DISTRICT OF COLUMBIA
COURT OF APPEALS

In re Amendment of Rules Governing Interest on Lawyers' Trust Accounts (IOLTA)	No. M – 235 – 09

COMMENTS OF THE ACCESS TO JUSTICE COMMISSION IN SUPPORT OF PROPOSED AMENDMENTS TO THE RULES GOVERNING INTEREST ON LAWYERS' TRUST ACCOUNTS

The District of Columbia Access to Justice Commission ("Commission") submits these comments in support of the amendments, recommended by the District of Columbia Bar and the District of Columbia Bar Foundation, to the DC Rules of Professional Conduct and the Rules Governing the DC Bar respecting the Interest on Lawyers' Trust Accounts ("IOLTA") program.[1] The Court published the proposed amendments for comment on November 19, 2009.

This Court established the Commission in 2004 to address the scarcity of civil legal services available to low and moderate income residents of the District of Columbia and to break down barriers in the civil justice system that impede equal access to justice. In addition to judges of this Court and the Superior Court of the District of Columbia who are not parties to these comments, the Commission includes leaders of the DC Bar, the DC Bar Foundation, the DC Consortium of Legal Services Providers, and other community leaders.

In carrying out the mandate given it by this Court, the Commission has sought to strengthen funding for legal services for the poor and disadvantaged in the DC community. That funding is currently in crisis:

[1] The four judicial members of the 17-member Commission do not join in these comments and have not participated in their preparation or review.

> "The recession is decreasing the availability of legal services while the need is increasing. Virtually every source of funding for civil legal aid in the District has diminished over the last year. Programs report losing more than 25% in revenue and have shed approximately 12.5% of their lawyers and nearly 40% of non-lawyer staff, including paralegals, social workers, case managers and administrative support. As a result of these staff cuts, thousands of District residents who need legal help did not get served."[2]

A major component of the decrease in funding is the decline in income produced by IOLTA. In fiscal year 2008, IOLTA produced over $2 million for funding of civil legal services. As a result principally of the unprecedented decline in interest rates, IOLTA revenue dropped by over 60% in fiscal year 2009. The first six months of the current fiscal year forecast the likelihood of a still further decline.[3]

Adoption of the proposed amendments will be a significant step toward restoring and enhancing IOLTA funding. Today, DC lawyers and law firms are free to opt out of IOLTA. Moreover, financial institutions, approved by the Board on Professional Responsibility as depositories for IOLTA accounts, are free to set interest rates at whatever levels they wish. Following the path chosen by the majority of States, the amendments will change these overly permissive rules. First, they will move the DC Bar from an "opt-out" to a mandatory program, requiring all lawyers admitted to practice here – with an exception for lawyers in multi-state practice discussed below – to place into IOLTA accounts all IOLTA-eligible funds. As of January 1, 2010, 41 States require all practicing lawyers to participate in IOLTA.[4] Second, they will require financial institutions that wish to be approved as depositories for IOLTA accounts to agree to pay interest and dividend rates on those accounts comparable to the rates their non-

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[2] Joint Report of the DC Access to Justice Commission and the DC Consortium of Legal Services Providers, "Rationing Justice: the Effect of the Recession on Access to Justice in the District of Columbia" (November 2009), at 1.

[3] Id. at 5-6.

[4] ABA "Legal Services Now," Issue 71 (November 6, 2009). The Supreme Court has upheld the constitutionality of mandatory IOLTA. Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003).

IOLTA customers receive on comparably situated non-IOLTA accounts. Twenty-eight States have this requirement in place.[5]

1. Mandatory IOLTA

Movement from the current opt-out program to a mandatory one can be expected to add significantly to IOLTA revenues. Under current rules that have been in place since 1985, DC lawyers and law firms may opt-out of IOLTA by filing a single notice with this Court.[6] Since no permanent record has been kept of opt-out filings, there is no way of learning how many attorneys are not participating in IOLTA or how many attorneys may be depositing only a portion of the IOLTA-eligible funds that they receive in IOLTA accounts.[7] The proposed amendments will end the current uncertainty respecting lawyers' IOLTA obligations, and require all DC lawyers to deposit all IOLTA-eligible funds in an IOLTA account with an approved financial institution.

According to the DC Bar Foundation, which conducted a 14-month review of the current IOLTA program, converting to mandatory IOLTA has "produced measurable revenue benefits."[8] For example, according to the ABA Commission on IOLTA, in the six months before conversion to mandatory IOLTA in March 2005, South Carolina averaged approximately $177,000 in

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[5] ABA "Legal Services Now," Issue 71 (November 6, 2009).

[6] Section (f), "Interest on Lawyers Trust Accounts Program," Appendix B to Rule X, Rules Governing the District of Columbia Bar. The rules expressly provide, "Any such submission need not be renewed for any ensuing year." Id. § (f)(1).

[7] IOLTA-eligible funds are defined as "funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or a third-party in excess of the costs incurred to secure such income." Proposed Rule 1.15(b). Proposed Comment [5] to Rule 1.15 provides that "the determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer."

[8] Report of the DC Bar Foundation's IOLTA Rules Review Subcommittee Proposing Revision of the Rules Governing the District of Columbia IOLTA Program (November 2, 2007) ("Bar Foundation 11/2/07 Report") at 10. The Bar Foundation Report was published February 5, 2009 by the DC Bar as an attachment to the draft amendments to the IOLTA Rules circulated by the Bar for pubic comment.

monthly IOLTA revenue. In the 15 months since conversion, monthly income averaged $371,000, a gain of 110%. Comparable figures for Indiana, which converted in July 2005, were $50,000 on average for the six months prior to conversion and $146,000 on average for the 12 months thereafter, an increase of 192%. Utah, which also converted in July 2005, experienced a 130% increase when its average monthly revenue over the six months prior to conversion, $16,500, is measured against the revenue received in the most recent month surveyed, June 2006, $38,000.[9]

The Access to Justice Commission approves the exception to the mandatory IOLTA rule provided in the proposed amendments which was worked out by the DC Bar to protect DC lawyers in multi-state practice from conflicting IOLTA mandates. The proposed language in the last sentence of proposed Rule 1.15(b) along with the explanatory and clarifying language in Comments [3] and [4] to that rule strike what should be a workable balance between the objectives of enhancing the participation of DC lawyers in IOLTA as well as IOLTA revenues on the one hand and avoiding placing DC lawyers in multi-state practice under conflicting IOLTA obligations on the other.

2. Comparable IOLTA Rates

Rate comparability, like mandatory IOLTA, can be expected to bring about significant increases in IOLTA revenues. Prior to the current recession and drop in interest rates to near zero, banks in DC paid low rates on IOLTA accounts, sometimes as low as one-tenth of one percent.[10] The Bar Foundation summarized the situation as follows:

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[9] ABA Commission on IOLTA, "Income Changes from 2005 Conversions to Mandatory IOLTA (July 2006)," attached as Exhibit No. 1. The ABA Commission report notes that the increases in income in the three states took place during a time of increasing interest rates, and that a portion of the increases may be attributable to other new rule provisions.

[10] Bar Foundation 11/2/07 Report at 13.

> "As of May 2007, with the Federal Funds rate at 5.25%, IOLTA rates in D.C. averaged 1.6%, and ranged from a low of 0.15% to a high of 4.25%. Putting to one side advances at five banks brought about by the Foundation's DC-IOLTA Preferred Bank Initiative, through which the Foundation negotiates with individual banks to provide higher rates on IOLTA accounts, most of the DC IOLTA accounts were held at banks paying rates of 0.987% or lower [footnote omitted]."[11]

According to the ABA Commission on IOLTA, again by way of example, Massachusetts, which implemented rate comparability on January 1, 2007, experienced an annual increase of 88%, with revenues moving from $17 million to $32 million and the average interest rate increasing from just over 1% to an average of 2.5% immediately upon implementation. Illinois, which made rate comparability a requirement effective June 1, 2007, had even more dramatic results. Again according to the ABA Commission, Illinois IOLTA revenue went from less than $5 million to approximately $17 million in the first year of comparability, an increase of 240%.

Interest rates are now at historic lows. By all accounts, they are likely to rise in the near future. The proposed rate comparability amendment will ensure that IOLTA accounts are not, as they have been in the past, left behind. Under the proposed rules, participation in IOLTA remains voluntary for all financial institutions, but for those that choose to benefit from this substantial market, it is appropriate and reasonable to require them to treat IOLTA accounts equally with other comparable deposits.

Conclusion

IOLTA has been an important engine for funding of legal services for the poor and disadvantaged. The proposed amendments hold promise of greatly increasing that funding at a time when it is so desperately needed. Lawyers have an obligation to assist in meeting the need for legal services of persons who, by reason of economic status or other disadvantage do not

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[11] Id.

have access to them.[12] Adoption of the proposed amendments strengthening IOLTA procedures and enhancing IOLTA earnings will assist members of the bar in fulfilling that obligation and advance the cause of serving the legal needs of disadvantaged persons. The Commission respectfully urges this Court to move promptly to approve the amendments to the IOLTA Rules proposed by the DC Bar and the DC Bar Foundation.

Respectfully submitted,

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[12] The Court has recognized this obligation in Rule 6.1 of the Rules of Professional Conduct.

EXHIBIT NO. 1

Income Changes from 2005 Conversions to Mandatory IOLTA
prepared by the ABA Commission on IOLTA
July 2006

State	Effective Date of Mandatory IOLTA	Date Income Shown Through	Average Monthly Income Six Months Before Conversion	Average Monthly Income Since Conversion	Income Most Recent Month	Percent Change (from Pre-conversion Average to Most Recent Month)	Income FY2005 (Fiscal Year of or Prior to Conversion)	Income FY2006 (Fiscal Year Following Conversion)	Percent Change from FY2005 to FY2006
Indiana	07/01/05	6/30/06	$49,814	$145,550	$216,641	334.9%	$502,179	$1,670,343	232.6%
South Carolina*	03/01/05	6/30/06	$176,713	$371,105	$434,289	145.8%	$2,557,686	$4,102,059	60.4%
Utah**	07/01/05	6/30/06	$16,500	N/A	$37,958	130.0%	$238,851	$374,748	56.90%

Notes:
The increases in income in all three states took place during a time of increasing interest rates. Also, a portion of the increases may be attributable to new rule provisions in all three states defining reasonable bank fees, prohibiting negative netting and/or imposing a comparability requirement on banks.

* South Carolina's FY2005 income figure includes three months from when the program operated as a mandatory program. The progam generated $1,439,870 in FY2004, its last full year as an opt-out program. Its FY2006 income is a 184.9 percent increase over FY2004.

** Utah attorneys are not required to certify their compliance with the mandatory requirement until September 1, 2006. Certification forms became available in June 2006, and the Utah Bar Foundation expects a significant increase in revenue as certification proceeds.