds. That is unfortunate for three reasons. First, use of funds generated by government mandate for political action and lobbying purposes is of questionable

legality. Such uses may be violative of the expressive rights of those forced to pay to support political causes they oppose. Second, the IOLTA funds are sorely needed for front line legal services programs to aid Maine citizens. These scarce funds should not be diverted to support political action and lobbying ventures in support of or opposition to particular social causes. Third, purely as a matter of policy, people who are forced by the government to contribute to a particular program should not be forced to subsidize political action and lobbying for causes with which they may disagree.

There is not much law on the legality of using forced IOLTA contributions for political purposes. What law there is suggests that a challenge to use of compulsory contributions for political purposes might succeed. In *Phillips v. Washington Legal Foundation,* the U.S. Supreme Court held that the interest income generated by funds held in IOLTA accounts is the private property of the owner of the principle. 524 U.S. 156, 172 (1998). This conclusion was reached after a Texas businessman filed suit alleging that the Texas IOLTA program violated the Fifth Amendment by taking his property without just compensation. *Id.* at 163. The Court based its holding on the premise that the Constitution merely protects, rather than creates, private property interests, and therefore property interests must be independently created. *Id.* at 171. ("The State's having mandated the accrual of interest does not mean the State or its designate is entitled

to assume ownership of that interest, as the State does nothing to create value; the value is created by respondents' funds.")

Although *Phillips* held that the interest generated by IOLTA programs was the private property of the owner of the principle, the Court subsequently held in *Brown v. Legal Foundation of Washington,* that IOLTA funds constituted a public use, and that just compensation is "measured by the property owner's loss rather than the government's gain." 538 U.S. 216, 237 (2003). Therefore, the private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken." *Id.* at 236. Nevertheless, the Court held that by the very construct of IOLTA, the owner's opportunities to earn net interest in a separate, individual account must be zero, and thus there is no taking in violation of the Fifth Amendment. *Id.* at 240. *Brown* involved a takings challenge. The concern here is the potential for a First Amendment challenge.

Justice Kennedy, dissenting in *Brown,* warned that the Court would one day be confronted with First Amendment challenges to IOLTA programs and suggested "one constitutional violation (the taking of property) likely will lead to another (compelled speech). These matters may have to come before the Court in due course." 538 U.S. 216, 253 (2003) (Kennedy, J., dissenting). Justice Kennedy stated that "the First Amendment consequences of the State's action have not been addressed in this case, but the potential for a serious violation is there." *Id.*

Recent jurisprudence on similar issues suggests that a First Amendment challenge would present a real risk that could seriously damage the IOLTA program. In *Locke v. Karass,* --- F.3d ---, 2007 U.S. App. LEXIS 18763 (1st Cir. 2007), the First Circuit approved the compulsory taking of deductions from public employee salaries to support legal services related to union organizing and bargaining activities. In so holding, the court distinguished what it held to be the proper use of funds for legal services related activities from what it suggested would be improper use of funds to "subsidize or financially support the political or ideological activities of the union." *Id.* *12 (citing *Machinists v. Street,* 367 U.S. 740, 744 ((1961) (it is a violation of First Amendment to permit forcible collection of funds from employees "to promote the propagation of political and economic doctrines, concepts and ideologies with which [they] disagreed").3 It is not much of a stretch to say the same about political uses of government mandated attorney and client contributions to IOLTA.

Beyond First Amendment issues, authorizing use of IOLTA funds for political action and lobbying is bad policy because it diverts funds needed to support core legal services activities. While many needs discussed above are not being addressed more than minimally, and while some very high priority needs, such as protection for victims of domestic violence, are being addressed

3 *See also Davenport v. Washington Education Assoc.,* --- U.S. ---, 127 S. Ct. 2372, 2377 (2007) ("Agency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment.")

inadequately, IOLTA funds are being used for lobbying and political action programs about which there may be uncertainty as to their proper place in the priority structure. According to the reports provided to the Court by the Maine Bar Foundation, programs that IOLTA funds supported this past year included (1) advocacy favoring citizens of foreign nations receiving in-state tuition rates at the University of Maine, while American citizens of other states would continue to be charged higher out-of-state tuition rates, (2) successful opposition to legislation to hold tenants criminally responsible for vandalism in their apartments, and (3) support for reforms in immigration practices to make it easier for citizens of foreign nations to relocate to the United States and to Maine.

To some, these efforts may be the most important initiatives that IOLTA funds support. Others may disagree. But debate over the legality and propriety of such political uses of funds may erode public support for the IOLTA program and divert attention from the important legal services work that is the justification for mandating IOLTA. I do not join an order that invites use of mandated IOLTA funds for political action and lobbying purposes.

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