Background to IOLTA Rule Amendment

Accompanying Rule Amendment Effective July 1, 2019

We have carefully reviewed the many comments received in response to the posting of proposed changes to the IOLTA Rules, and we thank those commenters who took the time to provide thoughtful and helpful comments.

We now provide the background perspective requested by many of the commenters.

The concerns giving rise to the proposals for which the Court has sought public input did not begin with questions regarding lobbying. Instead, the concerns relate to the accounting system used by the Maine Justice Foundation, to whom the funds are entrusted for distribution, and the substantial administrative costs of the Foundation that appeared to be reducing the IOLTA funds that are available to support access to justice in Maine.

The Court takes very seriously its responsibilities to assure appropriate use of the IOLTA funding it has mandated. Several years ago, the Court raised concerns with the Foundation regarding its accounting methodology, particularly related to the rise in administrative costs. The concerns regarding the increased administrative costs to which IOLTA funds were being allocated led the Court to seek assurances that the accounting for all IOLTA funds was being undertaken in a careful and reliable manner. Several discussions were held with Foundation leaders to address accounting practices and budgeting policies. The Foundation's initial responses regarding the actual allocation and uses of the IOLTA funds did not alleviate those concerns, and the Court sought a more detailed analysis.

In response, the Foundation provided an analysis to the Court in a report entitled, "An Examination of Maine's IOLTA Program," dated October 2018. We now understand that, in earlier years, the costs of administering the IOLTA funds often consumed less than 20% of the IOLTA funds annually. In recent

years, the increased staffing at the Maine Justice Foundation has resulted in the use of an expanding proportion of IOLTA funds to support that growing staff. [1]

For example, the Foundation reported that, in 2016, fully 54% of IOLTA revenues were spent on staffing and operational costs for the Foundation, leaving only 46% of the funds to be distributed to the providers of various legal services for Maine's low income and elderly citizens. A similar administrative use of the funds occurred in 2017 (48% was allocated to administrative costs) and 2018 (40% was allocated to administrative costs).

Throughout this process, the Court consistently expressed its goal of maximizing the IOLTA funds available to Maine people in need of legal assistance. Conversations regarding a cap on administrative costs led the Court to draft a proposed amendment to the IOLTA Rule.

Separately, during the time that the Court was considering the administrative costs allocated to IOLTA, a member of the Bar raised a different concern, specifically questioning the use of mandatory IOLTA funds for lobbying purposes. Similar concerns had been raised by Justice Robert Clifford and Justice Donald Alexander in 2007 when the IOLTA rules were originally promulgated. *See* 2007 Separate Statements of Non-Concurrence, attached.

To obtain further input on that issue, we included the proposal for a limitation on lobbying in the draft rule that contained the accounting and administrative cost amendments.

To be clear, the draft limitation on legislative lobbying was not, and is not, intended to include limitations on other types of systemic advocacy, such as impact litigation or administrative advocacy for individuals or groups of clients. Nor did the Court intend to prohibit organizations that do engage in legislative lobbying from receiving IOLTA funds to be used for other purposes. In addition, we unintentionally created confusion by referring to the provision of "direct

[1] We acknowledge the Foundation's representation that some of the additional paid Foundation staff, who may be able to seek out and secure funding from *other* sources, may ultimately provide further benefits to Maine people in need of help, but that broader goal should not reduce the immediate benefits of IOLTA funding as much as it has. Perhaps the time has come for a more far-ranging discussion of civil legal services funding, to include the possibility of a formal Access to Justice Commission for Maine.

legal services." We take the opportunity to address that issue in the Amended Rule promulgated today. *See* M. Bar R. 6(e)(3).

Finally, we note that most of the comments received by the Court have focused on the potential limitation on legislative lobbying and voter advocacy. Many commenters did not even mention the accounting or administrative proposals, and those that did were primarily in favor of clearer accounting and reduced administrative expenses.

Accordingly, having carefully reviewed the comments sent to the Court, we have concluded that action is required regarding the more pressing concern relating to budget and administrative costs, and that further study of the potential limitation on lobbying is appropriate. We therefore bifurcate the substantive issues and take the following actions.

Accounting and Administrative Costs

The Court today officially promulgates an amended rule, clarifying the breadth of acceptable uses of IOLTA funding, setting out requirements for the Foundation's accounting of IOLTA funds, and limiting the use of IOLTA funds for the Foundation's administrative costs to 22% annually, with a floor of $120,000,[2] effective in the calendar year beginning on January 1, 2021.

Use of Funds for Legislative Lobbying

Further study regarding the potential limitations on the use of court-mandated IOLTA funds for lobbying purposes will be undertaken before further action of the Court. A small working group will be assembled to make recommendations to the Court, and a public hearing will follow.

To clarify the scope of consideration for the working group, we again emphasize that any potential limitation would apply only to the lobbying generally understood to be legislative and candidate-based lobbying and not to the variety of systemic advocacy that includes litigation or administrative advocacy.

[2] The floor is intended to recognize that there are basic administrative costs that must be budgeted, and that, should the IOLTA revenues dip below $600,000 in any applicable 3-year calculation period, $120,000 from IOLTA funds will be available to the Foundation for its administrative costs.

In addition, as noted above, in the event that any limitation is ultimately promulgated, we clarify the Court's intention to allow IOLTA funds to be allocated to a provider notwithstanding that provider's participation in lobbying services that are separately funded through other sources.

Following the receipt of input from the anticipated working group, the Court will announce a date and time for a public hearing to allow interested parties to be heard regarding any potential limitation on the use of IOLTA funds.

Access to Justice

In conclusion, we thank the many members of the Maine Bar who have been and continue to be supportive of improvement in access to justice in Maine. We are fortunate to have a provider community that is dedicated to providing a broad range of legal assistance to Mainers in need and to attempting to fill the ever-present gap between the needs and the resources available. We look forward to a robust and productive discussion regarding the delivery of civil legal services in Maine.

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 tenant fails to pay the rent, causes disturbances that disrupt the lives of others, or

[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.

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.