St. Mary's Law Journal

Volume 34 | Number 4 Article 7

1-1-2003

Iolta in the Balance: The Battle of Legality and Morality between Robin Hood and the Miser Recent Development.

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RECENT DEVELOPMENT

IOLTA IN THE BALANCE: THE BATTLE OF LEGALITY AND MORALITY BETWEEN ROBIN HOOD[1] AND THE MISER

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1. Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 13 (U.S. Mar. 26, 2003) (Scalia, J., dissenting) (mentioning the "Robin Hood Taking").

I. INTRODUCTION

Recently, the constitutionality of Interest on Lawyers' Trust Account (IOLTA) programs hung in the balance. On one side of the scale stood the client's right to interest earned on client property, albeit relatively insubstantial; on the other side stood the potential benefit to civil justice. The classic fable, *Robin Hood*, best described the situation in Texas and other states adopting IOLTA programs. Little John, pondering the morality of his actions, asked Robin Hood, "Are we good guys or bad guys? You know, out robbing the rich to feed the poor?"[2] Siding for the greater good, Robin Hood responded: "*Rob* is a naughty word. We never rob, we just *borrow* a bit from those who can afford it."[3] Many Texas lawyers are confronted with this dilemma on a daily basis. Namely, should the client be forced to forfeit interest earned on the client's own money, or should the client have the choice of opting out of the IOLTA program?

Recent Fifth and Ninth Circuit opinions dealt directly with this issue, which resulted in a circuit split. Consequently, a debate arose over the legality and morality of funneling interest earned on client money to fund legal services for the poor. An analogy of this debate can be drawn using the literary characters of Robin Hood and the Miser:[4] Robin Hood, who wants to take IOLTA interest

2. *Robin Hood*, *in* DISNEY'S TREASURY OF CHILDREN'S CLASSICS 88, 91-92 (spec. ed., 1997).

3. *Id.*

4. *See* David Luban, *SILENCE! Four Ways the Law Keeps Poor People from Getting Heard in Court*, LEGAL AFF., May-June 2000, at 54, 56, WL 2002-JUN LEGAFF 54 (reciting "a Hans Christian Anderson-like tale about a miser").

for the good of society, and the Miser, who wants nothing more than to keep what is rightfully his. The Fifth Circuit, siding with the Miser, held IOLTA accounts to be an unconstitutional taking of client property.[5] The Ninth Circuit, serving Robin Hood, found IOLTA accounts constitutional, holding that IOLTA accounts are not a taking for which just compensation is due.[6] The plight of Robin Hood and the Miser was recently resolved in the Supreme Court of the United States decision of *Brown v. Legal Foundation of Washington*.[7] Keeping with tradition, Robin Hood ultimately prevailed. The Supreme Court, recognizing the public purpose served by IOLTA accounts, found such accounts to be constitutional.[8]

IOLTA programs escaped unscathed, saving legal services from the potentially immense impact caused by the disbandment of such programs. All fifty states and the District of Columbia have IOLTA programs.[9] Texas is among the twenty-seven states that maintain a mandatory IOLTA program, requiring all lawyers who handle client funds to participate.[10] As a result, Texas receives ap-

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> [I]magine a Hans Christian Anderson-like tale about a miser to whom the fairies gave a peculiar gift: a magic penny that will turn to ashes unless the miser gives it away. If the miser tries to hoard the penny or spend it on himself—poof, a handful of ashes. But if he gives it to a person in need, the penny will never disappear. The miser can't bear to give his penny to the beggar he sees shivering in the street. He tries and tries, but his hand just won't unclench to drop the penny in the beggar's cup. The fairies whisper in his ear that the fate of his soul depends on his choice. The miser is about to give in, but suddenly recognizes that the beggar is his old rival, fallen on hard times. 'Nothing for you!' he shrieks. At that moment the beggar dies, and the penny turns to ashes.

Id.

5. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 188 (5th Cir. 2001) (holding that IOLTA accounts amount to a per se taking of client property), *petition for cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1).

6. *See* Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 861-62 (9th Cir. 2001) (en banc) (holding that IOLTA accounts do not amount to a taking for which just compensation is due), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

7. Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 22-23 (U.S. Mar. 26, 2003).

8. *Id.* at 23.

9. Jarrod P. Beasley, Casenote, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, *524 U.S. 156 (1998)*, 25 S. ILL. U. L.J. 441, 443 (2001); Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 779 (2002).

10. ABANETWORK, *Current Status of IOLTA Programs*, *at* http://www.abanet.org/legalservices/iolta/ioltus.html (last updated Apr. 5, 2002).

proximately $5 million per year in funding.[11] Nationwide, IOLTA programs draw approximately $100 million in funding per year.[12] Without IOLTA programs, funding of legal services for the poor would be drastically curtailed.[13] As a result of a potential large-scale impact on civil legal services for the poor, many in the legal community took notice of the IOLTA debate, anxiously awaiting the Court's recent decision in *Brown*.[14]

This Recent Development examines the IOLTA concept and provides a synopsis of the recent debate leading to the ultimate decision in *Brown*. Part II explores the history of IOLTA programs and the application of the IOLTA program in Texas. Part III details the sources of funding for civil legal services federally and in Texas. Part IV provides a summary of the current debate encompassing the IOLTA program, centering on the Ninth Circuit decision in *Washington Legal Foundation v. Legal Foundation of Washington*[15] and the Fifth Circuit decision in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*[16] and ultimately the Supreme Court's decision in *Brown*. Finally, Part V addresses the potential IOLTA battle on a new front—whether mandatory IOLTA programs violate the clients' First Amendment rights.[17] Additionally, Part V discusses the importance of IOLTA in today's legal community.

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11. TEX. EQUAL ACCESS TO JUSTICE FOUND., *Interest on Lawyers' Trust Accounts Fund*, *at* http://www.txiolta.org/about/iolta_fund.html (last visited Mar. 11, 2003).

12. David Luban, *SILENCE! Four Ways the Law Keeps Poor People from Getting Heard in Court*, LEGAL AFF., May-June 2000, at 54, 56, WL 2002-JUN LEGAFF 54. IOLTA generates approximately $100 million per year, second only to the federally-funded Legal Services Corporation (LSC), which has an annual budget of $310 million. *Id.*

13. *See* Frank Newton, *ABA Commission on IOLTA to the Rescue?*, TEX. LAW., Jan. 27, 2003, at 35 (commenting that a shut down of IOLTA programs will result in a crisis in civil legal services provided to low-income people in Texas); *see also* Marcia Coyle, *Court Revisits Client Account Issue*, NAT'L L.J., Dec. 2, 2002, at 10A (noting that IOLTA funds provide 15% of funding for all civil legal services and fund 26% of pro bono programs sponsored by state bar associations).

14. *See* Max B. Baker, *High Court to Hear Legal-Aid Case*, FT. WORTH STAR-TELEGRAM, Dec. 9, 2002, 2002 WL 103708628 (noting that "'[t]he entire national legal services community is watching this case closely'").

15. 271 F.3d 835 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

16. 270 F.3d 180 (5th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1).

17. Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 1-2 (U.S. Mar. 26, 2003) (Kennedy, J., dissenting).

II. THE HISTORY OF THE IOLTA PROGRAM

A. *Handling Client Funds Prior to 1980*

The American Bar Association (ABA) Model Rule of Professional Conduct 1.15(a) provides: "A lawyer shall hold property of clients . . . that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."[18] In tandem with this ethical requirement, the Texas Disciplinary Rules of Professional Conduct require attorneys to place client funds in "trust" or "escrow" accounts that permit withdrawal on demand.[19] These accounts are often referred to as demand accounts.[20] While ethical requirements for safeguarding client property require attorneys to maintain client funds separate from attorney or law firm funds, commingling of multiple clients' funds into one account is permissible, provided individual client funds are properly identified.[21] Prior to the 1980s, federal banking law did not permit the accrual of interest on demand accounts.[22] Thus, because there was no interest to distribute, attorneys could pool client funds into a single demand account without worrying about allocating interest to the appropriate recipient.[23] Demand accounts left the benefit with the

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18. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (2002). The rule further imposes a duty on the attorney to safeguard all property and keep records of such property held for the client. *Id.*; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9) (imposing a substantially identical requirement on Texas attorneys).

19. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14(a), (b).

20. *See* S. REP. NO. 96-368, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 240 (discussing the accrual of interest on demand accounts); *see also* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 182 (5th Cir. 2001) (observing that the Texas Interest on Lawyers Trust Accounts program utilizes demand accounts), *petition for cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1).

21. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.14(a) (requiring that client funds be kept separate from attorney or law firm funds); *see also Tex. Equal Access to Justice Found.*, 270 F.3d at 182 (noting that attorneys are permitted to aggregate client funds into one trust account).

22. *See* Act of Aug. 16, 1973, Pub. L. No. 93-100, § 2(a), 1973 U.S.C.C.A.N. (87 Stat. 342) 391 (codified at 12 U.S.C. § 1832); *see also* S. REP. NO. 96-368, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 236, 239-40 (discussing the injustice of preventing the accrual of interest on demand accounts); *see also Tex. Equal Access to Justice Found.*, 270 F.3d at 182 (recognizing that prior to the use of NOW accounts in 1980, demand accounts were, "in effect, interest-free loans to the banks" as federal law prohibited the accrual of interest on these accounts).

23. Attorneys often pooled client funds into a single demand account due to the expense of maintaining a separate account for every client. NAT'L LEGAL AID & DEFENDER

bank, in the form of interest-free loans, rather than with the attorney or the client.[24]

In 1980, banking laws underwent major revisions. One of those revisions included the ability to use Negotiable Order of Withdrawal (NOW) accounts.[25] Unlike demand accounts, NOW accounts permit the payment of interest.[26] However, while the interest-bearing qualities of NOW accounts look appealing, such accounts are not always beneficial. For example, unless an individual client's funds are of a significant amount, sufficient to outweigh the cost of maintaining the account, NOW accounts provide no benefit for the client.[27] Further, pooling client funds in NOW ac-

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ASS'N, FACT SHEET ON INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA) 1, http://www.nlada.org/DMS/Documents/1011300749.75/Fact%20Sheet%20on%20IOLTA.PDF (last visited Feb. 27, 2003).

24. *Tex. Equal Access to Justice Found.*, 270 F.3d at 182.

25. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 303, 1980 U.S.C.C.A.N. (94 Stat. 146) 1321 (codified at 12 U.S.C. § 1832).

26. *Id.* However, the use of NOW accounts by for-profit corporations or partnerships was prohibited. *Id.*; *Tex. Equal Access to Justice Found.*, 270 F.3d at 183 n.1.

27. *See* Jarrod P. Beasley, Casenote, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, *524 U.S. 156 (1998)*, 25 S. ILL. U. L.J. 441, 442-43 (2001) (noting that the 1980 amendment to federal banking laws required lawyers to deposit client funds into interest-bearing accounts if the funds are capable of generating interest in excess of the costs associated with opening the accounts). In conducting the cost-benefit analysis of placing client funds in NOW accounts, attorneys must consider: (1) banking fees associated with these accounts; and (2) attorney fees for maintaining the account, including accounting costs for allocating interest on the account in which the client's funds are pooled. *Id.* at 444. With client funds of insubstantial amounts or funds held for a relatively short period of time, the cost of administering a NOW account outweighs any potential to accrue interest. *Id.* at 443. The TEAJF website provides useful guidelines to aid attorneys in a cost-benefit analysis. TEX. EQUAL ACCESS TO JUSTICE FOUND., *Financial Considerations of Separate Client Accounts*, *at* http://www.txiolta.org/attorneys/financial_considerations.html (last visited Mar. 12, 2003). The Foundation suggests that attorneys consider the following costs: the attorney's time in establishing the account, preparation and filing of tax forms, accounting expenses, cost of closing the account, the minimum account balance, and service charges or other additional fees. *Id.* As an example of a practical cost-benefit analysis, consider a small firm that figures an $80 fee as a reasonable approximation of costs associated with an IOLTA account. *Id.* If a client deposits with their attorney $15,000 for a period of six months, such funds would earn $110.96 if placed in an account yielding 1.5% annually ($15,000 x 1.5% divided by 365 x 180 days (6 months) = $110.96). *Id.* In such a situation, the benefit of maintaining the account ($110.96) outweighs the cost ($80). *Id.* However, where the $15,000 is held for only two weeks, the account would accrue only $8.63 in interest ($15,000 x 1.5% divided by 365 x 14 days (2 weeks) = $8.63), and the cost ($80) greatly outweighs the benefit ($8.63). TEX. EQUAL ACCESS TO JUSTICE FOUND., *Guidelines for Attorneys*, *at* http://www.txiolta.org/how.html (last visited Jan. 17, 2003). The Foundation website provides further guidelines for practical cost-benefit analysis. *Id.*

counts proves difficult due to the complexities associated with allocating the proper percentage of interest to each individual client's account.[28]

B. *The Birth of IOLTA*

Following the advent of NOW accounts, the idea of using interest accrued on client funds to support legal services for the poor quickly evolved.[29] As a result, IOLTA programs were created and used as the vehicle to collect the interest accrued from client funds and distribute the funding to organizations providing legal services for the poor.[30] The concept of IOLTA is simple. Client funds that are (1) of an insubstantial amount, or (2) held for a short period of time, making them incapable of accruing interest, are pooled and placed in IOLTA accounts.[31] Once the money is placed in an

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28. RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 42-3.2, at 620 (2000). In accordance with the common law rule that interest follows principal, client funds pooled in an interest-bearing demand account must be allocated proportionately by the amount of accrued interest each client earns in relation to her relative investment in the account. *Id.* This requirement is dictated by the IRS rule that income accrued to each client's funds be reported separately. Jarrod P. Beasley, Casenote, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, *524 U.S. 156 (1998)*, 25 S. ILL. U. L.J. 441, 443 (2001). While this may not seem difficult today with advanced computer software available for this type of accounting, such software was not prevalent prior to the 1980s. RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 42-3.2, at 620 (2000). Although modern software eases this accounting task, attorneys are still authorized to charge fees for their efforts in allocating interest. Jarrod P. Beasley, Casenote, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, *524 U.S. 156 (1998)*, 25 S. ILL. U. L.J. 441, 443 (2001). Consequently, the overall cost of legal and banking fees may still outweigh any accrued interest on the account. RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 42-3.2, at 621-22 (2000).

29. *See* Frank Newton, *ABA Commission on IOLTA to the Rescue?*, TEX. LAW., Jan. 27, 2003, at 35 (noting that Florida adopted the first IOLTA program in 1981, just one year after banking laws were amended to allow for the accrual of interest on demand accounts).

30. *See id.* (describing IOLTA programs as a supplement to federal civil legal services funding); Tim O'Brien, *An 'IOLTA' by Any Other Name*, 170 N.J. L.J. 173 (2002), WL 10/21/2002 NJLJ 1 (explaining that IOLTA programs siphon off accrued interest on client funds).

31. TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 4 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf. The Texas Equal Access to Justice Foundation is the state sponsored entity in Texas that is charged with collecting IOLTA funds and distributing them to qualified legal service organizations. TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 1, 4, 10 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf.

IOLTA account, the interest earned is funneled to a states-sponsored entity for the purpose of supporting legal services for the poor.[32] This is different from a traditional NOW account that allocates the interest proportionally to each client.[33] However, placing client funds in IOLTA accounts is permissible only where the administrative costs of maintaining an interest-bearing account outweigh the likely benefit of accrued interest on individual client funds.[34] The justification for using interest accrued on client funds is that, without the IOLTA account, the client funds would be incapable of accruing interest on their own.[35] Thus, interest is accrued as a result of the pooled IOLTA account rather than as a result of the client's individual funds.[36]

The invention of the IOLTA account was seen as pure genius, and the concept rapidly spread across the United States.[37] Further boosting the IOLTA benefit, the Internal Revenue Service in 1981 excluded interest earned on IOLTA accounts from the taxable income of the client.[38] Consequently, the effects of IOLTA accounts are as follows: (1) IOLTA accounts permit the accrual of interest on pooled client funds; (2) client access to interest accrued on these funds is prohibited; and (3) the poor are entitled to the interest accrued in IOLTA accounts in the form of subsidized legal ser-

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32. TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 10 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf.

33. *See* TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 11 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf (requiring funds earned from IOLTA to be distributed to legal service organizations).

34. NAT'L LEGAL AID & DEFENDER ASS'N, *IOLTA & Other Funding: What Is IOLTA?*, *at* http://www.nlada.org/Civil/Civil_IOLTA/IOLTA_IOLTA/IOLTA_IOLTA_Home (last visited Mar. 1, 2003).

35. TEX. STATE BAR R. art. XI, § 2, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998).

36. *Id.*

37. Stephanie Francis Cahill, *IOLTA Issue to Be Reviewed by Supreme Court*, 23 A.B.A. J. E-REP. 8 (2002), WL 1 No. 23 ABAJEREP 8. San Francisco lawyer Thomas P. Brown described the interest earned on IOLTA accounts as "spinning flax into gold." *Id.*; *see also* Jarrod P. Beasley, Casenote, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, *524 U.S. 156 (1998)*, 25 S. ILL. U. L.J. 441, 441 (2001) (noting that since "[t]he concept originated in Florida, . . . [IOLTA] has skyrocketed to the forefront of pro bono legal programs in the United States").

38. *See* Rev. Rul. 81-209, 1981-2 C.B. 16 (holding that interest accrued on an attorney trust account that is paid over to the state bar is excludable from the client's gross income); Rev. Rul. 87-2, 1987-1 C.B. 18 (reaffirming its holding that interest accrued on IOLTA accounts is excludable from the gross income of both the client and the attorney).

vices.[39] One must question whether this is nothing more than Robin Hood thievery—taking from the rich (the client with the funds) and giving to the poor (through free legal services funded by client money).

C. *How IOLTA Operates*

In 1981, Florida became the first state to adopt an IOLTA program.[40] Today, all fifty states and the District of Columbia operate IOLTA programs.[41] Either the state supreme court or the state bar creates IOLTA programs.[42] As part of creating an IOLTA program, a state agency is established to administer the program.[43] The state agency and its board of directors[44] are charged with collecting the interest on IOLTA accounts and distributing these funds to various legal services and programs for the poor.[45]

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39. TEX. EQUAL ACCESS TO JUSTICE FOUND., BROCHURE, http://www.txiolta.org/about/docs/TEAJF_brochure.pdf (last visited Mar. 12, 2003).

40. Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 779 (2002).

41. Jarrod P. Beasley, Casenote, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, *524 U.S. 156 (1998)*, 25 S. ILL. U. L.J. 441, 443 (2001); Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 779 (2002).

42. *See* Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 779 (2002) (noting that IOLTA programs are generally instituted by the state supreme court and applied through the state bar association).

43. *See* TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 1 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf (establishing the Texas Equal Access to Justice Foundation, a nonprofit corporation, to administer the Texas Equal Access to Justice Program promulgated by the Texas Supreme Court as the IOLTA program).

44. *See* TEX. STATE BAR R. art. XI, § 4(C) (providing guidelines for the establishment of the Board of Directors for the Texas nonprofit corporation (later named the Texas Equal Access to Justice Foundation) designated to administer the state's IOLTA program). The Board consists of a chairman and twelve members. *Id.* The Texas Supreme Court appoints six directors, while the Texas State Bar also appoints six directors. *Id.* "At least two of each group of appointees . . . shall not be attorneys, [or] have, . . . a financial interest in the practice of law." *Id.*

45. *See* TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 9 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf (directing banks to remit interest earned on the account to the TEAJF on a quarterly basis); TEX. EQUAL ACCESS TO JUSTICE FOUND., BROCHURE, http://www.txiolta.org/about/docs/TEAJF_brochure.pdf (last visited Mar. 12, 2003) (noting that the TEAJF administers funds that are used to provide civil legal assistance to low-income Texans).

There are three variations of IOLTA programs adopted by the states. First, the "comprehensive" program, adopted by twenty-seven states including Texas, requires all lawyers within the state who maintain client trust accounts to participate in the IOLTA program.[46] Second, the "opt-out" program, adopted by twenty-two states, provides for participation in the state's IOLTA program unless the attorney chooses not to participate.[47] Third, the "voluntary" IOLTA program, adopted in three jurisdictions, permits attorneys to participate at their own choosing.[48] All three variations receive the support of the ABA, which has deemed IOLTA programs ethical.[49] The ABA has written numerous amici curiae briefs in support of state IOLTA programs subject to constitutional challenge.[50]

D. *IOLTA in Texas*

The Texas Supreme Court, quick to adopt the IOLTA concept, implemented the state's first IOLTA program in 1984.[51] Initially, the Texas IOLTA program was voluntary, permitting attorneys to

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46. ABANETWORK, *Current Status of IOLTA Programs*, *at* http://www.abanet.org/legalservices/iolta/ioltus.html (last updated Apr. 5, 2002).

47. *Id.*

48. *Id.* Oklahoma, South Dakota, and the Virgin Islands provide for voluntary participation in the IOLTA program. *Id.*

49. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 348 (1982) (recognizing attorney participation in IOLTA programs as ethically permissible); ABANETWORK, *ABA Commission on Interest on Lawyers' Trust Accounts*, *at* http://www.abanet.org/legalservices/iolta/ioltcomm.html (last visited Mar. 1, 2003) (noting the ABA's conclusion that attorney participation in IOLTA programs is ethically permissible). The ABA Commission on Interest on Lawyers' Trust Accounts was created in 1986 to support IOLTA programs. *Id.* Tasks of the Commission are as follows:

> (1) [C]ollects, maintains, analyzes and disseminates information on programs involving the use of interest on lawyers' trust accounts for the support of law-related public service activities; (2) makes recommendations for ABA policy on the creation and operation of IOLTA programs; (3) maintains liaisons with state IOLTA programs; (4) oversees the IOLTA Clearinghouse, which provides information, materials and technical assistance on IOLTA program design and operation.

Id.

50. *See* ABANETWORK, *ABA Commission on Interest on Lawyers' Trust Accounts*, *at* http://www.abanet.org/legalservices/iolta/ioltcomm.html (last updated Apr. 4, 2002) (indicating that the ABA has filed five amici curiae briefs on behalf of the Texas IOLTA program and one on behalf of the Washington IOLTA program—the two programs currently in the spotlight).

51. TEX. STATE BAR R. art XI, § 5, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998).

pool qualified client funds into a single trust account and allocate the interest to civil legal services for indigent persons.[52] In 1989, the Texas Supreme Court converted the program from voluntary to mandatory to increase the level of IOLTA funding.[53] The court provided:

> (A) On certain client funds held by attorneys, interest income cannot reasonably be earned to benefit individual clients for whom the funds are held;
>
> (B) Income can be earned on those client funds pursuant to the program provided for in this Article and that income should be used to provide additional legal services to the indigent in civil matters[.][54]

The Texas Equal Access to Justice Foundation (TEAJF), established by the Texas Supreme Court when IOLTA was first adopted, administers the state's IOLTA program.[55] The rules governing the operation of the Foundation provide:

> An attorney licensed by the Supreme Court of Texas, receiving in the course of the practice of law in this state, client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time, must establish and maintain a separate interest-bearing insured depository account at a financial institution and deposit in the account such funds. All client funds may be deposited in a single unsegregated account. . . . The Foundation shall hold the entire beneficial interest in the interest earned.[56]

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52. TEX. EQUAL ACCESS TO JUSTICE FOUND., *Interest on Lawyers' Trust Accounts Fund*, *at* http://www.txiolta.org/about/iolta_fund.html (last visited Mar. 12, 2003). An attorney is only required to place in an IOLTA account client funds from which any interest accrued would be cancelled out by the cost of maintaining an individual interest-bearing demand account. NAT'L LEGAL AID & DEFENDER ASS'N, *IOLTA & Other Funding: What Is IOLTA?*, *at* http://www.nlada.org/Civil/Civil_IOLTA/IOLTA_IOLTA/IOLTA_IOLTA_Home (last visited Mar. 1, 2003). Where client funds are of a value substantial enough or held for a period long enough to generate beneficial interest, the attorney has a fiduciary duty to place the client funds in an individual interest-bearing account for the client. NAT'L LEGAL AID & DEFENDER ASS'N, FACT SHEET ON INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA) 1, http://www.nlada.org/DMS/Documents/1011300749.75/Fact%20Sheet%20on%20IOLTA.PDF (last visited Feb. 27, 2003).

53. TEX. EQUAL ACCESS TO JUSTICE FOUND., *Texas IOLTA Litigation Timeline*, *at* http://www.txiolta.org/about/iolta_litigation_timeline.html (last visited Mar. 12, 2003).

54. TEX. STATE BAR R. art. XI, § 2(A)-(B).

55. TEX. EQUAL ACCESS TO JUSTICE FOUND., BROCHURE, http://www.txiolta.org/about/docs/TEAJF_brochure.pdf (last visited Mar. 12, 2003).

56. TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 4 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf.

The rules further require Texas attorneys to place client funds in a demand account and use good faith in obtaining an interest rate on the account.[57] TEAJF uses interest accrued on the account to fund grants to qualifying organizations whose "primary purpose [is] the delivery of legal services to low-income persons."[58] Attorneys who fail to comply with the IOLTA program risk having their license suspended.[59] As a result of the mandatory program in Texas, IOLTA is a substantial contributor of funds for civil legal services provided to low-income persons.[60]

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57. TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 4B, 7 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf. The Foundation indicates that some banks are "IOLTA-friendly" in that they waive fees for maintaining the accounts, pay the highest interest possible, and waive minimum balance requirements. TEX. EQUAL ACCESS TO JUSTICE FOUND., *How to Be IOLTA-Friendly*, *at* http://www.txiolta.org/financial_institutions/iolta_friendly.html (last visited Mar. 12, 2003). TEAJF operates an Honor Roll program to recognize those banks that offer high interest rates through the IOLTA program to help improve access to justice. TEX. EQUAL ACCESS TO JUSTICE FOUND., BROCHURE, http://www.txiolta.org/about/docs/TEAJF_brochure.pdf (last visited Mar. 12, 2003). The Honor Roll has three levels of members: Gold, yielding 2.5% interest or above; Silver, yielding 2.0 to 2.49% interest; and Bronze, yielding 1.5 to 1.99% interest. *Id.*

58. TEX. EQUAL ACCESS TO JUSTICE FOUND. R.10, 11 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf. The Foundation's Board of Directors delegated the authority to promulgate a policy detailing the criteria for receiving a grant. *Id.* The following are minimum criteria that must be met: (1) the organization must qualify for exempt status from taxation under Internal Revenue Code § 501(c)(3); (2) the primary purpose of the organization must be to provide legal services to the indigent; (3) the organization must be current in all required governmental filings; (4) the organization must maintain open records and hold open meetings; (5) the organization must be an Equal Opportunity Employer; and (6) the organization must demonstrate the ability to utilize granted funds in a manner consistent with Foundation rules. *Id.*

59. TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 24 (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf. Each year the Foundation will furnish to the State Bar of Texas a list of attorneys who have not complied with the IOLTA program. *Id.* The State Bar of Texas shall send a non-compliance notice, after which an attorney will have thirty days to comply. *Id.* Failure to comply in the set time frame will result in immediate suspension of the attorney's license, and suspension will continue until the attorney files a compliance notice. *Id.* Attorneys who do not handle client funds are not required to establish IOLTA accounts, but must note this fact on their annually filed IOLTA compliance statement. TEX. EQUAL ACCESS TO JUSTICE FOUND. R. 4A (2002), http://www.txiolta.org/about/docs/Rules_Govern_TEAJF_Amended_March_20_2002.pdf.

60. *See* TEX. EQUAL ACCESS JUSTICE FOUND., LEGAL AID IN TEXAS 2001, at 17 (2002), http://www.txiolta.org/grants/docs/TX_Statewide_Overview_11-27-02.pdf (indicating that the mandatory Texas IOLTA program drew over $5 million in funding in the year 2001 alone).

III. CURRENT FUNDING FOR CIVIL LEGAL SERVICES

IOLTA accounts serve as a significant source of funding for civil legal services. If IOLTA is disbanded, it will have a ripple effect on civil legal services for the poor. In an era of budget cuts and a shift toward state-based funding,[61] the true victims of a curtailment of IOLTA programs would be the indigents, who would be "left unable to navigate our system of justice."[62]

A. *Federal Funding*

Nationwide, IOLTA funds generated over $200 million in 2001.[63] The only source of funding for civil legal services greater than IOLTA accounts is funding provided by the federal government through the Legal Services Corporation (LSC).[64] Last year, the LSC budget was over $300 million.[65] However, LSC providers have declined over the past few years, and "state-level funding has become a new focal point for the future of civil legal assistance."[66] In this shift toward state-based funding, IOLTA programs provide

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61. *See* Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1214, 1217 (2002) (indicating a movement toward state-based funding). Current state-based funding is largely generated through state IOLTA programs. *Id.* at 1227.

62. Brief of Amici Curiae AARP et al. at 5, Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), 2002 WL 31399637.

63. *Id.* at 11. This figure reflects interest accrued on attorney IOLTA accounts (approximately $162 million) as well as interest accrued on the collected IOLTA income. *Id.* at 12 n.14. "IOLTA program administrators . . . have the ability to retain reserves and manage interest proceeds in a manner that maximizes returns and provides additional value to the ultimate beneficiaries of services provided by IOLTA grantees." *Id.*

64. *See* David Luban, *SILENCE! Four Ways the Law Keeps Poor People from Getting Heard in Court*, LEGAL AFF., May-June 2000, at 54, 56, WL 2002-JUN LEGAFF 54 (illustrating that IOLTA, generating over $100 million per year, amounts to the second-largest source of funds for civil legal service—second only to the LSC); Jarrod P. Beasley, Casenote, *Interest on Lawyers' Trust Accounts: A Fifth Amendment Analysis:* Phillips v. Washington Legal Foundation, *524 U.S. 156 (1998)*, 25 S. ILL. U. L.J. 441, 441 (2001) (placing IOLTA funding second only to federal funding for civil legal services).

65. *See* David Luban, *SILENCE! Four Ways the Law Keeps Poor People from Getting Heard in Court*, LEGAL AFF., May-June 2000, at 54, 55, WL 2002-JUN LEGAFF 54 (listing the LSC annual budget at $310 million).

66. *See* Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1214, 1217 (2002) (reporting that LSC providers declined from 325 to 176 grantees between 1995 and 2002).

significant resources.[67] While each state varies in its use of IOLTA funds, the money is generally used to support programs and organizations that provide civil legal assistance to the indigent, improve the administration of justice within the court system, educate the public on legal issues, and provide "scholarships and clinical instruction for law students."[68] Proponents of IOLTA accounts view them as "a good way for the bar to give back and provide legal services for those who are less fortunate."[69]

B. *Texas Legal Services Funding*

The Texas IOLTA program is a monumental source of funding for civil legal services provided to indigents in Texas. Approximately 3.5 million Texans live under the poverty level and need assistance accessing the justice system.[70] "Almost one-half of low-income Texas households have had at least one legal problem in which they could have benefited from legal advice."[71] The program, operated by the TEAJF, generated $500,000 for grants in 1987-1988 and has grown to generate over $76 million since its inception.[72] Last year, IOLTA funds generated over $5 million in funding for civil legal services for indigents.[73] These Texas IOLTA funds are used to reduce the burden on taxpayers and human suf-

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67. *See id.* at 1227 (indicating that IOLTA funding has been a significant factor in the increase of funding from state and local governments since 1982). It is predicted that the state-based legal services funding of the future will come from "state governmental sources, the private bar, Interest of Lawyers Trust Accounts (IOLTA), private foundations, and the LSC." *Id.* at 1217.

68. ABANETWORK, *IOLTA at Work*, *at* http://www.abanet.org/legalservices/iolta/home.html (last visited Mar. 7, 2003).

69. Stephanie Francis Cahill, *IOLTA Issue to Be Reviewed by Supreme Court*, 23 A.B.A. J. E-REP. 8 (2002), WL 1 No. 23 ABAJEREP 8 (quoting John R. Jones, chair of the Texas Equal Access to Justice Commission).

70. *2002 Dues Statement Includes "Opt-Out" Access to Justice Contribution*, 65 TEX. B.J. 396, 397 (2002). "Approximately one-fifth of all Texas families live in poverty." TEX. EQUAL ACCESS TO JUSTICE FOUND., BROCHURE, http://www.txiolta.org/about/docs/TEAJF_brochure.pdf (last visited Mar. 12, 2003).

71. TEX. EQUAL ACCESS TO JUSTICE FOUND., BROCHURE, http://www.txiolta.org/about/docs/TEAJF_brochure.pdf (last visited Mar. 12, 2003).

72. TEX. EQUAL ACCESS TO JUSTICE FOUND., *Interest on Lawyers' Trust Accounts Fund*, *at* http://www.txiolta.org/about/iolta_fund.html (last visited Mar. 12, 2003).

73. *Id.*

fering caused by unmet legal needs, which ultimately increases civility in our society.[74]

While Texas IOLTA funds generate the bulk of state funding for civil legal services for indigents in Texas, additional sources of funding include the Basic Civil Legal Services (BCLS). The BCLS, also operated by TEAJF, is a program initiated by the Texas Legislature in 1997.[75] BCLS funding is generated by additional court filing fees for parties who file lawsuits in Texas courts.[76] The funds are deposited by the comptroller into the BCLS account of the judicial fund from which TEAJF makes grants, approved by the Supreme Court of Texas, for the purpose of providing basic civil legal services to low-income individuals in Texas.[77] In 2001, the BCLS program contributed $3 million to the TEAJF's $57.6 million budget.[78]

Another source of funding of civil legal services for low-income persons in Texas is private bar contributions.[79] Each year, Texas attorneys are required to pay dues to the state bar[80] and are encouraged to perform pro bono work and contribute money to legal services for the poor.[81] This current attorney dues statement saw a radical change from past years. In 2000, attorneys were merely

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74. TEX. EQUAL ACCESS TO JUSTICE FOUND., BROCHURE, http://www.txiolta.org/about/docs/TEAJF_brochure.pdf (last visited Mar. 12, 2003).

75. TEX. EQUAL ACCESS TO JUSTICE FOUND., *About the Texas Equal Access to Justice Foundation*, *at* http://www.txiolta.org/about/index.html (last visited Mar. 12, 2003); *see also* TEX. GOV'T CODE ANN. § 51.943 (Vernon Supp. 2003) (describing the Basic Legal Services Account).

76. *See* TEX. GOV'T CODE ANN. § 51.701 (Vernon 1998) (requiring parties to pay the clerk an additional $40 filing fee to be given to the comptroller for placement in the judicial fund); *see also* TEX. EQUAL ACCESS TO JUSTICE FOUND., *About the Texas Equal Access to Justice Foundation*, *at* http://www.txiolta.org/about/index.html (last visited Mar. 12, 2003).

77. TEX. EQUAL ACCESS TO JUSTICE FOUND., *About the Texas Equal Access to Justice Foundation*, *at* http://www.txiolta.org/about/index.html (last visited Mar. 12, 2003).

78. TEX. EQUAL ACCESS TO JUSTICE FOUND., LEGAL AID IN TEXAS 2001, at 17 (2002), http://www.txiolta.org/grants/docs/TX_Statewide_Overview_11-27-02.pdf.

79. *See* Eric Kleiman, *After Awakening, Texas' Hankinson Delivers*, LSC's EQUAL JUST. MAG., Summer 2002, http://www.ejm.lsc.gov/EJMIssue2/judicial/judicial.htm (noting that the Texas Bar donated more than a half-million dollars to benefit civil legal aid); *see also* Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213, 1217 (2002) (listing private bar contributions as an additional source of state-based funding).

80. TEX. STATE BAR R. art III, § 3.

81. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002). Attorneys are encouraged to contribute fifty hours of pro bono legal service per year and contribute financially to legal services for the poor. *Id.*

asked to make voluntary contributions to legal services for the poor.[82] Voluntary contributions through the 2000 dues statement amounted to $60,000 in funding.[83] This inadequate private bar funding led to a change. In 2001, attorney dues statements included a $65 "opt-in" contribution, which allowed Texas attorneys to elect to make an additional contribution to legal services for the poor.[84] This opt-in contribution generated over $517,000.[85] While the increase in contributions from 2000 to 2001 looks significant, the court saw only a 12% attorney participation level.[86]

In light of this limited participation and faced with a funding crisis, the TEAJF proposed an "opt-out" provision, which was adopted by the Texas Supreme Court.[87] Thus, on the 2002 dues statement, attorneys were presented with a $65 "opt-out" contribution.[88] With an opt-out provision, an additional $65 is automatically included in each Texas attorney's dues statement.[89] An attorney who does not wish to contribute to civil legal services must select to opt-out, subtracting $65 from her dues statement.[90] The idea behind the change was to encourage voluntary contribu-

82. *See 2002 Dues Statement Includes "Opt-Out" Access to Justice Contribution*, 65 TEX. B.J. 396, 396 (2002) (discussing the voluntary contributions made through the 2000 attorney dues statement).

83. *Id.*

84. *Id.* (noting that the "opt-in" provision first appeared on dues statements in 2001).

85. *Id.* (reporting 2001 voluntary bar contributions due to the "opt-in" provision totaling $517,331). The "opt-in" feature of 2001 received a mere 12% participation rate. *Id.*

86. *2002 Dues Statement Includes "Opt-Out" Access to Justice Contribution*, 65 TEX. B.J. 396, 396 (2002).

87. *See id.* (indicating that a funding crisis for civil legal services prompted the change from an "opt-in" provision to an "opt-out" provision). The funding crisis is fueled by a number of factors, including the increase in need for civil legal services, the current challenge to IOLTA programs, and a decrease in interest rates. *Id.* In adopting the opt-out contribution feature, the court made note of South Carolina's opt-out program, which receives 80% participation. *Id.* The proposal for the opt-out provision was recommended to the Texas Supreme Court with unanimous support from the TEAJF as well as strong support from the Texas State Bar Committee on Legal Services to the Poor in Civil Matters. *Id.*

88. *See 2002 Dues Statement Includes "Opt-Out" Access to Justice Contribution*, 65 TEX. B.J. 396, 396-97 (2002) (noting plans to include the new "opt-out" feature on the 2002 attorney dues statement, mailed in May).

89. *Id.* at 396.

90. *Id.*

tions, and increase the support level from Texas attorneys.[91] Chief Justice Phillips of the Texas Supreme Court stated, "We don't view this as coercion, but I guess it is friendly persuasion."[92] It is estimated that the 2002 opt-out contribution will generate $3.6 million.[93] Although other sources of funding are available for civil legal services, IOLTA programs remain an essential source of support. "In many instances IOLTA funds are used to leverage these other funding sources by providing required non-federal matches, or as general operating funds for which these other funds cannot be used."[94]

IV. CURRENT LITIGATION SURROUNDING IOLTA

Current litigation surrounding IOLTA focuses on a constitutional challenge. The Fifth Amendment of the United States Constitution states that no "private property be taken for public use, without just compensation."[95] This "Takings Clause does nothing to bar the government from taking property, but only from taking it without just compensation."[96] Thus, in evaluating a Takings Clause claim, courts examine three elements: (1) whether the interest constitutes "property";[97] (2) whether there has been a gov-

91. *Id.* In light of this encouragement, the contribution remains voluntary and instructions were included in the statement to inform attorneys how to opt-out of the contribution, should they so choose. *Id.* at 397.

92. *2002 Dues Statement Includes "Opt-Out" Access to Justice Contribution*, 65 TEX. B.J. 396, 397 (2002).

93. *Id.* at 396.

94. Brief of Amici Curiae AARP et al. at 3, Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), 2002 WL 31399637.

95. U.S. CONST. amend. V. The Fifth Amendment was made applicable to the states through the Fourteenth Amendment. *See* U.S. CONST. amend. XIV (declaring "nor shall any State deprive any person of life, liberty, or property, without due process of law"); *see also* Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 239 (1897) (applying the "Due Process Clause" to the states through the Fourteenth Amendment).

96. Phillips v. Wash. Legal Found., 524 U.S. 156, 175 (1998) (Souter, J., dissenting). The U.S. Supreme Court refers to the final clause of the Fifth Amendment as the Takings Clause and the Just Compensation Clause. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (referring to the Takings Clause), *with* Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 13 n.6 (U.S. Mar. 26, 2003) (referring to the Just Compensation Clause).

97. U.S. CONST. amend. V (stating that "private property [shall not] be taken for public use, without just compensation").

ernmental "taking" of the property for public use;[98] and (3) whether just compensation has been denied.[99] In conducting an analysis under the Takings Clause, all three elements must be considered together to establish a constitutional violation.[100]

Consequently, IOLTA challenges are commonly founded on the Fifth Amendment's Takings Clause.[101] Opponents of the IOLTA program argue that interest earned on IOLTA accounts, generated from client funds, is the private property of the client, and that allocating the interest to civil justice is a governmental taking for which just compensation is due.[102] Counterarguments stem from the three elements of the Takings Clause analysis. Proponents first

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98. *Id.* A threshold issue to a Takings Clause claim is whether the governmental taking is for a public use. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984). "'[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.'" *Id.* at 241 (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937)).

99. U.S. CONST. amend. V; *Phillips*, 524 U.S. at 172 (Souter, J., dissenting); Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 781 (2002). *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (conducting a Fifth Amendment analysis by looking for a property interest, a taking, and determining what just compensation is due).

100. Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 781 (2002).

101. *See, e.g.*, *Phillips*, 524 U.S. at 156 (framing the issue of the case with respect to the Fifth Amendment); Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 841 (9th Cir. 2001) (en banc) (stating the basis of the challenge to the IOLTA program in the State of Washington), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325); Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 184 (5th Cir. 2001) (restating the appellant's claim that the IOLTA program created a Fifth Amendment violation), *petition for cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1); Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 968 (1st Cir. 1993) (affirming the district court's dismissal of a claim based on the Fifth Amendment); Cone v. State Bar of Fla., 819 F.2d 1002, 1004 (11th Cir. 1987) (outlining the claims of the appellant based on the Fifth Amendment, violation of due process, and state law claims regarding fiduciary duty); Brief of Amicus Curiae of Pacific Legal Foundation at 2, Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc), 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), 2002 WL 1968184 (arguing that the seizure of IOLTA generated interest amounts to a taking under the Fifth Amendment). IOLTA challenges have also raised a First Amendment issue regarding the client's rights to freedom of speech and freedom of association. *Legal Found. of Wash.*, 271 F.3d at 841; *Tex. Equal Access to Justice Found.*, 270 F.3d at 184; *Mass. Bar Found.*, 993 F.2d at 980.

102. *See, e.g.*, *Phillips*, 524 U.S. at 163 (noting Respondent's allegation that the Texas IOLTA program amounts to a taking for which just compensation is due); *Tex. Equal Access to Justice Found.*, 270 F.3d at 184 (arguing that IOLTA programs amount to an impermissible taking in violation of the Fifth Amendment); *Mass. Bar Found.*, 993 F.2d at 970

contend that interest earned on IOLTA accounts is not private property of the client.[103] Further, even if the interest is private property, allocation of the interest to civil justice is not a taking for public use.[104] Finally, even if IOLTA accounts constitute a taking, the taking is so insignificant that no just compensation is due.[105] To successfully defeat IOLTA under the Fifth Amendment Takings Clause, all three prongs must be answered affirmatively.[106]

A. *Prong One: Whether Interest Earned on IOLTA Accounts Is Private Property*

1. Interest Income As Private Property

When IOLTA was initially challenged, courts focused on the first prong of the Takings analysis—whether interest earned on IOLTA accounts is the private property of the client.[107] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[108] served as the guiding case on the property status of interest income. In *Webb's*, the Supreme Court addressed the constitutionality of a state statute providing for retention of the interest accrued on interpleader funds and found that such retention violated the Takings Clause.[109] Acknowledging

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(alleging IOLTA accounts are a taking without just compensation in violation of the Fifth Amendment).

103. *See Phillips*, 524 U.S. at 169 (acknowledging Petitioner's argument that interest income is not private property because it "cannot reasonably be expected to generate interest income on [its] own"). The *Phillips* Court dispelled this argument by holding that interest earned on IOLTA accounts is the private property belonging to the owner of the principal from which the interest accrued. *Id.* at 160.

104. *See Legal Found. of Wash.*, 271 F.3d at 861 (applying an ad hoc analysis and concluding that allocation of interest accrued on IOLTA accounts does not amount to a taking).

105. *See id.* (holding that even if the IOLTA program amounted to a taking, no just compensation would be due because "any taking of their property would be nil"). *But see Loretto*, 458 U.S. at 434-35, 437-38 n.15 (holding that property includes more than an economic right and may be taken even where infringement was negligible and possibly resulted in an increase in market value).

106. *See Phillips*, 524 U.S. at 175 (Souter, J., dissenting) (arguing that it "makes good sense to consider what is property only in connection with what is a *compensable taking*") (emphasis added); *see also* Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 781 (2002) (noting that a court must find all three elements of the Takings Clause analysis to conclude that there has been a taking).

107. *See Phillips*, 524 U.S. at 169 (discussing that the issue of "[w]hether client funds held in IOLTA accounts could generate net interest is a matter of some dispute").

108. 449 U.S. 155 (1980).

109. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980).

the traditional rule that "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property," the Court held that interest accrued on interpleader funds is private property.[110] Concluding its Takings Clause analysis, the Court held that the State "by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."[111]

Early IOLTA challenges adopted the general rule set forth in *Webb's* that interest follows principal. However in addressing these challenges, courts were quick to distinguish interest earned on IOLTA accounts from the interest at issue in *Webb's*. *Cone v. State Bar of Florida*[112] and *Washington Legal Foundation v. Massachusetts Bar Foundation*[113] were among the first cases to address the constitutionality of IOLTA accounts under the Fifth Amendment. While acknowledging the holding in *Webb's*, the Eleventh Circuit in *Cone* and the First Circuit in *Massachusetts Bar Foundation* drew the distinction between the interest in *Webb's* and IOLTA interest at the first element of the Takings Clause analysis—whether the interest constitutes private property.[114] Unlike the funds placed in the interpleader account in *Webb's*, the funds placed in IOLTA accounts were incapable of drawing net interest.[115] The benefit of IOLTA accounts came only when client funds were pooled together into one account.[116] As a result of the inabil-

110. *Id.* at 164.

111. *Id.*

112. 819 F.2d 1002 (11th Cir. 1987).

113. 993 F.2d 962 (1st Cir. 1993).

114. *See* Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 975-76 (1st Cir. 1993) (holding that plaintiffs had no tangible property right in interest accrued on the account as in *Webb's*); Cone v. State Bar of Fla., 819 F.2d 1002, 1007 (11th Cir. 1987) (distinguishing *Webb's* on the basis of the net value accrued on the account in each case). In *Webb's*, "[t]he funds were sufficient in amount, and held for a sufficient period of time, to generate $90,000 in interest over a year and a half." *Id.* In *Cone*, the court found that interest accrued on the IOLTA account at issue had no net value. *Id.*

115. *See, e.g.*, Phillips v. Wash. Legal Found., 524 U.S. 156, 169 (1998) (acknowledging that client funds placed in IOLTA accounts generate no net interest); *Cone*, 819 F.2d at 1007 (noting that IOLTA funds generate no net value).

116. *See Cone*, 819 F.2d at 1007 (stressing that interest income on IOLTA accounts is generated only by combining all client funds into a single account); Kristi L. Darnell, Note, *Pennies from Heaven—Why* Washington Legal Foundation v. Legal Foundation of Washington *Violates the U.S. Constitution*, 77 WASH. L. REV. 775, 779-80 (2002) (noting that the

ity to draw any net interest, the circuit courts in *Cone* and *Massachusetts Bar Foundation* held there was no property interest from which the state could "take."[117] Because the first element of the Takings Clause analysis was absent, the courts determined that further examination was unwarranted.[118]

Following *Webb's; Cone*, and *Massachusetts Bar Foundation*, the ensuing rules were set forth: (1) under a Supreme Court holding, interest income follows principal, and as such, is property;[119] and (2) the First and Eleventh Circuits, distinguishing interest income of no net value, held that interest earned on IOLTA accounts is not property.[120] It appeared that the application of the Takings Clause, as applied to interest income, turned solely on the amount of principal. If the principal is capable of accruing net interest, such interest follows principal and is the private property of the holder of the principal.[121] On the other hand, if the principal on its own is incapable of accruing interest, then such interest accrued is not private property governed by the Takings Clause.[122] Due to this seemingly *de minimis* distinction, the IOLTA debate was set in motion.

2. IOLTA Interest As Private Property

Shortly after *Massachusetts Bar Foundation*, the IOLTA debate reached the Supreme Court, and the issue of whether IOLTA interest constitutes private property under the Takings Clause was finally settled in *Phillips v. Washington Legal Foundation*.[123] In the lower court case leading to *Phillips*, the Washington Legal Foundation, a public-interest group, filed suit against the Texas Equal Ac-

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collective funds from pooled client monies generate the interest from which the IOLTA program operates).

117. *See Mass. Bar Found.*, 993 F.2d at 975 (denying the plaintiffs a property right in interest accrued on funds placed in IOLTA accounts); *Cone*, 819 F.2d at 1007 (holding that the plaintiff had no property interest, and as such there was no taking).

118. *See Mass. Bar Found.*, 993 F.2d at 976 (emphasizing that its holding does not create a *de minimus* standard for Fifth Amendment takings because none of the plaintiff's property was taken).

119. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

120. *Mass. Bar Found.*, 993 F.2d at 975; *Cone*, 819 F.2d at 1007; *see also Phillips*, 524 U.S. at 169 (acknowledging that client funds placed in IOLTA accounts generate no net interest).

121. *Webb's*, 449 U.S. at 164-65.

122. *See Phillips*, 524 U.S. at 169 (distinguishing the capability to draw "interest" from the capability to draw "net interest").

123. Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).

cess to Justice Foundation (TEAJF), the organization responsible for maintaining the Texas IOLTA program.[124] The Washington Legal Foundation alleged "that the Texas IOLTA program violated their rights under the Fifth Amendment, by taking their property without just compensation."[125] The district court granted summary judgment to TEAJF upon the reasoning that there is no property right in the interest accrued on IOLTA accounts.[126] The Fifth Circuit reversed the district court decision, "concluding that 'any interest that accrues belongs to the owner of the principal.'"[127] As a result of a split between the First and Eleventh Circuits, holding that IOLTA interest is not property, and the Fifth Circuit, holding that IOLTA interest is property, the Supreme Court granted certiorari to the Fifth Circuit.[128]

In *Phillips*, the Supreme Court began by acknowledging the common law rule that "interest follows principal."[129] In so holding, the Court affirmed the Fifth Circuit decision and found that interest accrued on client funds held in IOLTA accounts is the property of the client.[130] The Court seemed unpersuaded by TEAJF's argument that interest earned on IOLTA accounts is not the client's private property "because the client funds held in IOLTA accounts 'cannot reasonably be expected to generate interest income on their own.'"[131] The *Phillips* Court, rejecting TEAJF's argument, clarified that "it is not that the client funds to be placed in IOLTA

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124. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 163-64 (1998) (providing the procedural history for *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 873 F. Supp. 1 (W.D. Tex. 1995), *rev'd*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998)). Respondents Michael Mazzone, a practicing attorney in Texas who maintains client funds in IOLTA accounts, and William Summers, a client whose retainer had been deposited by his attorney in a Texas IOLTA account, joined the Washington Legal Foundation. *Id.* In addition to the TEAJF, petitioners included W. Frank Newton, in his capacity as TEAJF chairman, and nine Texas Supreme Court Justices. *Id.*

125. *Id.* at 163.

126. *Id.*

127. *Phillips*, 524 U.S. at 163 (citing Wash. Legal Found. v. Tex. Equal Access to Justice Found., 94 F.3d 996, 1004 (5th Cir. 1996)).

128. Phillips v. Wash. Legal Found., 521 U.S. 1117, 1117 (1997) (order).

129. *Phillips*, 524 U.S. at 165.

130. *Id.* at 160.

131. *Id.* at 169 (citation omitted). In the current IOLTA debate, this reasoning is used to support the argument that allocation of client funds held in an IOLTA account is not a taking for which just compensation is due.

accounts cannot generate *interest*, but that they cannot generate *net interest*."[132]

Regardless of the distinction between interest and net interest, the majority held that "property" is not contingent on economic value, but it also consists of the legal value associated with the right to "possess, use and dispose" of the property.[133] TEAJF further argued that income accrued on IOLTA accounts is not the product of client funds, but a "government-created value" arising from increased efficiency and the pooling of client funds.[134] The majority rejected this argument and stated that, while the State mandates the accrual of interest, it does nothing to create the value of the account—the value arises from the client funds.[135]

Though resolving the issue of whether IOLTA interest constitutes property, the *Phillips* Court remanded to the lower courts for the determination of whether IOLTA accounts amount to a taking for public use and what, if any, just compensation is due.[136] Thus, while the first prong of the Takings Clause analysis had been resolved in the affirmative, the second and third prongs remained unsettled.

B. *Prong Two: Whether IOLTA Accounts Constitute a Taking*

Having failed to resolve the issue of whether IOLTA programs amount to a taking, the second prong of the Takings analysis, the Supreme Court revisited the IOLTA issue in light of the split in the Fifth and Ninth Circuits.[137] The dividing line between the two circuits as to whether IOLTA programs amount to a taking, rests on the proper analysis used in addressing the Takings issue. There are two methods of analysis commonly applied in Takings cases—the

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132. *Phillips*, 524 U.S. at 169.

133. *Id.* at 169-70.

134. *Id.* at 170.

135. *Id.* at 170-71. The Court cited its previous holding in *Webb's* that the State "'having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.'" *Id.* at 171 (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162 (1980)).

136. *Phillips*, 524 U.S. at 172. The dissenting Justices in *Phillips* criticized the majority for addressing only the first element of the Takings Clause analysis. *See id.* at 175 (Souter, J., dissenting) (commenting that it "makes good sense to consider what is property only in connection with what is a compensable taking").

137. Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

per se analysis and the ad hoc analysis.[138] Under a per se analysis, permanent appropriation of private property by the government amounts to a per se taking.[139] Alternatively, the ad hoc analysis does not apply a "set formula," but relies on three factors to determine whether "justice and fairness" require compensation: "(1) '[t]he economic impact of the regulation on the claimant;' (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations;' and (3) 'the character of the governmental action.'"[140] Under an ad hoc analysis, a taking is found to occur only where "a particular regulation goes so far that it 'force[s] "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."'"[141]

1. The Ninth Circuit Approach[142]

Following the remand of *Phillips*, in *Washington Legal Foundation I*,[143] a panel of the Ninth Circuit applied a per se analysis and concluded that IOLTA programs amount to a taking and as such

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138. *Id.*

139. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 188 (5th Cir. 2001) (holding that because interest generated on IOLTA accounts is the private property of the principal holder and the State permanently appropriated the interest, such appropriation amounted to a per se taking), *petition for cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1); *see generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (holding that physical occupation of property amounts to a taking regardless of the purpose); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (identifying a physical invasion as a taking).

140. *Legal Found. of Wash.*, 271 F.3d at 857 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)) (alteration in original).

141. *Id.* (citations omitted) (alteration in original).

142. The Ninth Circuit cases originated in Washington State with a challenge to the Washington State IOLTA program. *Legal Found. of Wash.*, 271 F.3d at 841. The state's IOLTA program was adopted by the Washington State Supreme Court in 1984. *Id.* at 843. Washington Rules of Professional Conduct:

> [R]equires lawyers to place 'client funds that are nominal in amount or expected to be held for a short period of time' in either (i) a pooled interest-bearing trust account, the interest from which is paid to the Legal Foundation of Washington, (ii) a separate interest-bearing trust account for a particular client, or (iii) a 'pooled interest-bearing trust account with subaccounting that will provide for computation of interest earned by each client's funds and the payment thereof to the client.'

Id. (citing WASH. RULES OF PROF'L CONDUCT R. 1.14(c)(2)).

143. 236 F.3d 1097 (9th Cir. 2001), *rev'd en banc*, 271 F.3d 835 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

are unconstitutional.[144] However, upon a rehearing en banc, in *Washington Legal Foundation II*,[145] the Ninth Circuit applied an ad hoc analysis with the conclusion that IOLTA programs are constitutional.[146] The court reasoned that the per se analysis was rarely employed in a context apart from real property and was thus an inappropriate analysis for the taking of intangible property such as money.[147] Therefore, relying on the three factors of the ad hoc analysis, the Ninth Circuit concluded that IOLTA programs did not amount to a taking.[148] First, the court reasoned that because client funds deposited in IOLTA accounts were incapable of accruing interest apart from the IOLTA program, the taking of that interest had no economic impact on the holder of the principal.[149] "The IOLTA program, at worst, maintains the status quo and, at best, provides clients with interest they otherwise would not have earned."[150] Further, the court reasoned that because the client funds were incapable of accruing interest on their own, the client and holder of the principal could not expect their funds to accrue interest, "and thus, the IOLTA program could not have interfered with their investment-backed expectations."[151] Finally, the court held that the use of IOLTA accounts is merely a regulation on the use of property.[152] As such, the Ninth Circuit concluded that "IOLTA regulations [were] not out of character for either the commercial industry or the professions they affect[ed]."[153]

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144. *See* Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1115 (9th Cir. 2001) (holding that the appropriation of interest accrued on client funds is a taking requiring just compensation), *rev'd en banc*, 271 F.3d 835 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325). The court remanded for a determination of just compensation stating that just compensation "may be less than the amount of the interest taken, or nothing, depending on the circumstances." *Id.*

145. 271 F.3d 835 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

146. Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 841 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

147. *Id.* at 854.

148. *Id.* at 857.

149. *Id.*

150. *Id.* at 857-58.

151. *Legal Found. of Wash.*, 271 F.3d at 860.

152. *See id.* at 861 (indicating that the government regulates the banking industry and the practice of law).

153. *Id.*

2. The Fifth Circuit Approach

Ultimately, the Fifth Circuit applied the per se approach to conclude that IOLTA programs were unconstitutional.[154] The Fifth Circuit approach began with the remand of *Phillips* to the district court. U.S. District Court Judge James Nowlin applied an ad hoc analysis similar to that applied by the Ninth Circuit en banc and concluded that IOLTA accounts did not amount to a taking of client property for which just compensation is due.[155] However, the Fifth Circuit reversed Judge Nowlin's decision on appeal.[156] The Fifth Circuit rejected the ad hoc approach and opted for the use of the per se analysis, finding the Texas IOLTA program unconstitutional.[157] In applying the per se analysis, the court cited *Webb's* as dispelling "any assertion that the per se test applies solely to governmental appropriation of real property."[158] The Fifth Circuit reasoned that the significance of the public purpose for which the taking occurred, coupled with the insignificant intrusion on the individual from whom the taking was made, was irrelevant.[159] Thus, the court concluded that because interest income amounted to private property of the principal owner, per *Phillips*, and the IOLTA program was a permanent appropriation of that interest against the client's will, a taking had occurred.[160]

Following the Ninth Circuit en banc hearing resulting in the application of the ad hoc analysis and a holding that IOLTA programs were constitutional, a rehearing en banc in the Fifth Circuit

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154. *Compare* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 188, 195 (9th Cir. 2001) (applying a per se analysis and concluding that the IOLTA program is unconstitutional), *petition for cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1), *with Legal Found. of Wash.*, 271 F.3d at 857, 861 (using an ad hoc analysis to determine that the IOLTA program is constitutional).

155. *Tex. Equal Access to Justice Found.*, 270 F.3d at 185.

156. *Id.* at 195.

157. *See id.* at 188 (holding that because interest income is the private property of the client, the state's appropriation of the property amounted to a per se taking).

158. *Id.* at 187.

159. *See id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) when stating that "'no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation'"); *see also* Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding that the installation of cable lines on private property amounted to a taking for which just compensation was due, despite the minimal intrusion).

160. *Tex. Equal Access to Justice Found.*, 270 F.3d at 188.

was requested.[161] However, the Fifth Circuit denied the en banc review.[162] Therefore, the Fifth and Ninth Circuits were split as to: (1) the proper takings analysis to apply, and (2) in applying the correct analysis, whether IOLTA programs amount to a taking for which just compensation is due. Review by the Supreme Court of the Ninth Circuit's en banc decision was requested and granted.[163] The Ninth Circuit case was heard on December 9, 2002 and on March 26, 2003, the Supreme Court of the United States released its decision in *Brown v. Legal Foundation of Washington*, holding in favor of the Ninth Circuit IOLTA program.[164]

Prior to the *Brown* decision, and as a result of the Fifth Circuit's refusal to review *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* en banc, a petition for certiorari was filed for the Fifth Circuit case.[165] The Supreme Court has yet to make a decision as to whether it will grant the review.[166] However, the petition for certiorari was redistributed for conference immediately following the *Brown* decision.[167]

3. *Brown* Closes the Chapter

The Supreme Court, in *Brown v. Legal Foundation of Washington*, confronted the issue left unaddressed by the Court in *Phillips*—whether IOLTA programs amount to a taking for which just compensation is due.[168] In addressing the first issue of whether a taking has occurred, the Court bifurcated the analysis into two con-

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161. *See* Wash. Legal Found. v. Tex. Equal Access to Justice Found., 293 F.3d 242, 243 (5th Cir. 2002) (per curiam) (denying the petition for rehearing en banc).

162. *Id.*

163. Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 835 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

164. Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 23 (U.S. Mar. 26, 2003). The case was initially styled *Washington Legal Foundation v. Legal Foundation of Washington*. However, upon a determination by the Court that the Washington Legal Foundation lacked standing to raise a claim, the case was restyled as *Allen Brown and Greg Hayes v. Legal Foundation of Washington*. *Id.* at 9-10.

165. Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180 (5th Cir. 2001), *petition for cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1).

166. Supreme Court of the United States, Docket for 02-1, at http://www.supremecourtus.gov/docket/02-1.htm (last visited Mar. 31, 2003).

167. *Id.*

168. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (stating "[w]e express no view as to whether these funds have been 'taken' by the State; nor do we express an opinion as to the amount of 'just compensation,' if any, due respondents").

siderations: (1) whether the alleged taking was for "public use" and (2) what type of taking, if any, was involved.

a. Public Use

Although the Fifth Amendment does not proscribe a taking when just compensation is provided, the taking of private property must serve a public use.[169] The *Brown* Court concluded that the "public use" condition was unquestionably satisfied.[170] The Court held that the taking of interest accrued in IOLTA accounts is no different than a state imposed tax used to fund legal services.[171] Acknowledging that public funds may be used to support a legal service recipient in a dispute against an individual forced to contribute, the Court held that such circumstances do not undermine the public use of funds.[172]

Even though the majority determined that the public use element was unquestionably satisfied, all members of the Court were not in accord on whether it was necessary to address the public use issue. Justice Scalia, in his dissenting opinion, expressed surprise that the majority even addressed "a nonjurisdictional constitutional issue raised by neither the parties nor their *amici*."[173] In addition to not raising the public use element in its petition for certiorari, neither the Fifth Circuit nor the Ninth Circuit cases on constitutionality of IOLTA under the Fifth Amendment addressed the public use element. It can only be assumed that the Fifth and Ninth Circuit, in skipping over this issue, determined that the

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169. U.S. CONST. amend. V; *see also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 127 (1978) (commenting "that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose"); Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 13 (U.S. Mar. 26, 2003) (stating that one condition for the state to confiscate private property under the Fifth Amendment is that "the taking must be for a 'public use'"); *see generally* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984) (addressing the public use element of the Takings Clause).

170. Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 14 (U.S. Mar. 26, 2003).

> Even if there may be occasional misuses of IOLTA funds, the overall, dramatic success of these programs in serving the compelling interest in providing legal services to literally millions of needy Americans certainly qualifies the Foundation's distribution of these funds as a "public use" within the meaning of the Fifth Amendment.

Id.

171. *Id.* at 13-14.

172. *Id.* at 14.

173. *Id.* at 2-3 n.2 (Scalia, J., dissenting).

"public use" element was unquestionably satisfied thus negating the need to address it.

b. Type of Taking

Having determined that the public use condition of the Takings Clause was satisfied, the Court next addressed the type of taking, if any, involved with IOLTA accounts.[174] The Court began its analysis by making a distinction between physical takings and regulatory takings.[175] In a physical taking, the Fifth Amendment requires that compensation be provided when the government confiscates private property for public use.[176] In such physical takings, a clear rule is applied—such physical appropriations amount to a per se taking for which just compensation is due.[177]

However, the Constitution is silent as to a regulatory taking, which restricts the rights of a property owner to make certain uses of the property. Although no physical appropriation is made with a regulatory taking, the Court has recognized that a use restriction on property may amount to a taking under certain circumstances.[178] In such regulatory takings, Courts typically employ an ad hoc analysis, conducting factual inquiries into the purpose and economic effect of such takings.[179] Thus, it is necessary to distinguish between physical and regulatory takings primarily for the purpose of determining which test to apply in conducting a takings analysis. The *Brown* Court ultimately concluded that the appropriation of interest earned on IOLTA accounts was more akin to a physical taking for which the per se approach is adopted.[180] In so concluding, the Court held that the client's "interest was taken for a public use when it was ultimately turned over to the Foundation."[181] Having determined that IOLTA accounts amounted to a

174. *Brown*, No. 01-1325, slip op. at 14.

175. *Id.* at 14-15 (O'Connor, J., concurring) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) and stating that "'[t]he text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings.'").

176. *Id.*

177. *Id.*

178. *Brown*, No. 01-1325, slip op. at 15.

179. *Id.*

180. *Id.* at 17.

181. *Id.*

per se taking, the Court continued on with the analysis to determine what, if any, just compensation is due.

C. *Prong Three: Whether Just Compensation Is Due*

Upon the finding of a taking for public use, the issue of just compensation remains to be addressed. The Fifth Circuit, concluding that IOLTA accounts amount to a taking, reversed and remanded to the district court the issue of what just compensation was due.[182] However, the court did recognize that property interest, amounting to more than mere economic interest, includes the right to use, possess, and dispossess—a significant legal interest.[183] Conversely, the Ninth Circuit reasoned that because only a taking without just compensation is prohibited by the Fifth Amendment and any compensation due to the client from a taking of IOLTA interest would be "nil," the State did not violate the Constitution when it appropriated funds accrued on IOLTA accounts.[184] Ultimately, the Supreme Court agreed with the Ninth Circuit position on the issue of just compensation, finding "[b]ecause . . . compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case."[185] This is consistent with typical IOLTA rules, which authorize the placement in IOLTA accounts of only those client funds of a small amount or those held for a short period of time, such that the funds would be incapable of accruing any benefit in excess of the cost of maintaining an interest bearing account for the benefit of the client.[186] As such, the net loss to the client in the *Brown* case was

182. *See Tex. Equal Access to Justice Found.*, 270 F.3d at 195 (remanding for the determination of appropriate relief).

183. *Id.* at 187-88.

184. Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 861-62 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

185. Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 23 (U.S. Mar. 26, 2003). The Washington IOLTA program provides for placement of client funds in an IOLTA account only "if the money cannot earn net interest for the client." *Id.* at 7-8 (citations omitted). As such, the placement in an IOLTA account of client funds capable of accruing net interest is a violation of the Washington State IOLTA rules; a violation for which the lawyer may be held accountable. *Id.* at 9.

186. *See id.* at 7-8 (discussing the Washington IOLTA program).

zero, thus, the Court determined that any compensation due to the client was also zero.[187]

In concluding that no compensation was due, the Court focused on the premise set forth by Justice Holmes—"'the question is what has the owner lost, not what has the taker gained."[188] The Court further "noted that the private party 'is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.'"[189] It was made clear to the Court that without the IOLTA account, the client funds in the case at hand would not have been capable of producing any net interest for the clients.[190]

V. Is IOLTA Safe?

Although the Supreme Court clearly settled the Fifth Amendment debate related to the taking of interest accrued on IOLTA accounts, the potential for battle between Robin Hood and the Miser remains. However, rather than a Fifth Amendment claim, the second IOLTA war may be had on the front of the First Amendment. Justice Kennedy, in his dissenting opinion noted, "[t]he First Amendment consequences of the State's action have not been addressed in this case, but the potential for a serious violation is there. . . . One constitutional violation (the taking of property) likely will lead to another (compelled speech)."[191]

A. *Battle on Another Front*

Initial IOLTA challenges were based on both First and Fifth Amendment grounds; however, now that the Fifth Amendment issue is resolved, only the First Amendment issue remains. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."[192] Furthermore, "[i]t is well-established that the freedom of speech and association protected by the First

187. *Id.* at 19.

188. *See Brown*, No. 01-1325, slip op. at 18 (quoting Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910)).

189. *See id.* (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

190. *Id.* at 11.

191. *Id.* at 1-2 (Kennedy, J., dissenting) (citations omitted).

192. U.S. Const. amend. I.

Amendment includes the freedom to choose 'both what to say and what *not* to say.'"[193] In *Washington Legal Foundation v. Massachusetts Bar Foundation*, clients challenging IOLTA alleged "that '[t]he collection of and use of interest, under color of state law, generated by funds in IOLTA trust accounts' violate[d] their rights to freedom of speech and association."[194] However, the First Circuit, upon determining that interest generated by IOLTA accounts was not the property of the client, found no First Amendment infringement.[195] In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*[196]—the district court case leading up to the Supreme Court decision in *Phillips*—clients alleged that mandatory IOLTA participation forced them to support and associate with organizations funded by the IOLTA program.[197] However, the district court, after similarly determining that interest accrued on IOLTA accounts was not the property of the client, held that there was no First Amendment violation.[198] Although the *Phillips* court reversed the district court, finding that interest accrued on IOLTA accounts is the property of the client, the Court did not address the First Amendment claim.[199] Upon remand of *Phillips* for the determination of whether a taking occurred under the Fifth Amendment, the First Amendment claim re-surfaced. However, the Fifth Circuit, in *Texas Equal Access to Justice I*, declined to address the First Amendment claim, focusing instead on the Fifth Amendment challenge.[200]

The First Amendment claim was also part of the initial IOLTA challenge in the Ninth Circuit.[201] However, the Ninth Circuit re-

193. Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992) (citing Riley v. Nat'l Fed'n for the Blind, 487 U.S. 781, 797 (1988)).

194. Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 979-80 (1st Cir. 1993).

195. *Id.* at 980.

196. 873 F. Supp. 1 (W.D. Tex. 1995), *rev'd*, Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).

197. Wash. Legal Found. v. Tex. Equal Access to Justice Found., 873 F. Supp. 1, 9 (W.D. Tex. 1995), *rev'd*, Phillips v. Wash. Legal Found., 524 U.S. 156 (1998).

198. *Id.*

199. Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998).

200. Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180, 185 (5th Cir. 2001), *cert. filed*, 71 U.S.L.W. 3092 (U.S. June 26, 2002) (No. 02-1).

201. Wash. Legal Found. v. Legal Found. of Wash., 236 F.3d 1097, 1103-04 (9th Cir. 2001) (refraining from addressing the First Amendment claim due to merits with the Fifth Amendment claim), *rev'd en banc*, 271 F.3d 835 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

frained from addressing the issue and instead focused on the Fifth Amendment claim.[202] Likewise, when the Ninth Circuit IOLTA challenge reached the Supreme Court, the majority did not address the First Amendment claim.[203] However, Justice Kennedy, in his dissent in *Brown*, stated that IOLTA accounts may constitute "forced support of certain viewpoints."[204] Thus, as the First Amendment challenge remains on the horizon and is recognized by at least one member of the Court, the battle may continue on First Amendment grounds. However, the long road to *Brown* may have dissuaded a new attack. Chief counsel for the Washington Legal Foundation, Richard Samp, stated that "it was not clear" if the First Amendment challenge would be pursued.[205]

IOLTA serves as an essential source of support for civil legal services. Without IOLTA funding, many programs would have to curtail their services to indigents.[206] Civil legal services would suffer and federal and state governments would be left to scramble for additional sources of funding to fill the deficit.[207] Therefore, if IOLTA challengers pursued a new attack on First Amendment grounds, proponents of the program would be compelled to initiate a vigorous defense to save the program—much like the defense to the Fifth Amendment challenge.

B. *The Importance of IOLTA in Today's Legal Community*

1. Beneficiaries of IOLTA

The Texas IOLTA program serves as a significant source of funding for civil legal services, generating over $5 million in 2001.[208] Without IOLTA funding, thousands of poor individuals in Texas would be unable to obtain legal services to resolve even the most

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202. *Id.*

203. Brown v. Legal Found. of Wash., No. 01-1325, slip op. (U.S. Mar. 26, 2003).

204. *Id.* at 1 (Kennedy, J., dissenting).

205. Tony Mauro, *Victory for IOLTA Programs at Supreme Court*, AM. LAW. MEDIA, Mar. 27, 2003, http://www.law.com/jsp?id=1048518194202.

206. Brief of Amici Curiae AARP et al. at 3, Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), 2002 WL 31399637.

207. *See id.* (emphasizing that civil legal services receive approximately 90% of IOLTA funds).

208. TEX. EQUAL ACCESS TO JUSTICE FOUND., LEGAL AID IN TEXAS 2001, at 17 (2002), http://www.txiolta/grants/docs/TX_Statewide_Overview_11-27-02.pdf.

pressing of legal concerns.[209] The largest beneficiaries of IOLTA are impoverished. Approximately 15% of the Texas population lives in poverty, second only to California.[210] San Antonio ranks among the top twenty-five largest cities in terms of poverty status, with 18.8% of San Antonio residents living below the poverty level.[211] El Paso, Houston, Corpus Christi, Dallas, Forth Worth, and Austin all rank within the top fifty largest cities in terms of poverty levels.[212] Child poverty is significantly high in Texas.[213] As of 1998, 22% of children under the age of eighteen and 30% of children under the age of six live in poverty.[214] Although the national poverty rate saw a recession in 2001,[215] the recent downturn in the economy has left more Americans without jobs and will ultimately be reflected in the poverty levels. The second beneficiary group of decreased civil legal services is the elderly, as they are substantial consumers of such legal services.[216] Moreover, the need for legal services by the elderly will only rise as the baby boomer generation reaches the age of sixty.[217]

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209. *See* Brief of Amici Curiae AARP et al. at 5, Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc) (noting that as a result of IOLTA funding, many Americans "have avoided eviction from the only housing available to them, obtained life-saving medical care, realized freedom from abusive spouses, relatives, and institutional caregivers, collected restitution from unscrupulous merchants, and received public services and benefits that enable them to purchase life's basic necessities"), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), 2002 WL 31399637.

210. *See* BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES: 2001, at 34 (2002), www.census.gov/prod/2002pubs/p60-219.pdf (citing from Table B-2, the poverty rate by state in the year 2000).

211. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *Percent of Population Below Poverty Level, at* http://www.census.gov/acs/www/Products/Ranking/SS01/R01T160.htm (last revised Jan. 14, 2003) (ranking by city the percent of population living below the poverty level).

212. *Id.*

213. CTR. FOR PUB. POLICY PRIORITIES, *Texas Poverty: An Overview*, http://www.cppp.org/products/poverty101.html#poverty (last visited Mar. 8, 2003).

214. *Id.*

215. *See* BERNADETTE D. PROCTOR & JOSEPH DALAKER, U.S. DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES: 2001, at 2 (2002), www.census.gov/prod/2002pubs/p60-219.pdf (providing a graphical analysis of the number of poor and the corresponding poverty rate from 1959-2001 in the United States).

216. Brief of Amici Curiae AARP et al. at 1, Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), 2002 WL 31399637.

217. *Id.* IOLTA funding increases the older population's access to legal assistance for "basic necessities such as health care, in-home support services, protective services, and

2. A Funding Deficit

While a compelling need for civil legal services remains, a curtailed IOLTA program would leave a $5 million deficit in the funding of these legal services.[218] Other sources of funding such as attorney contributions,[219] state bar funds,[220] BCLS funds,[221] and foundation grants[222] are insufficient to meet the needs of civil legal services in Texas amidst an increased need for such services.[223] TEAJF funds numerous legal service programs in Texas such as Advocacy, Inc., the Houston Immigration & Refugee Services Coalition, the San Antonio Immigration and Refugee Coalition, the Texas Legal Services Center, and the Texas Rural Legal Aid, Inc.[224] Over $4 million (36%) of the total $11.5 million in funding for TEAJF grantees was generated from IOLTA accounts.[225] Clearly, the loss of IOLTA funds to TEAJF and its grantees would be detrimental. Without the significant funding supplied by the IOLTA program, legal service organizations would have to reduce the amount of service providers, curb the types of legal services provided, and perhaps turn away those in need of legal services. Studies reveal that the current level of unmet legal needs is high, and a decrease in funding would only exacerbate the problem by increas-

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benefits from programs such as Social Security, Supplemental Security Income (SSI), Medicare and Medicaid." *Id.* at 1-2.

218. *See* TEX. EQUAL ACCESS TO JUSTICE FOUND., LEGAL AID IN TEXAS 2001, at 17 (2002), http://www.txiolta.org/grants/docs/TX_Statewide_Overview_11-27-02.pdf (showing that the Texas IOLTA program generates over $5 million per year).

219. *See* ABANETWORK, *A Chart of Significant Fundraising Activities for Legal Services*, http://www.abanet.org/legalservices/sclaid/sclaid_body.html (last visited Jan. 26, 2003) (listing funds raised by attorneys at over $1 million). Texas does not have an attorney registration fee, which is used in states such as Minnesota, Ohio, and Oregon to provide additional funding for legal services. *Id.*

220. *See id.* (listing state bar funding to programs at $602,000).

221. *See id.* (stating that filing and other court fees raise approximately $4 million in funds).

222. *See id.* (stating that funding from foundation and corporation grants amounts to $2.7 million).

223. *See 2002 Dues Statement Includes "Opt-Out" Access to Justice Contribution*, 65 TEX. B.J. 396, 396 (2002) (stressing that the need for civil legal services for the poor is on the rise, while the sources of funding continue to decrease). TEAJF estimates that civil legal services will see a 20% decline in funding. *Id.*

224. *See* TEX. EQUAL ACCESS TO JUSTICE FOUND., *2003 Grant Awards*, *at* http://www.txiolta.org/grants/awards/2003_awards.html (last visited Mar. 12, 2003) (listing the 2003 TEAJF grantees).

225. *Id.*

ing the number of individuals who will be unable to receive needed legal services.[226]

C. *Client Consent*

The importance of IOLTA funding is clear, and while the previous discussion focused on the potential elimination of all IOLTA funding, a Supreme Court ruling that IOLTA programs are unconstitutional on First Amendment grounds will not necessarily mean the downfall of programs dependent upon IOLTA funds. States could continue to operate IOLTA programs under the auspices of client consent.[227]

Most IOLTA programs operating in the fifty states are either mandatory or voluntary.[228] Under a mandatory program, the attorney is required to place qualified funds in an IOLTA account.[229] Under a voluntary program, the attorney may elect to place qualified funds in an IOLTA account.[230] Note that even under the voluntary program, the choice to utilize an IOLTA account lies with the attorney and not the client. Thus, current IOLTA programs operate under the presumption that client consent to pool multiple clients' funds and allocate accrued interest on the pooled funds is not necessary.[231] Herein lies the morality issue of the current

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226. Brief of Amici Curiae AARP et al. at 9, Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001) (en banc), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325), 2002 WL 31399637. "A survey of selected programs in the spring of 1993, when LSC funding was substantially higher than it is today, revealed that nearly half of all people who applied for [legal] assistance from local programs were turned away because of a lack of program resources." LEGAL SERVS. CORP., SERVICING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS 13 (2000), http://www.lsc.gov/pressr/EXSUM.pdf. The problem of unmet needs is present in Texas as well. A Texas State Bar survey in 1991 revealed that nearly 70% of the legal needs of indigents in Texas go unmet each year. LEGAL SERVS. OF N. TEX., *Questions and Answers About the Dallas Volunteer Attorney Program, at* www.lsnt.org/nav/volist.asp (last visited Mar. 8, 2003). This figure was calculated prior to the decrease in LSC funding.

227. *See* Marcia Coyle, *Federal Ruling Puts Texas IOLTA Plans in Jeopardy: Legal Aid Funding Deemed a 'Taking,'* NAT'L L.J., Oct. 19, 2001, at A1 (quoting Dean W. Frank Newton of Texas Tech University as saying "Texas would still be able to run voluntary IOLTA programs").

228. ABANETWORK, *Current Status of IOLTA Programs, at* http://www.abanet.org/legalservices/iolta/ioltus.html (last updated Apr. 4, 2002).

229. *Id.*

230. *Id.*

231. *See* Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835, 843-44 (9th Cir. 2001) (en banc) (noting that the IOLTA program does not require client consent or that

IOLTA programs. Is it ethical to place client funds in a pooled account without gaining their consent and without even informing them that funds were placed in such an account? Is it ethical to appropriate client funds to support civil legal services that the client has not agreed to support? Perhaps the motto of IOLTA programs should be—when in doubt, ask the client. A simple adjustment to the IOLTA operations, requiring that attorneys gain client consent prior to placing funds in IOLTA accounts, would eliminate any doubt about the morality of such programs. For example, attorneys could simply draft a clause into their standard fee agreement authorizing placement of qualified funds in pooled IOLTA accounts. Of course, ethical standards would require that the attorney inform clients of the effect of agreeing to such placement.

VI. CONCLUSION

The morality and legality of the current IOLTA programs was weighed by the Supreme Court on Fifth Amendment grounds and may still be in the balance on First Amendment grounds. IOLTA programs permit, and in many states, require attorneys to place qualified client funds in a pooled trust account from which the interest generated is allocated to provide funding for civil legal services. Recently, IOLTA saw its first constitutional challenge under the Fifth Amendment with arguments focused on the taking of private property without just compensation. The Supreme Court found a taking, but determined no just compensation was due. Despite the downfall to IOLTA opponents, challenges may continue under the freedom of speech and association guise of the First Amendment.

As the IOLTA debate continues on First Amendment grounds, it is important to remember some basic principles. First, the only client funds authorized for placement in an IOLTA account are those funds which are held for such a short period of time or are of such a small amount that the cost of placing the funds in an individual interest-bearing account would outweigh any potential for accrued

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the attorney inform the client of the placement of their funds in an IOLTA account), *cert. granted*, 70 U.S.L.W. 3756 (U.S. June 10, 2002) (No. 01-1325).

interest on the account.[232] Second, the decision of whether client funds are appropriate for placement is left to the attorney as the current program operates without client consent.[233] Regardless of the outcome of any future First Amendment IOLTA challenge, a client could consent to participation in IOLTA programs thus eliminating constitutional concerns.

Robin Hood and the Miser stood before the courthouse steps in anticipation of an ultimate command on the legality and morality of IOLTA—on Fifth Amendment grounds. Robin Hood prevailed. Following the Supreme Court decision in *Brown*, dissenting Justice Scalia commented:

> Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking, in which the government's extraction of wealth from those who own it is so cleverly achieved, and the object of the government's larcenous beneficence is so highly favored by the courts (taking from the rich to give to indigent defendants) that the normal rules of the Constitution protecting private property are suspended.[234]

Someday in the future Robin Hood and the Miser may meet again on the court house steps—this time carrying the First Amendment. Once again, the legality and morality of IOLTA may hang in the balance.

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232. NAT'L LEGAL AID & DEFENDER ASS'N, *IOLTA & Other Funding: What Is IOLTA?*, *at* http://www.nlada.org/Civil/Civil_IOLTA/IOLTA_IOLTA/IOLTA_IOLTA_Home (last visited Mar. 1, 2003). "[I]nterest generated on IOLTA deposits cannot exceed the administrative costs associated with maintaining a separate account in a financial institution. If the interest does exceed these costs, the attorney is duty bound to invest those funds in accounts that accrue to the benefit of the client." *Id.* "If a client's deposit is large enough or held for a long enough time to earn interest for the client net of banking charges and administrative fees, the funds may not be placed in an IOLTA account. As a result, clients experience no financial loss under IOLTA." NAT'L LEGAL AID & DEFENDER ASS'N, FACT SHEET ON INTEREST ON LAWYERS' TRUST ACCOUNTS (IOLTA) 1, http://www.nlada.org/DMS/Documents/1011300749.75/Fact%20Sheet%20on%20IOLTA.PDF (last visited Feb. 27, 2003).

233. TEX. EQUAL ACCESS TO JUSTICE FOUND., *Do You Really Need an IOLTA Account?*, *at* http://www.txiolta.org/attorneys/need_iolta_account.html (last visited Mar. 4, 2003).

234. Brown v. Legal Found. of Wash., No. 01-1325, slip op. at 13 (U.S. Mar. 26, 2003) (Scalia, J., dissenting).