

1998

Iola and Professional Responsibility in the Shadow of *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*

Gerald A. Gordon

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Gerald A. Gordon, *Iola and Professional Responsibility in the Shadow of Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 6 J. L. & Pol'y (1998).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol6/iss2/5>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**IOLA* & PROFESSIONAL RESPONSIBILITY IN
THE SHADOW OF WASHINGTON LEGAL
FOUNDATION v. TEXAS EQUAL ACCESS TO
JUSTICE FOUNDATION****

*Gerald A. Gordon****

The Court declines to address the expressed social, political or public policy concerns related to the current operational procedures of the Texas Equal Access to Justice Foundation as it administers the [IOLA] Program.¹

This decision is an important one because it contradicts every other court in the country that has addressed this issue, including two of our sister circuits and a large number of state appellate courts. . . . [T]his case poses an unwarranted threat to a primary source of funding for public interest legal organizations in this circuit at a time when these organizations are already struggling for their lives financially.²

* In New York, the subject program of this Comment is called IOLA, Interest on Lawyers' Accounts. Other jurisdictions refer to this program as IOLTA, Interest on Lawyers' Trust Accounts, or IOTA, Interest on Trust Accounts. Hereinafter, all such programs will be referred to as "IOLA" regardless of the individual states' actual acronym.

** 94 F.3d 996 (5th Cir. 1996) [hereinafter WLF].

*** Brooklyn Law School Class of 1999; B.A. Bucknell University, 1994.

¹ Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 11 (W.D. Tex. 1995) [hereinafter Washington Legal Found.].

² Washington Legal Found. v. Texas Equal Access to Justice Found., 106 F.3d 640, 641-42 (5th Cir. 1997) (Benavides, J., dissenting).

INTRODUCTION

The Preamble to the American Bar Association's ("ABA") Model Rules of Professional Conduct ("MRPC") states that "[a] lawyer should be mindful . . . of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence on their behalf."³ Similarly, the New York State Bar Association's ("NYSBA") Code of Professional Responsibility ("CPR") states that "every person in our society should have ready access to the . . . professional services of a lawyer . . ."⁴ Working to provide legal services to all members of society, almost every state has adopted an IOLA program.⁵

The New York State IOLA program⁶ was created to manage

³ MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997).

⁴ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1996). Hereinafter, the ABA's MRPC and NYSBA's CPR are to collectively be called the "Professional Codes."

⁵ IOLA programs exist in 49 states and the District of Columbia. Risa I. Sackmary, Comment, *IOLTA's Last Obstacle*: Washington Legal Found. v. Massachusetts Bar Found.'s *Faulty Analysis of Attorneys' First Amendment Rights*, 2 J.L. & POL'Y 187, 189 (1994). The remaining hold-out state is Indiana which has "consistently refus[ed] to accept" an IOLA program. *Id.* See *infra* note 55 for a list of these IOLA programs.

⁶ The IOLA program discussed in this Comment is the New York State program. Any other state's program will be expressly stated as such.

The New York State IOLA program was created to combat the lack of availability of "civil legal services to poor persons [which is considered] essential to the due administration of justice." Legislative Findings and Declaration, N.Y. STATE FIN. LAW § 97-v (McKinney 1997). The purpose of the program is to provide "funding for providers of civil legal services in order to ensure effective access to the judicial system for all citizens of the state to the extent practicable within the means available for that purpose." *Id.* The IOLA program established an IOLA fund to

receive funds from any source for disbursement to nonprofit legal services providers for charitable purposes The IOLA fund will receive the interest earned by qualified client funds held by attorneys in unsegregated interest-bearing accounts designated IOLA accounts. Funds which qualify for deposit in IOLA accounts are those which . . .

interest generated from trust funds containing clients' money that do not justify investment for the benefit of a client because they are either: 1) of a nominal amount or 2) held for a short period of time.⁷ While these funds may not justify investment, it does not preclude the trust account's ability to earn interest. Under the IOLA program, interest generated on these accounts is distributed to "not-for-profit . . . entities for the purpose of delivering civil legal services to the poor."⁸ The goal is to provide "civil legal services

attorneys do not deposit in segregated accounts because insufficient interest would be earned to justify the expense of administration. When pooled in an IOLA account, funds which would be unproductive as individual accounts will generate income, the beneficial interest in which will be held by the IOLA fund exclusively for charitable purposes.

Id.

⁷ See N.Y. JUD. LAW § 497 (McKinney 1997) (explaining that "[q]ualified funds' are moneys" that are "too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner" and are therefore able to be a part of the IOLA program); Betsy Borden Johnson, Comment, *"With Liberty and Justice For All" IOLTA in Texas - The Texas Equal Access to Justice System*, 37 BAYLOR L. REV. 725, 726 (1985) (asserting that funds that are nominal in amount or held for a short period of time do not justify investment because the amount of interest generated will not produce enough funds to cover the cost of maintaining the account and therefore will not benefit the client by producing income).

⁸ N.Y. STATE FIN. LAW § 97-v (McKinney 1997). In 1995, the New York State IOLA program generated \$8.8 million, the second largest IOLA fund in the United States. Jill Schachner Chanen, *Not With My Money You Don't: Conservative Group Tries to Shut Down Lawyer Trust Account Payouts*, A.B.A. J., Nov. 1997, at 42.

"No less than [75%]" of the generated funds will be distributed to non-profit organizations that deliver civil legal services to the poor. N.Y. STATE FIN. LAW § 97-v(3)(b). The remaining 25% of the funds are to be used to improve the "administration of justice" which includes "the provision of civil legal services to groups currently under served by legal services, such as the elderly and the disabled, and the enhancement of civil legal services to the poor through innovative and cost-effective means, such as volunteer lawyer programs and support and training services." N.Y. STATE FIN. LAW § 97-v(3)(c).

to groups currently underserved by legal services” and to enhance “civil legal services to the poor.”⁹

In a recent challenge to Texas’ IOLA program, the Fifth Circuit held that the IOLA program was unconstitutional because it was a taking of property from the client.¹⁰ However, both the District Court and the Fifth Circuit “decline[d] to address” the ethical implications of such a holding.¹¹ This Comment focuses specifically on the “ethical implications” and the conflict that the Fifth Circuit has created with the Professional Codes.¹² Part I explains

⁹ *Id.*

¹⁰ *WLF*, 94 F.3d 996, 1004 (5th Cir. 1996). This challenge originated in the United States District Court, Western District of Texas and can be found at 873 F. Supp. 1 (W.D. Tex. 1995). The District Court decision was affirmed in part, vacated in part and reversed in part by *WLF*, 94 F.3d 996. A rehearing and suggestion for rehearing *en banc* was denied by the Fifth Circuit Court of Appeals, 106 F.3d 640 (5th Cir. 1997); the Supreme Court denied certiorari, 117 S. Ct. 2514 (1997). Subsequently, under the caption of *Phillips v. Washington Legal Found.*, 117 S. Ct. 2535 (1997), certiorari was granted. Arguments were heard before the Supreme Court on January 13, 1998 but to date no opinion has been handed down. Dana Coleman, *IOLTA Case Could Threaten Funding*, N.J. LAWYER, Jan. 12, 1998, at 1. See discussion *infra* for a history of the suit.

¹¹ *WLF*, 94 F.3d 996 (the court did not expressly decline to address the “social, political or public policy concerns[,]” however, it is presumed that they agreed with the District Court because they did not discuss these issues); *Washington Legal Found.*, 873 F. Supp. 1, 11 (W.D. Tex. 1995) (“The Court declines to address the expressed social, political or public policy concerns related to the current operational procedures of the Texas Equal Access to Justice Foundation as it administers the [IOLA] program.”).

¹² See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997) (stating that a lawyer should strive to aid those that cannot afford legal services); MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1997) (explaining that lawyers have a duty to provide legal services for those that cannot afford them and to participate in activities to improve the law), MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1996) (stating that every person should be able to obtain legal services); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1996) (stating that lawyers should “assist in making legal services fully available”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-16 (1996) (stating that lawyers should “support and participate” in activities enabling the provision of legal services to all people); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1996) (stating that lawyers should support programs that provide legal services to those that cannot afford them); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1996) (stating that lawyers should

the concept and history of IOLA; Part II discusses the Fifth Circuit's decision; Part III presents the conflicting decisions of the First¹³ and Eleventh¹⁴ Circuits; and Part IV highlights the relevant portions of the Professional Codes and discusses the possible ramifications to both Professional Codes in light of the Fifth Circuit's decision. This Comment concludes that the Professional Codes clearly express aspirations for lawyers to aid in providing legal services to those who cannot afford them either by directly providing these services or by participating in and supporting the IOLA programs of their individual states.

I. THE CONCEPT AND HISTORY OF IOLA

A. *The Concept of IOLA*

In carrying out business transactions, lawyers are given money by or on behalf of their clients.¹⁵ Lawyers are required to place this money into a trust account called a "demand account"¹⁶ that is not connected with their own property.¹⁷ In addition, a lawyer must notify a client when money has been received and must promptly deliver to the client any money that is the property of the client.¹⁸

support programs to improve the legal system); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-9 (1996) (stating that lawyers should assist in making changes to improve the legal system).

¹³ *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993) [hereinafter *Massachusetts Bar Found.*].

¹⁴ *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir.), *cert denied*, 484 U.S. 917 (1987).

¹⁵ "Some examples include money received from a client's debtor, from a defendant to satisfy a judgment, from a settlement, or from a client to be used in a particular transaction." Johnson, *supra* note 7, at 726.

¹⁶ These trust accounts are called "demand accounts" because of the duty of the lawyer to place clients' funds into "a trust account that permits withdrawal on demand." See *WLF*, 94 F.3d at 998.

¹⁷ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1996).

¹⁸ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102. For examples of moneys that a

Before 1980, federal law did not allow banks to pay interest to these demand accounts.¹⁹ As a result, demand accounts functioned as interest-free loans to the bank.²⁰ To prevent banks from being so unjustly enriched, new federal banking regulations created the Negotiable Order of Withdrawal ("NOW") account.²¹ NOW accounts, which operate as interest-bearing checking accounts,²² "created a vehicle for [lawyers] to pool client funds into an interest-bearing trust account, provided that none of the funds belong to a for-profit corporation."²³ But since the costs of maintaining the trust account were not permitted to be paid from the interest it generated,²⁴ it did not make good business sense to place clients' funds into their own trust accounts.²⁵ As a result, two classes of trust accounts developed.²⁶

client must be notified of or have delivered to him, see *supra* note 15.

¹⁹ *WLF*, 94 F.3d at 998.

²⁰ *Id.*

²¹ *Id.* (citing the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 146 (codified as amended at 12 U.S.C. § 1832 (1989))).

²² 12 U.S.C. § 1832(a)(1) (1989). "A NOW account has attributes of both the traditional checking account and the traditional savings account. A draft drawn on a NOW account is negotiable and may be transferred freely, thus resembling a checking account. NOW accounts are similar to savings accounts because they earn interest, unlike demand deposits." Johnson, *supra* note 7, at 726 n.7.

²³ *WLF*, 94 F.3d at 998; see 12 U.S.C. § 1832(a)(2) (allowing NOW accounts to be comprised of commingled funds belonging to various individuals or non-profit organizations or both).

²⁴ *WLF*, 94 F.3d at 998 ("[S]uch a practice would constitute an impermissible benefit from the management of the trust account in violation of the ethical rules."); see also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982) (stating that interest generated on clients' funds in an interest-bearing account for the sole purpose of "defray[ing] the expense" of administrative costs would violate the MRPC).

²⁵ Separate trust accounts are not justified in these situations because the funds held will not generate enough interest to cover the administrative costs, and thereby will not be a benefit to the client. See generally Johnson, *supra* note 7, at 726.

²⁶ Johnson, *supra* note 7, at 726.

The first class of trust accounts is comprised of individual funds which can produce interest and therefore, benefit the client.²⁷ This occurs when the interest exceeds the cost of maintaining an independent account and results in income for the client.²⁸ Generally, these funds are of a substantial amount or are to be held for a long period of time.²⁹ The second class of trust accounts is comprised of clients' funds that are nominal in amount or are to be held for a short period of time.³⁰ Generally these funds do not produce enough interest to benefit the client or to justify being held in an independent account.³¹ Therefore, instead of being held in individual accounts, these funds are commingled with other similarly situated clients' funds and deposited into a single trust account.³² The IOLA program focuses on this second class of trust accounts.³³

Even though these funds are commingled, and are constantly being deposited and withdrawn, the account is still capable of earning interest if it is a NOW account.³⁴ But to divide and distribute the interest generated to each client in proportion to the amount of their individual funds is impractical "because administrative costs would equal or exceed each clients' portion of the interest and would often result in a loss to the individual client."³⁵ Instead, the lawyer will deposit the "unproductive"³⁶ funds into a

²⁷ Johnson, *supra* note 7, at 726 (explaining that funds that are "either large enough . . . or which are to be held long enough" justify being held in a separate account because they can generate interest that is in excess of the cost of maintaining the account, and therefore, will generate income that benefits the client).

²⁸ Johnson, *supra* note 7, at 726.

²⁹ ABA TASK FORCE AND ADVISORY BOARD, INTEREST ON LAWYER TRUST ACCOUNTS, REPORT TO THE BOARD OF GOVERNORS, at 1 (July 26, 1982) [hereinafter ABA REPORT].

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Johnson, *supra* note 7, at 726.

³⁴ ABA REPORT, *supra* note 29, at 5; see also *supra* note 22 and accompanying text (explaining NOW accounts).

³⁵ Johnson, *supra* note 7, at 726.

³⁶ These funds are labeled "unproductive" because they do not generate

non-interest bearing demand account.³⁷ Once this is accomplished the bank once again receives an interest-free loan.³⁸ It is at this point that IOLA intervenes and shifts the benefit from the banking institution to the coffers of law-related public interest organizations.³⁹

The operating principle of IOLA is simple. "Qualified funds"⁴⁰ are deposited in an IOLA account at the banking institution of the lawyer's choice.⁴¹ IOLA accounts are similar to NOW accounts in that they are interest-bearing and allow the clients' funds, which comprise the principal, to be freely deposited and withdrawn.⁴² The interest that is generated from the deposits is sent directly to a non-profit organization established to receive the revenue.⁴³

interest and will not benefit the client. *See Johnson, supra* note 7, at 727.

³⁷ Johnson, *supra* note 7, at 727.

³⁸ *See WLF*, 94 F.3d 996, 998 (5th Cir. 1996); Johnson, *supra* note 7, at 727 (stating that without the IOLA programs banks retain profits from funds deposited in non-interest bearing accounts).

³⁹ ABA REPORT, *supra* note 29, at 1 (explaining how the banking institution's benefit is shifted to law-related public interest organizations through the IOLA program).

⁴⁰ N.Y. JUD. LAW § 497(2) (McKinney 1997). This statute defines "[q]ualified funds" as:

Moneys received by an attorney in a fiduciary capacity from a client . . . and which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client

Id.

⁴¹ *Id.* § 497(4)(a). Section 497(4)(a) states that

an attorney shall have discretion, in accordance with the code of professional responsibility, to determine whether moneys received by an attorney in a fiduciary capacity from a client or beneficial owner shall be deposited in non-interest, or in interest bearing accounts. If in the judgment of an attorney any moneys received are qualified funds, such funds shall be deposited in an IOLA account in a banking institution of his or her choice offering such accounts

Id.

⁴² Johnson, *supra* note 7, at 727.

⁴³ *See* N.Y. STATE FIN. LAW § 97-v (McKinney 1997) (stating that non-profit organizations receiving the deposited funds are selected by the IOLA board

This organization then distributes the funds "as grants and contracts to not-for-profit tax-exempt entities for the purpose of delivering civil legal services to the poor and for purposes related to the improvement of the administration of justice."⁴⁴

The accomplishment of the IOLA program is that it shifts the benefits derived from the interest generated from the commingled trust accounts from the bank to the poor for the improvement of the administration of justice.⁴⁵ Even with these noble goals:

The IOLA concept should be understood for what it is as well as for what it is not. It is not a panacea which will resolve America's problem in providing adequate legal services to the poor. But, the IOLA concept is a . . .

of trustees that is "appointed to administer the New York IOLA fund" and are guided by the principles set forth within section 97-v of the New York State Finance Law).

⁴⁴ *Id.* The distribution of the IOLA funds is relatively broad and unstructured. The board of trustees, comprised of members who are "knowledgeable and supportive of the delivery of civil legal services to the poor and the improvement of the administration of justice," are appointed by the governor of New York to administer the fund. *Id.* § 97v-(2). The distribution is restricted only by terms set forth within section 97-v of New York State's Finance Law. The board's administration power includes the "power to receive, hold and manage any moneys and property received from any source." *Id.* § 97-v(3)(a).

While the choice of non-profit organizations to receive IOLA funds is relatively unrestricted, the proportion of the funds' distribution is specifically prescribed. *Id.* § 97-v(3)(b). The Finance Law states that "[n]o less than seventy-five percent of the total funds distributed in any fiscal year shall be allocated to not-for-profit tax-exempt providers for the purpose of delivering civil legal services to the poor." *Id.* The remaining twenty-five percent of the fund is to be "allocated for purposes related to the improvement of the administration of justice, including, but not limited to, the provision of civil legal services to groups currently under-served by legal services . . . and the enhancement of civil legal services to the poor through innovative and cost-effective means." *Id.* § 97-v(3)(c).

Furthermore, the board is empowered to "adopt rules and regulations . . . to carry out the purposes and provisions of this section" and to "insure that grants and contracts are made with not-for-profit providers of civil legal services for the poor to provide stable, economical and high quality delivery of civil legal services to the poor throughout the state." *Id.* § 97-v(3)(d).

⁴⁵ Johnson, *supra* note 7, at 727-28; see also ABA REPORT, *supra* note 29, at 1 (discussing the value of the IOLA program concept).

unique opportunity to improve the human condition in exchange for minimal efforts.⁴⁶

With this in mind, it is clear that the IOLA program carries out the Professional Codes' express intentions of providing law-related public services and improving the judicial system.⁴⁷ In addition, the program does so in a manner that is easy to administer and involves very little time or energy on the part of a lawyer, an especially satisfactory result for all lawyers, whether a sole practitioner or an employee of a large law firm.⁴⁸

B. *The History of IOLA*

Foreign jurisdictions have had IOLA programs since the 1960's.⁴⁹ These jurisdictions demonstrated to legal thinkers in the

⁴⁶ Johnson, *supra* note 7, at 730 (footnotes omitted).

⁴⁷ Johnson, *supra* note 7, at 730.

⁴⁸ Johnson, *supra* note 7, at 730. The program is easy to administer because the attorney's duties are set forth in each individual state's law governing the IOLA program. For instance, in New York, the Judiciary Law states when an attorney is to participate in the IOLA program and also states what attorneys should do with funds that are determined to not be IOLA qualified. N.Y. JUD. LAW § 497 (McKinney 1997). Once the funds are deposited, the administration of those funds is placed in the hands of the IOLA program's board of trustees and wholly out of the hands of the attorney. N.Y. STATE FIN. LAW § 97-v (McKinney 1997). In addition, an attorney is not liable in damages or able to be charged with professional misconduct for mistakenly depositing money into an IOLA account if the attorney exercised judgment in good faith that the funds were qualified for the program. N.Y. JUD. LAW § 497. Once the funds are deposited in the IOLA program, the purpose of enhancing the administration of justice and assisting in the provision of civil legal services to the poor is satisfied and an attorney has acted to fulfill express goals set forth in the Professional Codes. See MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Rule 6.1 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1, EC 2-1, EC 2-16, EC 2-25, EC 8-1 (1996).

⁴⁹ ABA REPORT, *supra* note 29, at 3. For instance, Australia, Canada and parts of Africa have all adopted some form of an IOLA program. Taylor S. Boone, Comment, *A Source of Revenue for the Improvement of Legal Services, Part I: An Analysis of the Plans in Foreign Countries and Florida Allowing the Use of Clients' Funds by Attorneys in Non-Interest-Bearing Trust Accounts to Support Programs of the Organized Bar*, 10 ST. MARY'S L.J. 539, 542-50 (1979).

United States the value of channeling unproductive client trust funds into new revenue for various law-related public interest purposes.⁵⁰ It was not until 1981, after five years of studying the possible uses for interest generated from clients' trust accounts, that the Florida Supreme Court adopted the first IOLA program in the

Australia's early programs were enacted by the individual states with Victoria being the first state to adopt an IOLA program for the improvement of the administration of justice. Johnson, *supra* note 7, at 730 n.24. Following Victoria's lead, other states adopted their own IOLA programs, all of which require mandatory participation. Johnson, *supra* note 7, at 730 n.24. The basic plan of the Australian states was to require

the transfer to the applicable law society or law foundation an average of between one-third and two-thirds, of the lowest balance of the principal held in the lawyer's trust accounts during the preceding statutory period. The funds are then invested by the law society or law foundation and the interest used for the Solicitor's Guarantee Fund or for legal aid.

Johnson, *supra* note 7, at 730 n.24.

While British Columbia was the first Canadian province to adopt an IOLA program, by the 1970's all 10 of the provinces and the Yukon and Northwest Territories had adopted their own mandatory programs. Johnson, *supra* note 7, at 730 n.25. In contrast to the Australian plan, which requires only a proportion of the funds from lawyer's trust accounts be given to the administering organization, the Canadian plan requires the entire fund be turned over to the administrator unless there is a "written agreement between the solicitor and his client concerning the disposition of interest or unless the client directs the funds to be held in a separate account." Johnson, *supra* note 7, at 730 n.25. The administrator then places the funds in an interest bearing trust account, the interest from which is "remitted to the law foundation" to be used for "legal education, research, legal aid, law libraries, [or] law reform." Johnson, *supra* note 7, at 730 n.25.

The IOLA programs of the Republic of South Africa, South West Africa and Zimbabwe are "less comparable with those of Australia and Canada." Johnson, *supra* note 7, at 730 n.26. The major difference is that the African plans are not mandatory. Johnson, *supra* note 7, at 730 n.26. Generally, in the African plans, if the "attorney determines that he will not invest funds for the client's benefit, he is not required to place the funds in a trust savings account. Interest accruing on trust savings accounts must be remitted to the equivalent of a client's security fund." Johnson, *supra* note 7, at 730 n.26.

⁵⁰ See Arthur J. England, Jr. & Russell E. Carlisle, *History of Interest on Trust Accounts Program*, 56 FLA. B.J. 101, 102 (1982) (highlighting the benefits to the foreign jurisdictions with IOLA-like programs).

United States.⁵¹ Under the Florida IOLA program, participation was voluntary⁵² and the interest from the account was funneled directly to the state's bar foundation to fund legal services "for indigents, to provide law student loans, to improve the administration of justice, and to finance other public programs."⁵³ In response to Florida's successful ratification of IOLA, and also partly due to the extreme need to improve the country's legal system for the poor, other states began to develop and adopt their own programs.⁵⁴ Presently, almost every state has adopted some sort of IOLA program.⁵⁵ Only Indiana has consistently refused to

⁵¹ See *In re Interest on Trust Accounts*, 402 So. 2d 389, 393 (Fla. 1981) (adopting the Florida IOLA fund).

⁵² Florida's IOLA program was implemented as a voluntary program by the Florida Supreme Court. *Id.* The Florida Supreme Court has subsequently amended the IOLA program to mandatory. *In re Interest on Trust Accounts: A Petition to Amend the Rules Regulating the Florida Bar*, 538 So. 2d 448, 453 (Fla. 1989).

⁵³ Johnson, *supra* note 7, at 731.

⁵⁴ Sackmary, *supra* note 5, at 190. For example:

In 1981, the California legislature enacted a mandatory program which earmarked all proceeds for legal aid. Idaho's Supreme Court authorized a voluntary program in 1982 which remits interest to the Idaho Law Foundation to support delivery of legal services and other programs. Also, in 1982, Maryland's legislature authorized voluntary participation in an [IOLA] program and directed interest to a state legal service corporation providing legal services to indigents.

Johnson, *supra* note 7, at 731.

⁵⁵ 49 states and the District of Columbia acknowledge IOLA as constitutional and ethical. Sackmary, *supra* note 5, at 190. These states have authorized IOLA programs through either legislation or court rule. ALA. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1992); ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.15(d) (1989); CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1989); RULES OF THE ARIZ. SUP. CT. Rule 29(a) (1984); ARK. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1994); CAL. BUS. & PROF. CODE art. 14, ch. 4, §§ 6210-6228 (1981); COLO. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1992); CONN. GEN. STAT. § 51-81(c) (1993); CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1993); DEL. LAWYERS' CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1983); D.C. COURT OF APPEALS RULES GOVERNING THE BAR Rule 10, App. B (1985); RULES REGULATING THE FLA. BAR Rule 5-1.1(d) (1989); RULES AND REGULATIONS FOR THE ORGANIZATION AND GOVERNMENT OF THE STATE BAR OF GA. Rule 4-102(d), standard 65 (1989); GA. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102, Rule 3-109

accept an IOLA program stating that such programs are unconsti-

(1989); HAW. SUP. CT. R. 11 (1991); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1989); ILL. SUP. CT. R. 1.15 (1987); IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 9-103 (1985); KAN. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1992); KY. SUP. CT. R. 3.830 (1991); LA. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1995); ME. BAR RULES 3.6(e)(4), (5) (1993); MD. CODE ANN., BUS. OCC. & PROF. § 10-303 (1995); MASS. SUP. JUD. CT. R. 3:07 (1990); MASS. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1990); MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1990); MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.15(d) (1993); MISS. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1993); MO. RULES OF PROFESSIONAL CONDUCT Rule 1.15(d) (1996); MONT. RULES OF PROFESSIONAL CONDUCT Rule 1.15, 1.18 (1996); NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1984); NEV. REV. STAT. §§ 217-221 (1992); N.H. SUP. CT. R. 50, 50-A (1991); N.J. SUP. CT. R. 1:28A (1988); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-115 (1988); N.Y. JUD. LAW § 497 (McKinney 1988); N.Y. STATE FIN. § 97-v (McKinney 1984); NORTH CAROLINA RULES OF PROFESSIONAL CONDUCT Rule 10.3 (1988); N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1987); OHIO REV. CODE ANN. §§ 4705.09-10 (1985); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1983); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(D) (1989); PA. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1996); R.I. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1988); S.C. CT. APP. R. 412 (1987); S.D. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1987); TENN. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1988); STATE BAR OF TEX. RULES art. XI (1982); UTAH RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1983); VT. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-103 (1990); VA. SUP. CT. Canon 9 (1995); WASH. RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1984); W. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1989); WISC. SUP. CT. R. 20:1.15 (1989); WYO. RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW Rule 1.15 (1990). Six of these states have also issued court opinions authorizing the IOLA programs. *In re* Interest on Lawyers' Trust Accounts, 675 S.W.2d 355, 356-57 (Ark. 1984); *In re* Interest on Trust Accounts, 402 So. 2d 389, 392 (Fla. 1981); *In re* Petition by Massachusetts Bar Ass'n, 478 N.E.2d 715, 716 (Mass. 1985); *In re* Minnesota State Bar Ass'n, 332 N.W.2d 151, 158 (Minn. 1982); *In re* Petition of New Hampshire Bar Ass'n, 453 A.2d 1258, 1260 (N.H. 1982); *In re* Interest on Lawyers' Trust Accounts, 672 P.2d 406, 406 (Utah 1983). Indiana's state bar association has authorized an IOLA program through legislation but it has never been implemented due to denial of its constitutionality and ethicality by court opinion. *In re* Indiana State Bar Ass'n's Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts, 550 N.E.2d 311, 312 (Ind. 1990).

tutional and unethical.⁵⁶

While Florida remains the model for IOLA programs, states have differed on whether to make them mandatory, voluntary or "opt-out."⁵⁷ In the mandatory programs, the state requires interest to be earned on all lawyers' trust accounts whether for the client or for contribution to IOLA programs.⁵⁸ Voluntary programs require participating lawyers who open IOLA accounts to inform their local bar association as to the establishment of such a fund.⁵⁹ Non-participating lawyers in a voluntary IOLA program state may deposit a client's nominal or short-term funds into non-interest bearing accounts.⁶⁰ An "opt-out" state requires lawyers to initially enroll in the program, but allows them to withdraw from participation during an annual opt-out period if they find that they do not wish to continue their participation in the program.⁶¹

⁵⁶ See *In re* Public Law No. 154-1990, 561 N.E.2d 791, 793-94 (Ind. 1990) (rendering the entire IOLA program unconstitutional); *In re* Indiana State Bar Ass'n's Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts, 550 N.E.2d 311, 312 (Ind. 1990) (refusing to implement an IOLA program because the interest proceeds belong to the clients, and therefore the program diverts clients' funds, and convolutes attorneys' fiduciary duty to their clients).

⁵⁷ See Rachel Scovill Worthington, Comment, *IOTA - Overcoming its Current Obstacles*, 18 STETSON L. REV. 415, 419 (1989) (describing types of IOLA programs).

⁵⁸ *Id.* at 418. There are 25 mandatory IOLA states: Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Vermont, Washington, West Virginia and Wisconsin. *Id.*

⁵⁹ *Id.* at 420-21. There are 9 voluntary IOLA states: Alaska, Arkansas, Delaware, Georgia, Indiana (whose state court has an authorized IOLA program but has not implemented it at this time), New Mexico, Oklahoma, South Dakota and Wyoming. *Id.*

⁶⁰ *Id.* at 419.

⁶¹ *Id.* at 420-21. Attorneys choose to "opt-out" mainly due to lack of knowledge of the purpose and mechanics of the program. *Id.* at 421 n.38. Basically, an "opt-out" program "encourages broader participation while retaining the element of individual choice." *Id.* at 421. "Opt-out" plans require attorneys to affirmatively exclude themselves from the IOLA program when they prefer not to participate. *Id.* There are 16 opt-out IOLA states: Alabama, Idaho, Kansas, Kentucky, Maine, Mississippi, Missouri, Nebraska, Nevada, New Hampshire,

Whether voluntary, mandatory or opt-out, the states “recognize[] the potential for public good in the program.”⁶² In addition, the program allows lawyers to satisfy their professional responsibility of making legal services available to individuals who are unable to afford them and to improve the administration of justice.⁶³

II. THE FIFTH CIRCUIT AND *WASHINGTON LEGAL FOUNDATION V. TEXAS EQUAL ACCESS TO JUSTICE FOUNDATION*

In order to fully understand the state of affairs regarding Texas’ IOLA program it is important to examine how both the District Court and the Fifth Circuit arrived at their respective decisions. In doing so, it is evident that the Fifth Circuit is not only in conflict with the First and Eleventh Circuits, but confused within its own court system as well.⁶⁴

In the United States District Court, Western District of Texas, the plaintiffs⁶⁵ brought a suit claiming, *inter alia*, that the Texas Interest on Lawyers’ Trust Accounts program operated in violation of their First and Fifth Amendment rights.⁶⁶ The Texas IOLA

North Carolina, Rhode Island, South Carolina, Tennessee, Utah and Virginia. The District of Columbia also has an opt-out program. *Id.*

⁶² *Id.* at 420.

⁶³ *Id.* See also MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997) (stating that lawyers should strive to provide legal assistance to those that can not afford it); MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (same) (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1996) (stating that all people should have access to legal services); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-1 (1996) (stating that lawyers should participate in improving the availability of legal service).

⁶⁴ Compare *WLF*, 94 F.3d 996 (5th Cir. 1996) (holding IOLA unconstitutional), with *Massachusetts Bar Found.*, 993 F.2d 962 (11th Cir. 1993) (holding IOLA constitutional), *Cone v. State Bar of Florida*, 819 F.2d 1002 (1st Cir. 1987) (same), and *Washington Legal Found.*, 873 F. Supp. 1 (W.D. Tex. 1995) (same).

⁶⁵ The plaintiffs included are “the Washington Legal Foundation, a self-described non-profit public interest law and policy center, Michael Mazzone, a Texas resident and attorney licensed to practice by the Texas Bar, and William Summers, a Texas resident and consumer of legal services rendered by members of the Texas Bar.” *Washington Legal Found.*, 873 F. Supp. at 3.

⁶⁶ *Id.*

program,⁶⁷ established by the Rules of the State Bar of Texas,⁶⁸ requires lawyers that receive clients' funds that are "nominal in amount" or "reasonably anticipated to be held for a short period of time" to be deposited in a commingled interest-bearing trust account.⁶⁹ These funds, which are not reasonably expected to earn interest for the benefit of the client, are the only funds which qualify for IOLA in Texas.⁷⁰ If the lawyer reasonably believes that the funds could generate interest for the client, then the lawyer is not prohibited from depositing them into an individual non-IOLA account.⁷¹ The interest generated by the IOLA funds are channeled to the Texas Equal Access to Justice Foundation, a defendant in this action,⁷² which then distributes the funds to the state's non-profit law-related organizations.⁷³ The program began as a voluntary venture, but because it generated insufficient funds, it was subsequently amended to be mandatory.⁷⁴

Plaintiffs claimed that the mandatory program violated their Fifth Amendment rights by taking their property without just compensation.⁷⁵ Plaintiffs specifically argued that the interest

⁶⁷ There are no significant differences between Texas and New York's IOLA program. Refer to Part I.A for a description of the New York IOLA program.

⁶⁸ SUPREME COURT OF TEXAS, RULES GOVERNING THE STATE BAR OF TEXAS art. XI, § 2 (1985) (implementing the IOLA program in Texas); *Washington Legal Found.*, 873 F. Supp. at 4.

⁶⁹ *Washington Legal Found.*, 873 F. Supp. at 4.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² The defendants, in addition to the Texas Equal Access to Justice Foundation, a non-profit law-related public interest organization, are W. Frank Newton, the Foundation's chairperson and all nine Justices of the Texas Supreme Court. *Id.* at 3.

⁷³ These organizations "provide a wide range of legal services, ranging from providing legal assistance to permanent resident aliens seeking naturalization, to documentation for Central American refugees seeking asylum, to legal services to death row inmates, to various AIDS organizations." *Id.* at 4.

⁷⁴ *Id.* at 5 n.5 (stating that the need for improvement of legal services has been a prominent issue facing Texas and therefore providing funds is of the utmost importance (citing *State Bar of Texas v. Maria Gomez*, 891 S.W.2d 243, 247 (Tex. 1994))).

⁷⁵ *Id.* at 5. The Fifth Amendment provides that "private property shall not be taken for public use without just compensation." U.S. CONST. amend. V.

generated from the trust accounts was client property and was wrongly seized by the state.⁷⁶

In opposition to these claims, the defendants argued that neither of these violations existed.⁷⁷ Specifically, defendants argued that the Fifth Amendment claim was without merit because the IOLA program actually created funds that clients would never see and would not have been generated without IOLA.⁷⁸ Without the IOLA program, clients' funds would still be commingled in non-interest bearing accounts.⁷⁹ If funds were commingled, it is obvious that clients would never earn interest, therefore, clients do not have any property interest to contest under IOLA.⁸⁰ The defendants further argued that the IOLA program, while creating interest, never allows that interest to go to the client, and therefore, the client continues to have no property interest.⁸¹ Finding the defendants' arguments persuasive, the District Court held that the IOLA program did not violate plaintiffs' Fifth Amendment rights.⁸²

The plaintiffs also claimed that the IOLA program violated their First Amendment rights by depriving them of their "freedom of speech and association."⁸³ Specifically, the plaintiffs stated that

⁷⁶ *Washington Legal Found.*, 873 F. Supp. at 5.

⁷⁷ "The Defendants have responded that the [IOLA] Program neither effects a taking of the interest generated by the Program in violation of the Fifth Amendment, nor compels speech or involuntary association in violation of the First Amendment." *Id.* at 3.

⁷⁸ *Id.* at 5 ("[P]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980))).

⁷⁹ *See id.* at 6.

⁸⁰ *See id.*

⁸¹ *Id.* at 8.

⁸² *Id.* ("[T]he Court finds no constitutional infirmity with respect to attorneys' . . . participation in the [IOLA] program.").

⁸³ *Id.* at 9. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

the mandatory involvement in the IOLA program forced them to associate with "various recipient organizations whose purported objectives the plaintiffs find objectionable."⁸⁴ The court recognized that freedom of speech is a "well-established" and "protected" right which includes the right to "refrain from speech" and to be free from forced support of groups with "political and ideological purposes with which [an individual] disagrees."⁸⁵ While acknowledging the importance and sanctity of these First Amendment rights, the court stated that plaintiffs' claim was dependent on the outcome of their Fifth Amendment claim.⁸⁶ If the interest generated was not determined to be the property of the plaintiffs, and therefore, not a taking without compensation, then "the collection and use of the interest by the [IOLA] program does not constitute financial support by the plaintiffs of the recipient organizations."⁸⁷ The court then held that because they found no property right there could be no forced association, and therefore, no violation of the First Amendment.⁸⁸ Thus, the Texas IOLA program was held constitutional.⁸⁹

It is important to point out that while not explicitly admitting it had considered the ABA's MRPC or Texas' version of the CPR, the court concluded that it did not want to address the "social,

⁸⁴ *Washington Legal Found.*, 873 F. Supp. at 9.

⁸⁵ *Id.* The court stated that:

It is well-established that the freedom of speech protected by the First Amendment includes the freedom to choose "both what to say and what not to say." The right to refrain from speech is violated when the government compels an individual to endorse a belief that he or she finds repugnant. It also may be violated when the government compels an individual to subsidize political and ideological purposes with which he or she disagrees.

Id. (internal citations omitted).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* ("[T]he Plaintiffs have failed to adequately allege any connection between themselves and the [IOLA] recipient organizations, the Court finds that the Texas [IOLA] Program does not unconstitutionally burden the Plaintiffs' First Amendment rights." (citing *Massachusetts Bar Found.*, 993 F.2d 962, 980 (1st Cir. 1983))).

⁸⁹ *Id.* at 11.

political or public policy concerns” related to the IOLA program.⁹⁰ But even while the court claimed not to be addressing these issues, it clearly stated that the “undisputed purpose of the [IOLA] Program [was] to provide funding for legal services”⁹¹ and that the program “squarely fit” within the goals of “improving the quality of the legal service available to the people of the state.”⁹² These statements, made by a court purporting to avoid discussing the implications of the goals of the Professional Codes, do in fact show that the IOLA program embodies the expressed desire of the Professional Codes to assist in providing legal services to the poor and improve the judicial system.⁹³

On appeal, the United States Court of Appeals for the Fifth Circuit disagreed with the District Court’s decision and instead determined that there was a violation of the Fifth Amendment because the interest earned was clients’ “property.”⁹⁴ The Fifth Circuit based its reversal on the fact that Texas had always followed the “traditional rule” that interest, as a product of the principal, is thereby, part of the principal.⁹⁵ Based on this rule, it would appear that the interest generated by funds in the IOLA account is the property of the clients who had their principal deposited therein.⁹⁶ The Fifth Circuit simply concluded that the

⁹⁰ *Id.* (“The Court declines to address the expressed social, political or public policy concerns related to the current operational procedures of the Texas Equal Access to Justice Foundation as it administers the [IOLA] program. Alleviation of these concerns rests with Texas attorneys . . . the state bar . . . [and] elected public officials.”).

⁹¹ *Id.* at 10.

⁹² *Id.* “The undisputed purpose of the [IOLA] Program is to provide funding for legal services to a substantial segment of the population of Texas. This squarely fits within the purview of improving the quality of the legal service available to the people of the state.” *Id.* at 9.

⁹³ *See id.* (explaining that while the court did not desire to address the ethical considerations of the IOLA program, its unquestionable goal was to aid in procuring legal services to those that could not afford it).

⁹⁴ *See* WLF, 94 F.3d 996, 1004 (5th Cir. 1996).

⁹⁵ *Id.* at 1000. “Texas observes the traditional rule that ‘interest follows principal,’ which recognizes that interest earned on a deposit of principal belongs to the owner of the principal.” *Id.*

⁹⁶ *Id.*

District Court adopted theories advocated by the First and Eleventh Circuits⁹⁷ which “circumvent[ed] this rule.”⁹⁸

The Fifth Circuit also determined that the United States Supreme Court’s decision in *Webb’s Fabulous Pharmacies v. Beckwith*⁹⁹ added credence to the Texas rule, and its reversal of the District Court, that interest follows principal.¹⁰⁰ In *Webb’s Fabulous Pharmacies*, Beckwith¹⁰¹ was appointed receiver of Webb’s Fabulous Pharmacies¹⁰² when its sale to Eckerd’s was inhibited by a previously existing, but not previously revealed, debt.¹⁰³ Eckerd’s had filed a “complaint of interpleader” against Webb’s Fabulous Pharmacies and its creditors in order to resolve the existing debt.¹⁰⁴ As a result, Eckerd’s was required by the

⁹⁷ See *Massachusetts Bar Found.*, 993 F.2d 962, 973 (1st Cir. 1993) (explaining that interest earned on clients’ funds held in IOLA accounts were never the clients’ because IOLA created it and since it took only what it created, no property interest was violated); *Cone v. State Bar of Florida*, 819 F.2d 1002, 1005 (11th Cir. 1987) (holding that there was no property interest in the fund’s generated interest because the IOLA program only took what it created). These Circuit Court decisions are discussed in Part IV of this Comment.

⁹⁸ *WLF*, 94 F.3d at 1000. “The district court concluded that the plaintiffs cannot ‘have a [cognizable] property interest in interest proceeds that, but for the [IOLA] Program, would have never been generated.’” *Id.* (quoting *Massachusetts Bar Found.*, 993 F.2d at 980).

⁹⁹ 449 U.S. 155 (1980), *rev’g* *Beckwith v. Webb’s Fabulous Pharmacies, Inc.*, 374 So. 2d 951 (Fla. 1979) (*per curiam*) [hereinafter *Webb’s*].

¹⁰⁰ See *WLF*, 94 F.3d at 1000-01.

¹⁰¹ *Webb’s*, 449 U.S. at 158. Beckwith was appointed receiver of the business known as Webb’s Fabulous Pharmacies in order to determine the number and amount of creditors’ claims filed against the business. *Id.* The purchaser of the business, Eckerd’s, filed the purchase price with the clerk of the court pending determination of the creditors’ claims. *Id.* Beckwith requested the funds be turned over to him in order to deal with the creditors. *Id.* The court transferred the funds but kept the interest that had accrued through the required escrow account that the funds were deposited in. *Id.* Beckwith thereby became the plaintiff of this suit seeking to recover the interest. *Id.*

¹⁰² *Webb’s Fabulous Pharmacies* was the defendant in the proceeding. *Id.* at 157.

¹⁰³ *Id.* at 156-57.

¹⁰⁴ *Id.*

court to tender the purchase price to the clerk of the court.¹⁰⁵ As required by state law, the funds were placed in an interest-bearing account and remained there until the matter was resolved.¹⁰⁶ On resolution of the matter, Beckwith, the court appointed receiver in charge of paying the creditors, demanded the funds be turned over to him.¹⁰⁷ The Florida state court complied and returned the principal but did not return the interest that had been generated while on deposit in the court's interest-bearing account.¹⁰⁸ Beckwith then filed suit to recover the interest.¹⁰⁹ The Florida Supreme Court determined that the interest was not the property of the creditors' because it was only generated due to the statute that required funds deposited with the court to be held in an interest-bearing account.¹¹⁰ Therefore, they were not entitled to the interest.¹¹¹

On appeal, the United States Supreme Court held that under Florida law, the principal was the private property of the creditor because it was not held for the benefit of the court, but instead for

¹⁰⁵ *Id.* at 157-58. The purchase price of \$1.8 million was required by Florida law to be delivered to the clerk of the court for deposit into an interest-bearing account, to retain the interest earned for the court and to deduct statutorily-defined fees for maintaining the funds. *Id.* at 157. The action of interpleader, filed by purchaser Eckerd's, was commenced in order to resolve the debt owed to Webb's Fabulous Pharmacies' creditors and ultimately to own the pharmacies as he originally intended. *Id.* Therefore, the funds were required to be deposited with the clerk of the court to ensure that the debt was paid before such transfer took effect. *See id.* at 157-58.

¹⁰⁶ *Id.* at 157.

¹⁰⁷ *Id.* at 158.

¹⁰⁸ The funds held in the interest-bearing account for the year which it took to resolve the matter accrued interest of more than \$100,000. *Id.* On demand to return the funds, the clerk complied but withheld approximately \$10,000 for administrative fees and the \$100,000 in interest that had accrued. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So. 2d 951, 952-53 (Fla. 1979) (per curiam).

¹¹¹ "Ultimately, the Florida Supreme Court ruled against [Beckwith], holding that there was no unconstitutional taking because money deposited with the clerk was public money, interest earned on public money was not private property, and the statute only took that which it created." *Beckwith*, 374 So. 2d at 952-53.

the benefit of the creditors.¹¹² Once it was determined that the creditors owned the principal, the Supreme Court then determined ownership of the interest that had been generated.¹¹³ The Court concluded that the State could not “assert ownership of . . . interest” from funds placed in an interest-bearing account simply due to the fact that it was statutorily required.¹¹⁴ The Supreme Court explained that traditional Florida law made clear that interest from deposited funds was part of the principal and therefore owned by whoever owned the principal.¹¹⁵ Finally, the Supreme Court declared that Florida’s keeping of the interest constituted an unconstitutional taking.¹¹⁶

The Fifth Circuit in *WLF* relied on *Webb’s* in support of its conclusion that interest from clients’ funds placed in an interest-bearing account should also be considered property of the client, as owner of the principal.¹¹⁷ The Fifth Circuit, like the Supreme Court in *Webb’s*, found the retention of this interest an unconstitu-

¹¹² *Webb’s*, 449 U.S. at 161. See also *WLF*, 94 F.3d 996, 1001 (5th Cir. 1996) (“[B]ecause the principal was ‘held only for the ultimate benefit of Webb’s creditors, not for the benefit of the court’ and eventually would be distributed to them, state law gave the creditors a property interest proportional to the share of the principal.” (quoting *Webb’s*, 449 U.S. at 161)).

¹¹³ *Webb’s*, 449 U.S. at 162.

¹¹⁴ *Id.* See also *WLF*, 94 F.3d at 1001 (“Reaching the opposite conclusion from that of the Florida Supreme Court, the Webb’s Court held that simply because the state ordered the placement of interpleaded funds into an interest-bearing account does not mean that the state can assert ownership of that interest.”).

¹¹⁵ *Webb’s*, 449 U.S. at 162-63. In recognizing Florida’s traditional rule and its effect, the Court stated:

[T]he usual and general rule under Florida law is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal, [therefore,] . . . earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property.

Id.

¹¹⁶ *Id.* at 163. See also *WLF*, 94 F.3d at 1001 (“The Court then concluded that the Florida law perpetrated an unconstitutional taking of interest, which is the property of the creditors who own the principal.”).

¹¹⁷ *WLF*, 94 F.3d at 1002.

tional taking.¹¹⁸ Thus, the Fifth Circuit held that the District Court was wrong in concluding that clients do not have a property interest in the interest earned from their funds in the IOLA accounts.¹¹⁹

Subsequently, the defendants petitioned for rehearing; this petition was denied.¹²⁰ In a scathing dissent, several judges called the majority's decision "an important one" because it took the opposite position of almost every other court in the country that has addressed the issue, including two other circuit courts and a "large number" of state appellate courts.¹²¹ As important as the dissenting opinion was in explaining why the case should be reheard, the

¹¹⁸ *Id.* The Fifth Circuit declared:

The Webb's decision, however, creates a rule . . . that a property interest existed in the accrued interest simply because "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." We see no reason why this rule does not apply to the instant case.

Id. (quoting *Webb's*, 499 U.S. at 164).

¹¹⁹ *Id.* at 1005. The Fifth Circuit subsequently vacated the District Court's decision and remanded the matter for further consideration. *Id.* ("For the foregoing reasons, we find that the district court erred by holding that the clients do not have a cognizable property interest in the interest proceeds that are earned on their deposit in [IOLA] accounts.").

¹²⁰ *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 106 F.3d 640, 641 (5th Cir. 1997). The Petition for Rehearing and Suggestion for Rehearing En Banc was denied and a dissenting opinion was written and joined by four of the circuit court judges including the Chief Judge. *Id.* at 641 (Benavides, J., dissenting).

¹²¹ *Id.* ("This decision is an important one because it contradicts every other court in the country that has addressed this issue, including two of our sister circuits and a large number of state appellate courts."). Compare *WLF*, 94 F.3d at 1005 (holding that interest generated from clients' funds on deposit in IOLA accounts is property of the client and therefore Texas' IOLA program is unconstitutional), with *Massachusetts Bar Found.*, 993 F.2d 962, 968 (1st Cir. 1993) (holding that no property right was violated and therefore Massachusetts' IOLA program was constitutional), *Cone v. State Bar of Florida*, 819 F.2d 1002, 1004 (11th Cir. 1987) (holding that no property right was violated and therefore Florida's IOLA program was constitutional), and *Washington Legal Found.*, 873 F. Supp. 1, 8 (W.D. Tex. 1995) (holding that funds generated from IOLA accounts were not the property of the client and therefore Texas' IOLA program was constitutional).

dissenting judges impliedly addressed the important professional and ethical responsibility issue at stake.¹²² The judges stated that this decision would be an “unwarranted” denial of funds to “public interest legal organizations” at a time when they were desperately needed.¹²³ While the dissenting judges recognized the importance of this issue, it was not directly addressed because of the refusal of the District Court to address the issue.¹²⁴

After denial of their petition for rehearing,¹²⁵ the defendants filed a Petition for Writ of Certiorari to the United States Supreme Court.¹²⁶ This too was denied.¹²⁷ Subsequently, the petition was amended and granted regarding only the Fifth Amendment taking of property issue.¹²⁸ While the Supreme Court has heard arguments on this issue, the final disposition of this case is pending.¹²⁹

The threat to IOLA programs in the United States is clear: a determination for plaintiffs will not only invalidate Texas’ program, but it will likely open the door for similar suits in states with similar programs in operation. In addition, it will also strike a

¹²² *Texas Equal Access to Justice Found.*, 106 F.3d at 641 (Benavides, J., dissenting).

¹²³ *Id.* at 641-42 (“[T]his case poses an unwarranted threat to a primary source of funding for public interest legal organizations in this circuit at a time when these organizations are already struggling for their lives financially.”).

¹²⁴ See *Washington Legal Found.*, 873 F. Supp. at 6 n.9, 11 (implying that the court declined to address the ethical implications behind the IOLA program).

¹²⁵ *Texas Equal Access to Justice Found.*, 106 F.3d at 641.

¹²⁶ *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 117 S. Ct. 2514 (1997).

¹²⁷ *Id.* at 2514.

¹²⁸ See *Phillips v. Washington Legal Found.*, 117 S. Ct. 2535 (1997). The Supreme Court of the United States stated that

[t]he petition for writ of certiorari is granted limited to the following question: Is interest earned on client trust funds held by lawyers in [IOLA] accounts a property interest of the client or lawyer, cognizable under the Fifth Amendment of the United States Constitution, despite the fundamental precept of [IOLA] that such funds, absent the [IOLA] program, could earn interest for the client of lawyer?

Id. at 2535.

¹²⁹ See *Coleman, supra* note 10, at 1 (stating that arguments before the Supreme Court would be on January 13, 1998).

severe blow to the Professional Codes whose express language demands the enactment of progressive programs like IOLA to aid in meeting its goals of providing services to the poor.¹³⁰ While the result is clear and harsh, the Fifth Circuit ignored the ethical implications altogether.

III. THE CONFLICTING CIRCUITS

Prior to the 1995 challenge to the Texas IOLA program,¹³¹ there had only been two serious challenges to IOLA programs in the United States.¹³² Both challenges involved clients who “alleged that their property was ‘taken’ when interest earned on client funds in a lawyer’s trust account accrued to a [designated law-related public interest organization].”¹³³ In *Cone v. State Bar of Florida*,¹³⁴ the Eleventh Circuit found that clients had no claim of entitlement to interest generated by their commingled funds, and therefore, upheld the Florida IOLA program.¹³⁵ In *Washington Legal Foundation v. Massachusetts Bar Foundation*,¹³⁶ the First

¹³⁰ See MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997) (stating that a lawyer should be “mindful of deficiencies” in the law and should assist the bar in an attempt to change the law); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1996) (explaining that in order to provide legal services to society, lawyers should strive to improve the law to meet everyone’s needs); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-1 (1996) (stating an “important function[] of the legal profession” is to strive to make legal services obtainable by all); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1996) (stating that “[e]very lawyer should support all proper efforts to meet [the] need for legal services”).

¹³¹ The United States District Court for the Western District of Texas heard the arguments of the parties on January 19, 1995. *Washington Legal Found.*, 873 F. Supp. 1 (W.D. Tex. 1995).

¹³² Kenneth Paul Kreider, Note, *Florida’s IOLTA Program Does Not “Take” Client Property for Public Use: Cone v. State Bar of Florida*, 57 U. CIN. L. REV. 369, 369 (1988) (stating that the two serious challenges were *Massachusetts Bar Found.*, 993 F.2d 962 (1st Cir. 1993) and *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987)).

¹³³ *Id.*

¹³⁴ 819 F.2d 1002 (11th Cir. 1987).

¹³⁵ *Id.* at 1007.

¹³⁶ 993 F.2d 962 (1st Cir. 1993).

Circuit found that clients did not suffer from Fifth Amendment violations when interest accrued from their commingled funds was placed into the Massachusetts IOLA program.¹³⁷ The court also found that participation in the IOLA program was not a violation of a client's First Amendment right to freedom of speech and association.¹³⁸ Both the First and Eleventh Circuit courts ultimately found their respective states' IOLA programs constitutional, and by upholding the programs they implicitly affirmed the Professional Codes' express purpose of providing law-related public services to those that cannot afford them on their own.¹³⁹

A. *Cone v. State Bar of Florida*

In *Cone v. State Bar of Florida*, the plaintiff¹⁴⁰ invoked the takings clause of the Fifth Amendment¹⁴¹ in an attempt to strike down Florida's IOLA program.¹⁴² In retaining a law firm to probate the estate of her deceased husband, plaintiff paid a retainer of \$100 which was deposited into a noninterest-bearing trust account.¹⁴³ At the conclusion of its involvement, the law firm unintentionally retained plaintiff's balance.¹⁴⁴ Soon after, Florida's IOLA program was approved by the State's Supreme

¹³⁷ *Id.* at 974.

¹³⁸ *Id.* at 980.

¹³⁹ See generally *Massachusetts Bar Found.*, 993 F.2d 962; *Cone*, 819 F.2d 1002.

¹⁴⁰ Jean Ann Cone, the named plaintiff, was the personal representative of the Estate of Evelyn M. Glaeser, the original plaintiff who passed away during the litigation of this suit. *Id.* at 1004 n.1.

¹⁴¹ The takings clause is found in the Fifth Amendment of the United States Constitution, which states in part, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

¹⁴² *Cone*, 819 F.2d at 1004 (stating that plaintiff claimed that she was deprived her property without due process). Florida's IOLA program transfers the interest generated from certain types of clients' funds that are placed in a lawyer's interest-bearing trust account to legal aid programs and other public organizations. *Cone*, 819 F.2d at 1003.

¹⁴³ *Id.*

¹⁴⁴ Plaintiff had a balance of \$13.75. *Id.* at 1004.

Court¹⁴⁵ and the law firm decided to transfer its nominal or short-term trust account funds, which included plaintiff's balance, into an IOLA account.¹⁴⁶ Plaintiff's balance remained in the IOLA account for close to three years.¹⁴⁷ When the error was discovered the firm issued a check to plaintiff in the amount of the balance.¹⁴⁸ Under the IOLA program, the interest that was generated over the three year period¹⁴⁹ was transferred to the Florida Bar Foundation.¹⁵⁰ Plaintiff then filed suit¹⁵¹ to recover the interest claiming, *inter alia*,¹⁵² that Florida's IOLA program had resulted in an "uncompensated taking of private property in violation of the Fifth Amendment."¹⁵³

¹⁴⁵ *Id.* The Florida IOLA program is described as follows:

The [IOLA] plan authorized, but did not require, lawyers and law firms to place nominal or short-term funds into pooled interest-bearing accounts, the interest proceeds of which to be remitted by the financial institution directly to the Florida Bar Foundation. The Foundation would then allot the funds to legal aid organizations, law student scholarships, and other charitable purposes. Only deposits which could otherwise not earn interest net of expenses (because they were nominal in amount or were to be held for a short period of time) could be used to generate interest under the [IOLA] program.

Id.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ The amount of interest generated was \$2.25. *Id.*

¹⁵⁰ *Id.*

¹⁵¹ In 1995, plaintiff filed a class action suit in the United States District Court for the Middle District of Florida, *Cone v. State Bar of Florida*, 626 F. Supp. 132 (M.D. Fla. 1985), claiming to represent "all persons similarly situated against the law firm, the Florida Bar, and the Florida Bar Foundation." *Id.* at 1003.

¹⁵² In addition to the Fifth Amendment claim, plaintiff also claimed "that the appropriation of the interest earned on her money" was a "deprivation of her property without due process, as well as a breach of fiduciary duty under state law." *Cone*, 819 F.2d at 1004. But after the court ruled that there was no violation of the Fifth Amendment, it declined to hear arguments based on these additional claims. *Id.*

¹⁵³ *Id.* The Fifth Amendment claim was "applied to the states via the Fourteenth Amendment." *Id.* Plaintiff's "argument was simple: any interest earned on her portion of the [law firm's IOLA] account belonged to her." *Id.*

The Eleventh Circuit Court of Appeals affirmed the District Court's determination that the Florida IOLA program was constitutional and that the plaintiff was not entitled to the interest generated from her balance.¹⁵⁴ The court stated that the plaintiff's constitutional claim was based on "whether the interest earned on nominal or short term funds held in an [IOLA] account was the property of the client for purposes of the Fifth and Fourteenth Amendments."¹⁵⁵ Under the traditional Florida property rule that "interest follows principle," it appeared that the plaintiff did have a valid constitutional claim.¹⁵⁶ But because the court found that the plaintiff's funds would not have generated any interest if not for the IOLA program there would have been no interest to follow her principal.¹⁵⁷ Therefore, she was not entitled to the interest.¹⁵⁸ In addition, the court found that the "regulations governing interest-bearing accounts"¹⁵⁹ and the nominal amount of the deposit could not have generated interest in excess of the cost of administering the IOLA account.¹⁶⁰ According to the court, this was further evidence that the plaintiff had no "legitimate claim of entitlement to the interest which she claimed was taken from her . . ."¹⁶¹ Thus, Florida's IOLA program was upheld.¹⁶²

¹⁵⁴ *See id.* at 1002.

¹⁵⁵ *Id.* at 1004.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* The Eleventh Circuit reasoned "that 'interest goes with the principle, as the fruit with the tree' . . . necessarily assumed the existence of a fruit-bearing tree. The District Court found that in the absence of the [IOLA] program, [the plaintiff's] money would not have borne any fruit, for her benefit or for anyone else's." *Id.* at 1004 (quoting *Himley v. Rose*, 9 U.S. 313, 319 (1809)).

¹⁵⁸ *Id.*

¹⁵⁹ "[O]nly funds owned by individuals, certain charitable non-profit organizations, or public entities are allowed to receive interest on their . . . accounts." *Id.* at 1005 (citing the Consumer Checking Account Equity Act, 12 U.S.C. § 1832(a)(2) (1982) (discussing eligible depositors for NOW accounts)).

¹⁶⁰ *Id.* at 1004 ("[The] economic realities of attempting to produce income with such nominal or short-term deposits . . . could not have earned any interest net of expenses without the [IOLA].")

¹⁶¹ *Id.*

¹⁶² *Id.* at 1008. Plaintiff subsequently filed for a writ of certiorari which was denied. *Cone v. State Bar of Florida*, 484 U.S. 917 (1987).

B. Washington Legal Foundation v. Massachusetts Bar Foundation

In *Washington Legal Foundation v. Massachusetts Bar Foundation*,¹⁶³ the plaintiffs¹⁶⁴ attempted to strike down Massachusetts' IOLA program¹⁶⁵ claiming that the program operated in violation of their constitutional rights.¹⁶⁶ Plaintiffs' initial argument focused on the theory that their First Amendment rights were violated because the IOLA program collected the interest generated by their funds and distributed it to designated public interest organizations which were then used for "litigation involving

¹⁶³ 993 F.2d 962 (1st Cir. 1993).

¹⁶⁴ The five plaintiffs in this suit were: 1) the Washington Legal Foundation, "a non-profit, public interest law and policy center operating in Washington, D.C."; 2) Karen Parker, a Massachusetts citizen "who . . . employed lawyers in connection with her real estate . . . and other businesses, which . . . resulted in her money being deposited in [IOLA] accounts"; 3) Stephanie Davis, a Massachusetts citizen who did not have any funds in an IOLA account but anticipated that she might "need to hire an attorney which would cause her money to be deposited in an [IOLA] account"; 4) William R. Tuttle, a Massachusetts citizen and attorney who did not maintain an IOLA account; and 5) Timothy J. Howes, a Massachusetts citizen and attorney who did maintain an IOLA account. *Id.* at 969.

¹⁶⁵ Massachusetts' IOLA program was established as a voluntary program in 1985 pursuant to an amendment to Canon 9, DR 9-102 of Rule 3:07 of the Rules of the Supreme Judicial Court. *See In re Massachusetts Bar Ass'n.*, 478 N.E.2d 715, 715-16 (Mass. 1985) (explaining the debate surrounding affirming the IOLA program). In 1990, it was changed to a mandatory program. *Massachusetts Bar Found.*, 993 F.2d at 969.

The program allows the IOLA Committee to transfer the interest generated from interest-bearing accounts comprised of pooled clients' funds that "were nominal in amount or to be held for only a short period of time" from a banking institution to eligible charities, such as "Massachusetts Legal Assistance, the Massachusetts Bar Foundation, and the Boston Bar Foundation." *Id.* at 968. Under Massachusetts rules, 67% of the funds are to be given to Massachusetts Legal Assistance and the remaining 33% to other charitable entities. *Id.* at 969.

¹⁶⁶ *Id.* ("The plaintiffs allege . . . that they have been deprived . . . of their rights secured by the First, Fifth, and Fourteenth Amendments of the Constitution by operation of the Massachusetts [IOLA] program.").

political or ideological causes and lobbying.”¹⁶⁷ This, they stated, “compel[ed] them to support political and ideological causes” with which they did not agree, thereby resulting in a “depriv[ation] of freedom of speech and association.”¹⁶⁸ In addition, the plaintiffs also claimed that the disbursement of interest took “the beneficial use of [their] funds which constitute[d] an unconstitutional taking in violation of the Fifth and Fourteenth Amendments.”¹⁶⁹

The United States Court of Appeals for the First Circuit affirmed the District Court’s determination¹⁷⁰ that the Massachusetts IOLA program did not violate the First or Fifth Amendments.¹⁷¹ The court first dealt with the plaintiffs’ claim that the Massachusetts IOLA program operated in violation of their Fifth Amendment rights.¹⁷² In applying a Fifth Amendment analysis,¹⁷³ the court found that clients, including plaintiffs, did not have a constitutionally protected property right to exclude others from the beneficial use of their funds while those funds are deposited in IOLA accounts.¹⁷⁴ The court explained that the IOLA program complied with the State’s disciplinary rules regarding client funds by leaving the deposited funds untouched,

¹⁶⁷ *Id.* at 973. The First Amendment directly provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. This has been interpreted to “protect[] the right not to speak or associate, as well as the right to speak and associate freely.” See *Massachusetts Bar Found.*, 993 F.2d at 976.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The Fifth Amendment states in part that “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. amend. V.

¹⁷⁰ See *Washington Legal Found. v. Massachusetts Bar Found.*, 795 F. Supp. 50 (D. Mass. 1992).

¹⁷¹ See *Massachusetts Bar Found.*, 993 F.2d at 968.

¹⁷² *Id.* at 973.

¹⁷³ The test applied by the court was whether “the [IOLA] program ha[d] caused a physical invasion and occupation, [even of a temporary nature,] of their tangible property rights.” *Id.* at 976.

¹⁷⁴ *Id.* For further discussion of courts’ methods of finding that clients do not have constitutionally protected property rights in interest placed in IOLA accounts, see Philip F. Downey, *Attorneys’ Trust Accounts: The Bar’s Role in the Preservation of Client Property*, 49 OHIO ST. L.J. 275 (1988).

always available to the clients and that the interest earned was never the client's property.¹⁷⁵ In conclusion, the court simply stated that there was no constitutionally protected Fifth Amendment right because the IOLA program did not occupy or invade their property.¹⁷⁶

In considering whether the plaintiffs' First Amendment rights were violated, the court applied a strict scrutiny test consisting of two parts.¹⁷⁷ The first part of the test examined whether the IOLA program was a burden to protected speech by "forcing expression through compelled support of organizations espousing ideologies or engaging in political activities."¹⁷⁸ The second part of the test inquired as to whether the IOLA program "serves compelling state interests through means which are narrowly tailored and germane to the state interests."¹⁷⁹ The court determined that the plaintiffs did not sufficiently allege a compelling connection between them and the recipient public interest organizations, and thereby failed to meet the first part of the test.¹⁸⁰ Because the first part was not met, the court deemed it unnecessary to inquire further.¹⁸¹ As a result, the court found that the plaintiffs' First Amendment rights were not violated¹⁸² and Massachusetts' IOLA program was upheld.¹⁸³

¹⁷⁵ *Massachusetts Bar Found.*, 993 F.2d at 976.

¹⁷⁶ *Id.* ("The property rights claimed by the plaintiffs are intangible. We find no logical or legal support for the plaintiffs' claim that the [IOLA] program has caused a physical invasion and occupation of their intangible property rights.")

¹⁷⁷ *Id.* at 977.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 980 ("Because the plaintiffs have not adequately alleged that the [IOLA] Rule compels a connection between them and the [IOLA] recipient organizations, we find that the [IOLA] Rule does not burden the plaintiffs' First Amendment rights.")

¹⁸¹ *Id.* ("Having found no impact on plaintiffs' First Amendment rights caused by the [IOLA] Rule, we need not consider whether the [IOLA] program serves a compelling state interest.")

¹⁸² *Id.* ("The process by which the [IOLA] program collects and uses the accrued interest does not affect the plaintiffs' funds . . . nor does it require any other expenditures or efforts by the plaintiffs. Put simply, the plaintiffs have not been compelled . . . to contribute money to the [IOLA] program.")

¹⁸³ *Id.* at 968.

IV. THE PROFESSIONAL CODES

The legal community has always found the ABA's ethical codes to be very important.¹⁸⁴ From the early 1900's to the late 1960's, the formal stance on issues in legal ethics was embodied in the ABA's Canons of Professional Ethics.¹⁸⁵ Due to the legal community's growing dissatisfaction with the Canons, a special committee was formed to draft an updated and revised version.¹⁸⁶ The new version, the Code of Professional Responsibility, was adopted by the ABA in 1969.¹⁸⁷ By 1980 nearly every state had followed the ABA in adopting the CPR.¹⁸⁸ But only eight years after the ABA adopted the CPR, the ABA commissioned another committee to recommend additional revisions.¹⁸⁹ This second committee, called the "Kutak Commission,"¹⁹⁰ found that major revisions were needed.¹⁹¹ After substantially rewriting and reorganizing the CPR, the ABA adopted the revised version called the Model Rules of Professional Conduct.¹⁹² Today, approximately "forty jurisdictions

¹⁸⁴ STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS xxi (1997) (stating that "the most important ethical codes for lawyers are those promulgated by the [ABA]").

¹⁸⁵ See *id.* at xxi, 421.

¹⁸⁶ *Id.* (discussing the appointing of a "Special Committee on the Evaluation of Ethical Standards (the 'Wright Committee')," which was instructed to "study the Canons," which ultimately drafted a new code which was then adopted by the ABA).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at xxii ("Within a few years, every state had adopted the new Code in some form. States varied somewhat in their adoptions, changing a word here or a sentence there, but most of the variations were modest.").

¹⁸⁹ *Id.* at xxii, 3.

¹⁹⁰ *Id.* at xxii ("That commission soon became known as the Kutak Commission, after Robert J. Kutak, an energetic and visionary lawyer from Omaha, Nebraska, who chaired the commission until his death in early 1983.").

¹⁹¹ *Id.*

¹⁹² *Id.* ("Between 1979 and 1982, the Kutak Commission circulated four major drafts [which] after significant revisions . . . [were] formally adopted on August 3, 1983.").

have adopted substantial proportions of the [MRPC].”¹⁹³ Of the “15 states [that] retain the . . . [CPR,]”¹⁹⁴ New York is one.¹⁹⁵

Because of the recognized importance of the Professional Codes,¹⁹⁶ the Circuit Court decisions concerning IOLA programs take on heightened meaning.¹⁹⁷ As discussed above, the First and Eleventh Circuits both upheld their respective states’ IOLA programs.¹⁹⁸ While the courts did not involve the ABA’s ethical rules, they were implicitly affirmed by upholding the IOLA programs which serve the legal needs of individuals that are unable to afford them.¹⁹⁹

Texas’ District Court also upheld the IOLA program²⁰⁰ but the effect on the ethical rules was different than the implicit affirmance of the First and Eleventh Circuit Courts. In its decision, the District Court “decline[d] to address” the ethical implications of the IOLA program.²⁰¹ Therefore, while upholding the IOLA

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 421.

¹⁹⁵ *Id.* at 809 (“The New York Code . . . is now codified at Part 1200 of the joint rules of the Appellate Divisions.”). Other states that have rejected the MRPC include California, Massachusetts, Oregon, and Vermont. *Id.* at xxii.

¹⁹⁶ *See id.* (explaining that the Professional Codes have always been considered important by the legal community).

¹⁹⁷ *See* WLF, 94 F.3d 996 (5th Cir. 1996) (making no mention of the ethical implications and not commenting on the district court’s decision to not address them); Massachusetts Bar Found., 993 F.2d 962 (1st Cir. 1993) (making no reference whatsoever to the ethical implications); *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987) (same); Washington Legal Found., 873 F. Supp. 1, 11 (W.D. Tex. 1995) (declining to address the “ethical implications” presented by the scrutiny of a program whose express objective is to provide funds to law-related public services).

¹⁹⁸ For a discussion of the First and Eleventh Circuits’ decisions upholding the IOLA programs, see *supra* Part III.

¹⁹⁹ *See generally* Massachusetts Bar Found., 993 F.2d 962 (making no reference to ethical implications and implicitly affirming the ABA’s ethical rules that Texas has adopted); *Cone*, 819 F.2d 1002 (adopting an IOLA program but not making any reference to ethical implications and implicitly affirming the ABA’s ethical rules that Florida has adopted).

²⁰⁰ *See* Washington Legal Found., 873 F. Supp. at 11.

²⁰¹ *Id.* (“The Court declines to address the expressed social, political or public policy concerns related to the current operational procedures of the Texas Equal Access to Justice Foundation as it administers the [IOLA] program.

program, which furthers the important objective of the ABA ethical rules, the court's decision was not as supportive of the ethical rules as that of the other circuits, which while not mentioning the ethical rules, did not "decline to address" them either.²⁰² Weakening the ethical rules' effect on the legitimacy of IOLA programs even further, the Fifth Circuit refused to uphold the Texas IOLA program²⁰³ without even mentioning the ethical implications. The court's clear disapproval of the program was yet another severe blow to the ethical rules. While the Supreme Court has already heard arguments on the issue, it has not yet reached a decision.²⁰⁴ Hopefully, the words of Judge Benavides, in his dissenting opinion opposing the denial of the petition for rehearing the issues in *WLF*, will convince the Supreme Court that ethical implications are important and need to be addressed.²⁰⁵ It is quite possible, however, that the express ethical objectives will not be considered.

Alleviation of these concerns rests with Texas attorneys . . . the state bar . . . [and] elected public officials.") (emphasis added).

²⁰² See generally *id.*; see *Massachusetts Bar Found.*, 993 F.2d at 962 (upholding IOLA while not claiming to not address the ethical implications); *Cone*, 819 F.2d at 1002 (same).

²⁰³ See *WLF*, 94 F.3d 996, 998 (5th Cir. 1996).

²⁰⁴ *Phillips v. Washington Legal Found.*, 117 S. Ct. 2535 (1997) (certiorari granted and issue pending); *Coleman*, *supra*, note 10, at 1 (stating that arguments were scheduled for January 13, 1998).

²⁰⁵ *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 106 F.3d 640, 641-42 (5th Cir. 1997). The judge, joined by three other judges, wrote:

This decision [to deny a rehearing in this case] is an important one because it contradicts every other court in the country that has addressed this issue, including two of our sister circuits and a large number of state appellate courts . . . [T]his case poses an unwarranted threat to a primary source of funding for public interest legal organizations in this circuit at a time when these organizations are already struggling for their lives financially.

Id.

A. The ABA's MRPC

The MRPC is "intended to serve the national framework for implementation of standards of professional conduct."²⁰⁶ In setting out to accomplish this noble goal, the Preamble states that:

A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives . . . in the public interest.²⁰⁷

The Preamble also declares that "a lawyer should strive . . . to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."²⁰⁸ These ideals are "a lawyer's responsibilities" and form the framework for the ABA's MRPC, especially as they pertain to the provision of legal services to those that cannot afford them on their own.²⁰⁹ A lawyer is "a public citizen having special responsibility for the quality of justice" and "play[s] a vital role in the preservation of society."²¹⁰ Therefore, when "[t]he Rules of Professional Conduct [are] . . . properly applied, [they] serve to define that relationship."²¹¹ As is made clear from the Preamble, lawyers are not only to be aware of the downfalls of the legal system, but are to take affirmative steps to aid those that are in need of legal assistance.²¹²

The MRPC explains a lawyer's duty in the sphere of public service through its various Article Six rules.²¹³ First, a lawyer is

²⁰⁶ MODEL RULES OF PROFESSIONAL CONDUCT Chairman's Introduction (1997).

²⁰⁷ MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1997) [hereinafter MRPC Preamble].

²⁰⁸ *Id.*

²⁰⁹ *Id.*; see MODEL RULES OF PROFESSIONAL CONDUCT Scope (1997).

²¹⁰ MRPC Preamble.

²¹¹ *Id.*

²¹² *See id.*

²¹³ *See* MODEL RULES OF PROFESSIONAL CONDUCT Article 6 (1997)

encouraged to give professional time to serve the public.²¹⁴ In addition, a lawyer is asked to take part in improving the legal system and to give financial support to groups whose goal is to provide legal services to people who cannot afford them.²¹⁵ The Comment to the MRPC's Rule 6.1 clearly establishes the policy that lawyers are to strive to help those that cannot afford to help themselves by either providing services or finances to groups that can provide the legal assistance that people need.²¹⁶ The Comment also states that because individual efforts are not enough to satisfy this need, "it has been necessary . . . to institute additional programs to provide legal services."²¹⁷

Clearly, IOLA is a program that embodies the expressed goals of the MRPC.²¹⁸ The express goal of providing "financial support" is satisfied when a lawyer "voluntarily contributes" through participation in an IOLA program.²¹⁹ IOLA would also satisfy the MRPC's goal of providing law-related public service because it qualifies as an "additional program to provide legal services."²²⁰

(discussing a lawyer's duty in the public service).

²¹⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (1997) ("A lawyer should aspire to render at least (50) hours" per year of legal assistance to those in need) [hereinafter MRPC Rule 6.1].

²¹⁵ *Id.* MRPC Rule 6.1(b)(3) provides that a lawyer should "participat[e] in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support for organizations that provide legal services to persons of limited means."

²¹⁶ MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 Cmt. (1997) [hereinafter MRPC Rule 6.1 Cmt.]. The Comment states:

Every lawyer . . . has a responsibility to provide legal services to those unable to pay Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means.

Id.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *See generally* MRPC Rule 6.1.

²²⁰ *See generally* MRPC Rule 6.1 Cmt.

With such uncontrovertible evidence that the MRPC considers providing legal services to those that cannot afford it as a high priority and main objective, it is clear what an obstacle the Fifth Circuit's decision is to carrying out and reaching this goal. The IOLA program only seeks to effectuate these noble goals and a Supreme Court decision upholding the Fifth Circuit will only result in decreasing any incentive a lawyer may have in easing the burden of a poor person trying to obtain legal assistance.

B. *The NYSBA's CPR*

The NYSBA has not adopted the ABA's MRPC but instead has retained the ABA's previous ethical rules, the CPR.²²¹ Nonetheless, New York places the same importance on its ethical rules as the ABA places on the MRPC.²²² Moreover, the text of the CPR is as indicative of the goals and obligations of a lawyer to provide law-related public services as the ABA's MRPC.²²³

In its Preamble, the CPR states that it hopes to guide lawyers by the principles set forth in its text.²²⁴ This principle is restated in the Preliminary Statement.²²⁵ The body of the CPR spells out the goals in express language. Canon One establishes that the first and foremost goal of the CPR is that a "lawyer should assist in maintaining the integrity and competence of the legal profession."²²⁶ This means that it is the obligation of a lawyer to provide legal services to "every person in our society."²²⁷

²²¹ GILLERS & SIMON, *supra* note 184, at 421 (stating that New York has retained the CPR as the state's ethical code).

²²² GILLERS & SIMON, *supra* note 184, at 421 (finding the CPR as important as the MRPC).

²²³ See CPR Preamble, Preliminary Statement (1996) [hereinafter CPR Preliminary Statement].

²²⁴ See MRPC Preamble.

²²⁵ See CPR Preliminary Statement.

²²⁶ MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1996).

²²⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1996) ("A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer") [hereinafter CPR EC 1-1].

Following the clear goal of the first Canon, Canon Two states that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."²²⁸ This direct affirmation of EC²²⁹ 1-1 shows how important the goal of providing legal services to the poor is to the NYSBA. Furthermore, it is the affirmative duty of the lawyer to "facilitate the process of . . . making legal services fully available."²³⁰ EC 2-16 states that a lawyer may fulfill this responsibility through the financial support of organizations that provide legal services to persons of limited means.²³¹ Canon Two and its "ethical considerations" clearly define their goals and a lawyer's obligations as that of providing legal services to those that cannot afford it. One way of doing this, as the CPR states, is through financial support of groups that provide these services. Clearly IOLA fulfills this goal.²³²

For those who remain unconvinced that IOLA fulfills the goal, the CPR implicitly states in Canon Eight that IOLA is indeed necessary.²³³ Canon Eight provides that continual efforts are needed to "maintain and improve our legal system."²³⁴ In doing so a lawyer is to act affirmatively in aiding programs that improve

²²⁸ *Id.* at Canon 2 (1996).

²²⁹ "EC" is short for "Ethical Considerations." These are described as "aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations." CPR Preliminary Statement. Disciplinary Rules, commonly referred to as "DR," differ from Ethical Considerations in that they are "mandatory in character . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

²³⁰ *Id.* at EC 2-1.

²³¹ *Id.* at EC 2-16 ("The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered . . . [therefore,] lawyers should support and participate in ethical activities designed to achieve that objective.") [hereinafter CPR EC 2-16].

²³² For an explanation of the concept of the IOLA program and how it fulfills its goals of providing legal services to those that cannot afford them on their own, see *supra* Part I.A.

²³³ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1996) (stating "a lawyer should assist in improving the legal system").

²³⁴ *Id.* at EC 8-1.

the provision of legal assistance to those that need it.²³⁵ Without these obligations the legal system ignores those in need of legal assistance. Therefore, IOLA is needed and encouraged by the provisions of the CPR.

C. Other Support for IOLA

In 1982, in response to the numerous states' drives toward implementing IOLA programs, the ABA Committee on Ethics and Professional Responsibility ("the Committee") issued a formal opinion addressing, *inter alia*, the question of whether lawyers were ethically permitted to take part in the IOLA programs.²³⁶ At the time this formal opinion was issued, the ABA followed the CPR, but has since revamped its ethical rules into the MRPC.²³⁷ The Formal Opinion of the Committee, therefore, focused on the CPR. Because the Professional Codes' goals are substantially the same,²³⁸ and no new formal opinion has been issued, the Committee's opinion applies to the MRPC as well as the CPR.²³⁹ While the Committee's opinion is not binding, but only advisory, on lawyers, it is strongly persuasive authority on the duties of lawyers and the ethicality of the IOLA program.²⁴⁰

²³⁵ *Id.* ("[L]awyers are especially qualified to . . . initiate corrective measures . . . to improve the [legal] system.")

²³⁶ ABA Committee on Ethics and Professional Responsibility, Formal Op. 348 (1982) [hereinafter Formal Op. 348]. The opinion stated:

Programs are being developed in a number of states to provide financial support for law-related public service projects from interest earned on lawyers' trust accounts in depository institutions. The Committee has been asked for its opinion on whether it is ethically permissible for lawyers to participate in these programs.

Id.

²³⁷ For explanation of the ABA adoption of the CPR, their subsequent revision and adoption of the MRPC and New York State's continued following of the CPR, see *supra* Part IV.

²³⁸ The goals of the Professional Codes are to strive to aid those that cannot afford legal services and to participate in activities to improve the law. See MRPC Preamble; CPR Preliminary Statement.

²³⁹ See Formal Op. 348., *supra* note 236.

²⁴⁰ See Amanda French Palmer, Comment, *A Critique of Interest on*

In answering the question of whether "lawyers may participate in programs using law-related public service projects," the Committee's opinion states that the Professional Codes do not explicitly make it permissible for lawyers to participate in IOLA programs.²⁴¹ The Committee did, however, recognize two practical benefits of IOLA programs: 1) shifting economic benefits from the banks to the law-related public interest organizations,²⁴² and 2) creating income where there would be none without the program.²⁴³ The Committee concluded that as long as a state's courts or legislature allows an IOLA program, a lawyer's participation in the program was ethical.²⁴⁴

Even while claiming that the Professional Codes did not clearly establish whether participation was ethically allowed, the Committee's opinion later states that they recognized the Professional Codes' clearly established goal of assisting in improving the legal system.²⁴⁵ The opinion continued to state that the goals of the Professional Codes are "advanced when a lawyer participates in a program which puts idle funds to law-related public uses."²⁴⁶

Thus, the ABA's formal opinion clearly shows that lawyer participation in IOLA programs is not only ethically permissible but also directly meets the goals of assisting in improving the legal system, and helps to provide legal services to those that, if not for

Lawyers' Trust Accounts Programs, 44 LA. L. REV. 999, 1000 nn.12-13 (1984) (stating that the Committee's advisory role is just that, advisory, and not binding authority).

²⁴¹ Formal Op. 348, *supra* note 236.

²⁴² Formal Op. 348, *supra* note 236 ("The practical effect of implementing these programs is to shift a part of the economic benefit from depository institutions to tax-exempt organizations.").

²⁴³ Formal Op. 348, *supra* note 236.

²⁴⁴ Formal Op. 348, *supra* note 236 ("[A]ssuming that either a court or a legislature has authorized a program . . . participation in the program by lawyers is ethical.").

²⁴⁵ Formal Op. 348, *supra* note 236 ("Canon 8 of the Model Code [of Professional Responsibility] says '[a] lawyer should assist in improving the legal system.'"). See also MRPC Rule 6.1 (stating that a lawyer has a responsibility to aid in the improvement of the legal system).

²⁴⁶ Formal Op. 348, *supra* note 236.

the IOLA program, could not otherwise afford them.²⁴⁷ Therefore, the Committee's opinion supports the conclusion that IOLA programs meet the goals of the Professional Codes.²⁴⁸

CONCLUSION

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.²⁴⁹

While the Fifth Circuit and its predecessors purport not to consider the ethical implications in deciding whether IOLA programs are valid, the Professional Codes have clearly made them a part of what they consider some of its principles to be. This, as stated in the previous sections, is the provision of legal services to those that cannot afford them on their own. Both Professional Codes also state that without lawyers assisting in the provision of these services, the profession cannot retain its nobility and integrity, and cannot continue to justify its important role in preserving society.²⁵⁰ By overlooking the Professional Codes' clearly expressed aspirations for the profession, the Fifth Circuit has, at best, amended the Professional Codes and eliminated the references to providing law-related public assistance. At worst, its decision has established the precedent that the Professional Codes are nothing more than a proposal and mean nothing in the eyes of the law.

²⁴⁷ Formal Op. 348, *supra* note 236.

²⁴⁸ Formal Op. 348, *supra* note 236.

²⁴⁹ CPR Preamble.

²⁵⁰ See MRPC Preamble; MRPC Rule 6.1; CPR Preamble; CPR EC 1-1.

