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# The IOLTA Program

## The Invisible Hand

Cassandra Chrones Moore

Over the next two or three years more than \$1 billion will funnel into a subterranean network for the support of liberal and progressive causes—without the consent or knowledge of the donors. The Interest on Lawyers' Trust Accounts program, commonly known as IOLTA, began in Florida in 1978. The program requires or permits attorneys to pool temporarily certain client trust accounts, specifically those of a "nominal" or "short-term" nature. The income earned from those pools is then diverted, ostensibly to provide legal services for the poor.

The income, however, has become a substantial subsidy for the political causes of the liberal left. In Massachusetts IOLTA funds have supported efforts to force redistricting to increase minority representation. Social Justice for Women, a lobbying group, receives funds, as does the AIDS Law Project of Gay and Lesbian Defenders, which opposes the testing of medical care providers for AIDS. The Massachusetts Advocacy Center, supported by the Massachusetts Legal Assistance Corporation, helped draft a proposal to eliminate entrance exams at the Boston Latin School, the oldest public school in the country and one renowned for its excellence.

In California IOLTA funds have been used to challenge parental notice laws on abortion. The Idaho Law Foundation supports a humanities council, as well as "law-related education" for elementary and high schools. In short, advocacy and

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lobbying are high on the IOLTA program's socio-political agenda. Service to the poor, its avowed reason for existence, ranks a poor third.

How did such a well-funded but effectively clandestine operation establish itself? At one time interest-bearing checking accounts were unavailable in the United States, and attorneys routinely deposited clients' funds in non-interest-bearing trust accounts. The economic benefit, if any, accrued to the bank and its shareholders. After federal legislation permitted interest-bearing checking accounts, the Florida Bar Association in the late 1970s created the IOLTA program and required attorneys to transfer the interest generated by pooled client funds held in trust for a short period of time to the Florida Bar Foundation for disbursement to organizations that the foundation designated as "charitable."

The requirement occasioned a number of legal challenges, the most important being *Cone v. State Bar*. The plaintiff alleged that the diversion of interest to the Florida Bar Foundation constituted a "taking" of the client's property in violation of the Fifth Amendment and that IOLTA might constitute an "assignment of income," which would raise tax problems with the Internal Revenue Service. The trial and appellate courts ruled that the client had no reasonable expectation of earning any money, since the amounts were too small or held for too short a time to generate income net of expenses. Therefore, the courts held that the state was taking nothing from him. The IRS fell into line by assuring the Supreme Court of Florida that there was no assignment of income.

## The Floodgates Open

As a result, IOLTA programs burgeoned. Enacted generally by the rule of state supreme courts but occasionally by state statute, they have spread to forty-nine states plus the District of Columbia over the past decade. Only Indiana has stood against the tide. The rationale for those programs is always the same: "Singularly [sic] the client funds could never generate enough interest to cover the bank service fees . . . collectively they become effective."

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For a profession so concerned with precise definition of terms, the language justifying IOLTA programs is singularly imprecise. What is a "nominal" sum? How long is a "short period of time"? The individual attorney has discretion to decide. Moreover, the attorney is not required to disclose to his client the disposition of the funds.

The funds generated are far from inconsequential, however, and they have increased as the program has moved progressively towards being mandatory. Initially, state IOLTA programs came in three varieties: voluntary, opt-out, and comprehensive. Voluntary programs left the attorney completely free to choose. In opt-out programs, which Delaware pioneered in 1983, each attorney must decide whether he will participate in the program and inform the entity governing the IOLTA program. If he fails to opt out, he is in the program. Idaho, for example, mandates that an attorney who declines to participate in the program file a written notice of declination with the chief justice of the Idaho Supreme Court between January 1 and January 10 as part of the annual licensing process. Those failing to file become participants automatically.

## Confusing Categories

The third category, labelled "comprehensive" by the American Bar Association, would in plain English be called "compulsory." That category has grown dramatically. In 1987 thirty-two of forty-seven approved IOLTA programs were voluntary. At the 1988 ABA Midyear Meeting, however, the association adopted a new policy "encouraging voluntary programs to adopt and convert to comprehensive IOLTAs," and shortly thereafter seven "converted." The ABA's prose is instructive. *IOLTA Update* notes that "[t]hese states followed the *good example* of those jurisdictions which started out with comprehensive or opt-out IOLTA plans" (emphasis added) and later converted. The language suggests that those who change over have seen the light.

The trend has continued. By 1991 twenty-three states had compulsory programs. Sixteen were opt-out, and three of those had converted from voluntary. Only eleven states had voluntary programs, and the number seemed likely to dwindle as states adopted the Georgia model of phased-in conversion from voluntary to opt-out and then to comprehensive.

## The Treasure Chest Grows

For the ABA and the participating jurisdictions, compulsion has had the happy result of increasing receipts markedly. In 1986, when the majority of IOLTA programs were still voluntary (thirty of forty-four), annual IOLTA income was slightly above \$30 million. By 1989 eighteen of the forty-nine programs were comprehensive, and income had more than doubled. Considering the "miniscule" amounts of interest supposedly earned, the sum is impressive.

A state-by-state survey underlines the progression. According to the ABA's *IOLTA Update*, Illinois's program had \$40,000 in monthly income before converting to comprehensive status in August 1987. After conversion, income skyrocketed to \$303,000 per month, nearly an eightfold increase. The number of eligible lawyers participating more than doubled—from 22 percent to 53 percent. Connecticut's monthly IOLTA income increased from \$95,000 in October 1989 to \$728,000 after conversion. Once again, the number of participating attorneys more than doubled—from 40 percent to 96 percent. New York's jump in IOLTA funds following conversion is still

more impressive. Monthly income rose from \$165,000 to \$1.8 million, while the number of participating attorneys more than tripled.

Shifting from a voluntary to an opt-out program yields substantial, if less striking, increases. For example, South Carolina's monthly preconversion IOLTA income of \$40,000 grew to \$176,000 under the "opt-out" program. The number of participating attorneys rose from 16 percent to 51 percent.

The totals for the forty-nine states and the District of Columbia are staggering. *IOLTA Update* listed the program's revenues for 1990 as \$153 million, of which roughly \$128 million were being distributed in grants. In 1990 the total income since inception was reported as \$335,531,299. By the third quarter of 1991 the total income since inception had ballooned to over half a billion dollars.

### Direction from the Top

Who directs those funds? For what is the money being used? The ABA has established an IOLTA commission and an IOLTA clearinghouse that disseminates information to attorneys and the public. The ABA's principal function, however, is to collect and disseminate information and to act as cheerleader for the IOLTA program. Since ABA membership is voluntary, real power rests with the state bar associations, in which membership is generally compulsory. Those associations can use the threat of suspension or disbarment to discipline members.

While some states' legislatures have promulgated IOLTA programs, the majority of states have enacted IOLTA programs through judicial rule. In those jurisdictions the state bar's IOLTA committee sanctions organizations entitled to collect and distribute funds. In Massachusetts, for example, IOLTA monies funnel through the Massachusetts Bar Foundation, the Massachusetts Legal Assistance Corporation, and the Boston Bar Foundation.

### The Uses of IOLTA Funds

The IOLTA program's stated purpose is to improve the administration of justice and to deliver civil legal services to those unable to afford them. As noted, however, the actual awards support a broad spectrum of liberal political causes. Clients may find one or many or none of the activities funded by IOLTA programs objectionable. The overriding

issue, however, is whether their attorneys have *disclosed* the possible uses of the trust funds and whether the clients have had an opportunity to refuse to participate if they so choose. The two most damning charges that can be levelled against the IOLTA program rest on the *involuntary* participation of the client and the failure to insist on the attorney's affirmative duty to disclose—a failure that effectively erases the age-old principle of fiduciary responsibility. The IOLTA program substitutes the interests of the IOLTA committee and the state bar for those of the client—an ethical breach.

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In 1991 *Massachusetts Lawyers Weekly* listed a number of IOLTA grants for "providing quality civil legal services to persons living at or below 125% of the federal poverty level, which is \$16,750 for a family of four"—clearly an activity consistent with the IOLTA program's stated goals. The grants wandered farther afield, however. In Suffolk County the International Institute of Boston's legal department received \$35,000 from the Massachusetts Bar Foundation "to aid indigent refugees and people seeking asylum, primarily from Southeast Asia, East Africa and Eastern Europe, obtain legal immigration services."

Grants dealing with the public sector often allege defects in "the system." The Massachusetts Legal Assistance Corporation awarded \$11,250 for a "Community Representation Project" of the Center for Public Representation in Hampshire County "to provide legal aid to persons labeled as mentally ill or retarded who are often denied legal aid *by the systemic barriers presented in community residential settings*" (emphasis added). The Massachusetts Bar Foundation added \$18,000 to the pot.

Certain awards have a strong whiff of politicized fishing expeditions. In Middlesex County, South Middlesex Legal Services received \$9,563 from the Massachusetts Legal Assistance Corporation for a "special project to investigate the practices currently employed by the MHFA [Massachusetts Housing Finance Agency] in setting aside the required number of units for low-income people." The Massachusetts Legal Assistance Corporation gave \$6,375 for another project of the South Middlesex Legal Services that would "help uncover harassment, inappropriate worker behavior and undue denial of benefits to needy clients by the Department of Welfare."

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Reviewing IOLTA awards in Boston brings into sharp focus the political nature of the program's activities. In October 1991 Ozell Hudson, executive director of the Boston Bar Association's Lawyers' Committee for Civil Rights under Law, a major IOLTA recipient, assisted a minority community coalition in filing suit in federal district court to force the state legislature to redraw electoral districts in time for the 1992 congressional elections. Hudson claimed that population shifts discovered by the 1990 federal census had uncovered "unfair apportionment" and "intentional discrimination." The same committee established a Fair Housing Project in 1986 and is *initiating* major legislation to discover discrimination in the sale or rental of property. The committee also undertakes *systemic testing* to identify brokers and landlords who discriminate.

The Disability Law Center, based in Boston, received numerous awards in 1991, the largest being \$120,000 from the Massachusetts Legal Assistance Corporation for "statewide general support." In September 1991 the center proved instrumental in obtaining the reinstatement of David Freeman, a fireman in Duxbury, who had assaulted and permanently injured his wife seven

years earlier. The judge found him not criminally responsible "by virtue of a temporary mental illness"—evidently brought on by his wife's request for divorce. The town fired Freeman twice; but the managing attorney for the Disability Law Center, Jane Alper, was able to persuade the Massachusetts Commission against Discrimination that Freeman had suffered "handicap discrimination." That commission ordered the fireman reinstated and awarded him \$200,000 for back pay and emotional distress, plus 12 percent interest.

Nor is Massachusetts alone. The State Bar of California, through the Legal Services Trust Fund, has funnelled monies to the National Center for Youth Law. That IOLTA recipient has mounted a challenge to the constitutionality of a California statute requiring minors to obtain the consent of a parent or a court order before obtaining an abortion.

### Defending the Turf

However questionable the use of clients' funds to advance a sociopolitical agenda may be, the IOLTA program publicizes its services and guards its prerogatives jealously. *Massachusetts Lawyers Weekly* claims 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." Only the hardest of heart could raise doubts about the means used to reach such laudable goals.

Attempts to restrict the uses of the funds have come under steady attack, coupled with ridicule. "It's Baaaaaack! McCollum-Stenholm Bill Threatens IOLTA Autonomy Once Again," trumpeted one *IOLTA Update* headline of an article on the Legal Services Reform Act of 1991. According to the *Update*, the bill seeks "to impede, restrict and control how civil legal services are delivered to the country's indigent citizens. . . . [It] includes severe restrictions on the extent to which IOLTA funds may be utilized by legal services programs which also receive funding from the Legal Services Corporation." In fact, the bill, now making scant progress in the House of Representatives, constitutes another attempt to rein in the Legal Services Corporation, this time by controlling the activities of IOLTA programs across the country that are in a sense its progeny.

### The Legal Services Corporation Nexus

To understand the true nature of the IOLTA phenomenon, one must revisit the conflict-ridden history of the Legal Services Corporation and examine that organization's ties to the IOLTA program. Established in 1974, the Legal Services Corporation was to provide nonpartisan legal aid for the poor in civil litigation. In fact, it engaged in political advocacy by litigating, lobbying, filing class-action suits, and disseminating propaganda to further a radical left-wing agenda. Ironically, the grant recipients neglected the needs of the indigent and even insisted that they could not serve clients because of "impending" congressional cut-backs, although funds were in fact available.

In 1977 Congress added restrictive amendments to the Legal Services Corporation Act of 1974 in an attempt to curb abuses; in 1980 it allowed the corporation's authorization to lapse. In 1983 a series of hearings held by Sens. Orrin Hatch, Charles Grassley, and Jeremiah Denton before the Senate Committee on Labor and Human Resources uncovered in detail the political nature of the corporation's activities and the network of grass-roots organizations that were campaigning actively for left-wing causes.

Despite those discoveries, support for the Legal Services Corporation remained strong. Stymied in their efforts to abolish the organization or even to push through sweeping reforms, the Reagan administration and its congressional supporters managed to reduce the corporation's political scope by attaching riders to annual appropriations bills. The riders contained important restrictions on lobbying, class actions, representation of illegal aliens, and the handling of abortion cases, activities that now figure prominently in IOLTA.

Throughout the controversies, however, Congress continued to vote funds for the corporation. Congressional controversy continues, fueled now by the rapidly escalating IOLTA treasure chest, guarded jealously by the ABA and the state IOLTA committees. Those funds are all but unrestricted, hence the attacks on the McCollum-Stenholm bill, which would subject IOLTA programs to the same restrictions imposed on the Legal Services Corporation. To the extent that the Legal Services Corporation and its grantees have been restrained from engaging in the flagrant social advocacy of the late 1970s, organizations funded through the IOLTA program would also be prevented from promoting political or ideological causes. The opposition on the part of the ABA has been bitter.



It would take a massive investigative effort to trace the flow of funds and thus to determine the extent to which IOLTA monies also support Legal Services Corporation grantees. According to the Washington Legal Foundation, IOLTA awards

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have become the main source of unrestricted funding for those grantees over the past three to five years and have enabled them to engage in political activities that would otherwise be difficult or impossible. California is a case in point. When the Legal Services Corporation reduced its 1990 grant to California's National Center for

Youth Law because the plaintiffs in its abortion case were not indigents, California's Legal Services Trust Fund continued to support the center's political activities with IOLTA monies.

### Legal Challenge

To date, efforts to oppose the IOLTA program that were based on the Fifth and Fourteenth Amendments have been unsuccessful. The latest and most complex of the legal challenges, however, has broken new ground. In April 1991 the Washington Legal Foundation filed suit in the Massachusetts federal district court that alleged that the state's IOLTA program "violates the Plaintiffs' constitutional rights as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution."

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**By alleging that the IOLTA program impinges on First Amendment rights, the Washington Legal Foundation further expanded the legal challenge to the program. Plaintiffs argued that requiring attorneys to support the program under the threat of disbarment or suspension, although the program may fund causes to which they or their clients object, is no less offensive than compelling them to contribute directly.**

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All members of the Supreme Judicial Court of Massachusetts were named as defendants, together with the Massachusetts and Boston Bar Foundations and the Massachusetts Legal Assistance Corporation. Named as well were the chairmen of the Massachusetts IOLTA committee and the board of bar overseers.

In the past defenders of the IOLTA program have cast aside the Fifth Amendment by arguing successfully that there would be no interest at all, absent an IOLTA program. A "taking" was therefore logically impossible. The suit initiated by the Washington Legal Foundation focused not on a taking of the interest generated by the pooled trust accounts but on "an unconstitutional taking of the beneficial use and equitable interest in the principal." Seizure of that beneficial use lay at the heart of the argument.

Regardless of yield, the plaintiffs claimed, equitable or beneficial interest constitutes a form of property ownership. The property need not be income-producing since "one incident of ownership is the right to keep land unoccupied and unproductive." Therefore, "third parties [the state] may not exploit unproductive property without the owner's consent."

Since an IOLTA account is a revocable trust, the client has the right not only to exclude others but to direct how he wishes the property to be used. The IOLTA program interferes with that right and thus sanctions an uncompensated "taking."

The essence of the Washington Legal Foundation's takings claim was that the IOLTA program appropriates clients' property to finance governmental goals that, however beneficial, should be supported by the public at large. If equity requires subsidized legal services for the poor, the foundation argued, then "either the bar leadership and the bench should persuade lawyers to donate their own funds or time . . . or they should persuade the legislature to appropriate tax monies for such purposes, but the judicial seizure of clients' beneficial or equitable interests in the clients' own property for such purposes is an unconstitutional taking." Thus, the foundation contended that no compelling state interest justifies interference with the clients' property rights. The foundation asserted that currently "the government is using someone else's property to generate revenue or profits, and without having to pay the market lending rates to do so."

The arguments of the defendants on the takings issue were dismissive. Their memorandum treated as inconsequential the argument based on the beneficial interest in the principal, focused instead on the interest generated by IOLTA accounts, and repeated the old argument: without the IOLTA program there would be no interest, therefore there can be no "taking." In any case, the defendants contended that the interest, having been generated solely through the IOLTA program, "is not the client's property."

### The First Amendment

By alleging that the IOLTA program impinges on First Amendment rights, the Washington Legal Foundation's suit further expanded the legal challenge. The IOLTA program, the plaintiffs charged, forces clients to support political and ideological beliefs and causes that they may well find repugnant. The First Amendment guarantees not only

freedom of speech and association but a negative right as well, "the right not to be compelled to support other speech or associational interests." Requiring attorneys to support the program under threat of disbarment or suspension, although the IOLTA program may fund causes to which they or their clients object, is no less offensive than compelling them to contribute directly.

The defendants' response was illuminating. They contended: "Plaintiffs' real complaint may be that they object to some of the uses of funds by the charities. . . . [H]owever, *plaintiffs have no right to have funds spent only for activities with which they agree*" (emphasis added).

### Dismissal and Appeal

On May 28, 1992, U.S. District Judge Joseph L. Tauro upheld the IOLTA program by allowing the defendants' motion to dismiss. In an opinion exemplary for its specious reasoning, Judge Tauro concluded that the Fifth and Fourteenth Amendment claims were without merit since the plaintiffs had no property interest in their trust account monies. Citing decisions in favor of IOLTA programs in other states, he quickly disposed of the taking of interest; but he avoided coming to grips with "the seizure of the beneficial use of the principal," the core issue of the "takings" challenge. Instead, he turned to the nineteenth-century doctrine of the "prudent man" that requires of a trustee only that he exercise "a sound discretion." The citation was all but irrelevant.

The First Amendment claim gave Judge Tauro greater difficulty. To make a just assessment, he noted, "it is necessary to determine, first, whether the plaintiffs allege any compulsion by the mandate of the IOLTA program and, second, whether they allege that the IOLTA program associates them with any 'speech.'" Although Massachusetts went "comprehensive" in 1990 and the state's IOLTA committee threatens uncooperative attorneys with suspension, Judge Tauro turned mandatory into voluntary. According to Tauro, "[t]here is no such compulsion here." Lawyers could refuse to hold client funds at all or hold them in individual interest-bearing accounts, he asserted. The alternatives are fictional since practicing attorneys can scarcely refuse to hold funds, and small individual accounts often impose a costly administrative burden. In transfers of property, moreover, federal law generally requires trust accounts.

Despite that setback, the legal challenge continues. On June 24, 1992, the Washington Legal Foundation filed its notice of appeal.

### The Role of Technology

Given the legal profession's tenacious hold on its perquisites, the support of the ABA, the Legal Services Corporation, and many in Congress, the debate as currently framed may never be resolved. Recent developments in data processing technology, however, are making it possible to track small sums deposited for very short periods of time, to compute interest, and to credit the account of each individual client with the sum. Thus, the factual premise underlying all IOLTA programs, that nominal sums held for a short period of time cannot produce interest net of expense for an individual client and should therefore be pooled, now seems to be invalid.

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Given such technological innovations, it may soon be as cost-effective to set up a separate account for each client as it has been to establish a trust account for clients' pooled funds. Then the legal profession and society will have to find another way to fund legal services for the poor. Perhaps they will also be able to devise a more open, equitable, and honest program.

### Selected Readings

- Rounds, C. "Social Investing, IOLTA, and the Law of Trusts: The Settlor's Case against the Political Use of Charitable and Client Funds." *Loyola University Chicago Law Journal*, Vol. 22 (1990).
- Hatch, O.G., Denton, J. *et al.* *The Robber Barrons of the Poor*. Washington, D.C.: Washington Legal Foundation, 1985.