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THE CONSTITUTIONALITY OF IOLTA ACCOUNTS

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THE CONSTITUTIONALITY OF IOLTA ACCOUNTS

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I. INTRODUCTION

The Fifth Circuit Court of Appeals created a split among the Circuit Courts when it remanded a challenge to the Texas Interest on Lawyers' Trust Account ("IOLTA") program for further consideration.[1] IOLTA accounts earn interest, which is distributed to non-profit organizations dedicated to providing legal services to the indigent.[2] The interest is generated by pooling client funds that, if deposited individually, are too small or are held for too short a duration to accrue interest greater than banking administration charges.[3] In applying the rule that "interest follows principal," the Fifth Circuit held in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*[4] that the interest earned in IOLTA accounts was the property of the clients whose money was held in those accounts.[5] The *Texas Equal Access to Justice Foundation* court's ruling departs from First and Eleventh Circuit Court opinions, concluding that interest earned in IOLTA accounts does not belong to clients because, but for the IOLTA program, such interest would never have been generated.[6] Accordingly, this Comment will

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1. Joyce Price, *Ruling May Imperil Legal Aid for Poor—Texas Taps Interest to Trust Funds*, WASHINGTON TIMES (D.C.), September 19, 1996, at A6.

2. IOLTA HANDBOOK, ABA COMMISSION ON INTEREST ON LAWYERS' TRUST ACCOUNTS 1 (1997) [hereinafter IOLTA Handbook].

3. *Id.*

4. 94 F.3d 996 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2514 (1997).

5. *Id.* at 1000-02.

6. Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 975 (1st Cir. 1993); Cone v. State Bar of Fla., 819 F.2d 1002, 1007 (11th Cir. 1987).

analyze whether or not clients have a property right in the interest that is generated in IOLTA accounts.

In *Texas Equal Access to Justice Foundation*, plaintiffs objected to certain IOLTA-funded activities, such as providing legal aid to refugees seeking political asylum in the United States and aid to organizations assisting death row inmates in challenging their death sentences.[7] The plaintiffs claimed that the Texas IOLTA program violated their rights under the Fifth Amendment by "taking"[8] their property, the IOLTA account interest, without just compensation.[9] Further, the plaintiffs claimed that their rights under the First Amendment were violated, when IOLTA account interest was used to support speech they found offensive.[10]

The Fifth Circuit remanded the case to the District Court to address the First and Fifth Amendment issues.[11] The Fifth Circuit noted "that to prevail on their takings claim, the plaintiffs [had to] demonstrate that the taking was against the will of the property owner. That, or a similar showing, would likely be necessary to prevail on [the] First Amendment claim."[12] However, because the Court declared that clients hold a property interest in the interest that accrues in an IOLTA account, the plaintiffs' task of showing that the funds were used against the plaintiffs' will appeared to be an easy one. Accordingly, the defendants applied for, and were granted, certiorari by the United States Supreme Court to hear the case.[13]

An IOLTA account, while sometimes compared to alchemy,[14] is not a magical process. In Part II, this Comment will explain how the legal profession's ethical rules combine with federal banking regulations to establish the IOLTA program and, consequently, generate interest for non-profit organizations. Part II will also discuss how much money IOLTA accounts have earned at both the state and national levels.

In Part III, this Comment will examine relevant court decisions

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7. *Texas Equal Access to Justice Found.*, 94 F.3d at 999.

8. "Taking" is used as a term of art, derived from the Fifth Amendment to the United States Constitution, which states in part, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

9. *Texas Equal Access to Justice Found.*, 94 F.3d at 999.

10. *Id.*

11. *Id.* at 1005.

12. *Id.*

13. *Id.* at 996.

14. *Id.* at 1000 (citing AMERICAN BAR ASS'N, CIVIL JUSTICE: AN AGENDA FOR THE 1990'S 56-72 (1989)). Alchemy is a medieval chemical art to transmute base metals into gold. THE NEW WEBSTER'S DICTIONARY 10 (5th ed. 1993).

that have addressed constitutional challenges to the IOLTA program, including the *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* decision. With near unanimity, the decisions have held IOLTA programs constitutional. Generally, courts have reasoned that clients do not have a property interest in the interest that is generated on deposits held in IOLTA accounts, where the deposit alone would not produce sufficient income to offset administrative charges.[15]

Part III continues by analyzing the potential effects of the Fifth Circuit's decision in *Texas Equal Access to Justice Foundation.* In particular, whether or not clients possess a property right in IOLTA-generated interest will be analyzed by examining specific First Amendment arguments. Part III will also analyze whether or not the IOLTA program burdens speech, as protected by the First Amendment, by compelling support for organizations espousing particular ideologies or engaging in particular political activities.

In conclusion, Part IV summarizes the First and Fifth Amendment issues that are implicated by the IOLTA Program.

II. BACKGROUND

A. *THE BIRTH OF IOLTA*

Frequently, lawyers need to hold money on a client's behalf. The legal profession's ethical rules require that lawyers hold this money in trust accounts, separate from the lawyers' own money, and to promptly deliver clients' money or property upon request.[16] Except in the situa-

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15. *See* Cone v. State Bar of Fla., 819 F.2d 1002, 1006-07 (11th Cir. 1987) (holding client did not have a claim of entitlement to interest accrued in IOLTA account); Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 976 (1st Cir. 1993) (holding clients did not have a constitutionally protected property right to exclude others from the beneficial use of their funds).

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1981). Rule DR 9-102 provides in pertinent part:

(A) All funds of clients paid to a lawyer . . . . shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(B) A lawyer shall:

(3) Maintain complete records of all funds . . . and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by the client the funds . . . which the client is entitled to receive. *Id.*

See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1995). Rule 1.15 provides in

tion where an individual client's deposit is capable of earning interest greater than account administration charges, lawyers often must use accounts which allow the lawyer to withdraw the money on demand, in order to facilitate prompt delivery to the client.[17] Historically, however, federal banking laws prohibited such "demand accounts" from accruing interest.[18] As a result, client's nominal or short term deposits that could not earn a net interest were pooled with other similar client deposits and held in a single non-interest-bearing demand account, separate from the lawyer's own funds.[19] These deposits became, in effect, an interest-free loan to the bank, which then used the funds to produce profit for its shareholders.[20] As such, the goal in creating the Interest on Lawyers' Trust Accounts program was to establish a trust account that could draw interest on deposits of clients' funds, without jeopardizing a lawyer's professional responsibilities.[21]

IOLTA accounts were established in 1982, when the federal banking regulations were amended to permit negotiable order of withdrawal ("NOW") accounts.[22] NOW accounts accrue interest and allow with-

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pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated. . . . Complete records of such account funds and other property shall be kept by the lawyer . . . .

(b) Upon receiving funds . . . a lawyer shall promptly deliver to the client or third persons any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. . . . All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. *Id.*

17. In some situations, the lawyer's fiduciary duty when holding client funds may require the lawyer to place funds into interest-bearing accounts. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982) (stating "where the amount of funds held for a specific client and the expected holding period makes it obvious that the interest which would be earned would exceed the lawyer's administrative costs and the bank charges, the lawyer should consult the client and follow the client's instructions as to investing"). *Id.*

18. *See* Banking Act of 1933 (Class-Steagall Act), Pub.L. No. 66, 48 Stat. 181 (codified in scattered sections of 12 U.S.C.).

19. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982).

20. *Id.*

21. Betsy Borden Johnson, Comment, *"With Liberty and Justice For All" IOLTA in Texas-The Texas Equal Access to Justice System*, 37 BAYLOR L. REV. 725, 725 (1985).

22. Consumer Checking Account Equity Act, 12 U.S.C. § 1832(a)(1) (1997).

drawals on demand.[23] Accordingly, attorneys use NOW accounts to earn interest on client funds, because a client's deposit can be withdrawn upon demand. An "IOLTA account" is the name given for the NOW account that is used to pool client deposits that individually are too small, or are held for too short of a duration, to earn interest.[24]

The statute creating NOW accounts, however, restricts their use. NOW accounts may consist "solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for . . . charitable . . . purposes and which is not operated for profit."[25] Accordingly, NOW accounts offer limited possibilities for lawyers to manage their clients' funds. For instance, a lawyer can only pool client funds into a single NOW account if all of the clients are individuals, as opposed to corporations or partnerships.[26] Further, a lawyer is prohibited from deducting any interest to pay for account administration costs, because the "entire beneficial interest" would not vest with "individuals."[27] Consequently, a lawyer must bill for account administration costs separately.

B. *STATE BY STATE OVERVIEW*

In the 1960s, several foreign jurisdictions, including Australia, Canada and parts of Africa, implemented the first IOLTA programs.[28] In 1981, by a special ruling from the Federal Reserve Board that enabled Florida to use NOW accounts before 1982,[29] the Florida Supreme Court adopted the United States' first IOLTA program.[30] Every state, as well as the District of Columbia, currently operates IOLTA programs.[31]

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23. *Id.*

24. Johnson, *supra* note 21, at 726.

25. 12 U.S.C. § 1832(a)(2).

26. *Id. See* Cone v. State Bar of Fla., 819 F.2d 1002, 1006 (11th Cir. 1987) (stating neither partnerships nor corporations are permitted to maintain NOW accounts under federal banking regulations).

27. 12 U.S.C. § 1832(a)(2). *See also* Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996, 998 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2514 (1997) (stating that attorneys may not deduct interest from the trust accounts in order to pay for banking administration charges because that would improperly benefit the attorney in violation of the ethical rules).

28. Johnson, *supra* note 21, at 730-31.

29. *See Cone*, 819 F.2d at 1006 (citing 68 A.B.A. J. 1500, 1504 n.7 (1982)).

30. *See In re* Interest on Trust Accounts, 402 So. 2d 389, 396 (Fla. 1981).

31. *See IOLTA Handbook, supra* note 2, at 1. For several years, Indiana was the only state that refused to institute an IOLTA program. *See In re* Indiana State Bar Ass'n's Peti-

Between states, IOLTA programs differ most notably in two respects. First, the program may be implemented either by court rule or legislative enactment, depending upon which government branch the state constitution holds responsible for regulating the state's legal profession.[32] Second, a lawyer's participation may be voluntary, mandatory or "opt-out."[33] In a voluntary program, a participating attorney may deposit client funds that are unable to earn interest into either an IOLTA account or an account that does not pay interest.[34] A participating attorney must inform the local bar foundation that an account has been established.[35] A mandatory program requires that all lawyers' trust funds earn interest, either for the client or for specific organizations designated to receive IOLTA account contributions.[36] An "opt-out" program enables lawyers to exclude themselves during an annual opt-out period, if they do not want to participate.[37]

IOLTA programs generate over one hundred million dollars annually nationwide for IOLTA recipients.[38] There are 26 states that use a mandatory program, 21 jurisdictions that use the opt-out program and 3 states that use a voluntary program.[39]

C. *HOW IOLTA OPERATES*

In large part, the Texas IOLTA program accurately reflects how IOLTA programs operate nationwide. Examining the Texas IOLTA program and the rules that govern its operation serves as a general

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tion to Authorize a Program Governing Interest on Lawyers' Trust Accounts, 550 N.E.2d 311, 313-16 (Ind. 1990) (holding that the program violated rules of professional conduct and rules for discipline of attorneys). *See In re* Public Law No. 154-1990, 561 N.E.2d 791, 793-94 (Ind. 1990) (holding that the Eleventh Amendment Immunity Clause which shielded attorneys from disciplinary action for participation in statutory attorney trust program rendered the entire program unconstitutional). However, the Indiana Supreme Court recently approved an IOLTA program. *See* Brennan J. Torregrossa, Washington Legal Foundation v. Texas Equal Access to Justice Foundation: *Is there an IOTA of Proprety Interest in IOLTA?* 42 VILL. L. REV. 189, 191 (1997).

32. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982).

33. Rachael Scovill Worthington, Comment, *IOLTA-Overcoming its Current Obstacles*, 18 STETSON L. REV. 415, 419 (1989).

34. *Id.* at 420.

35. *Id.*

36. *Id.* at 421.

37. *Id.* at 420.

38. Marcia Coyle, *Attorney Fund Controversy*, NAT'L L. J., October 6, 1997, at A1.

39. Torregrossa, *supra* note 31, at 192 n. 9.

example of how IOLTA programs function.[40]

On May 9, 1984, the Supreme Court of Texas signed an Order that amended the State Bar Rules and authorized a voluntary IOLTA program.[41] The amendment, codified as Article XI of the State Bar Rules, called for the creation of a nonprofit corporation to administer and to hold the beneficial interest earned from the money held in IOLTA accounts.[42] The Texas Supreme Court adopted the "Rules Governing the Operation of the Texas Equal Access to Justice Program" ("Texas Equal Access Rules").[43] The Texas Equal Access to Justice Foundation ("TEAJF") was created, pursuant to Texas Equal Access Rule 1.[44]

In 1988, the American Bar Association ("ABA") recommended that every state with a voluntary or an opt-out program convert to a mandatory program, because nationwide the mandatory programs were most successful at generating interest.[45] Accordingly, the Texas Supreme Court amended Article XI of the State Bar Rules and the Texas Equal Access Rules to authorize the mandatory Texas IOLTA program presently in operation.[46]

The Texas mandatory program requires that attorneys who hold "client funds that are nominal in amount or are reasonably anticipated to be held for a short period of time" deposit the funds into an unsegregated interest-bearing account, a pooled NOW account, with the resulting interest to be paid to the TEAJF.[47] By definition, funds are "nominal . . . or . . . held for a short period of time" when they could not reasonably be expected to earn interest for the client or if the interest which might be earned on such funds is not likely to be sufficient to offset the cost of establishing and maintaining the account, service charges, accounting costs and tax reporting costs which would be in-

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40. Any significant differences between state programs will be noted.

41. TEX. GOVT. CODE ANN., § 3, § 5 historical note (West 1997). IOLTA programs are created either by state supreme court order or by state statute. *IOLTA Handbook, supra* note 2, at 2.

42. § 4(a), (b). Article XI further provides that the nonprofit corporation would be governed by a board of directors consisting of twelve members and a chairman. The Supreme Court of Texas was to appoint the chairman and six directors, while the President of the Texas State Bar would appoint the other six directors. *Id.*

43. TEX. R. EQUAL ACCESS, Rule 1.

44. *Id.*

45. ABA House of Delegates Resolution 101 (1988).

46. TEX. GOVT. CODE ANN. § 3 (amended 1988). *See also IOLTA Handbook, supra* note 2, at 3.

47. TEX. R. EQUAL ACCESS, Rule 4.

curred in attempting to obtain interest on such funds for the client.[48]

Consequently, when a lawyer receives client funds, the lawyer must decide whether the amount is capable of earning net interest for that client. All that is required is a good faith determination.[49] If the funds are unable to generate net interest, Texas lawyers are required to deposit the funds into a pooled IOLTA account.[50] The depository remits the net interest[51] to the TEAJF,[52] which then distributes grants to non-profit organizations that "have as a primary purpose the delivery of legal services to low income persons," as assessed pursuant to ABA standards.[53] During the Texas IOLTA program's four voluntary years (1985-1988), TEAJF distributed approximately $2,500,000 in grants.[54] After 1988, TEAJF distributed approximately $50,000,000.[55]

III. ANALYSIS

A. *HISTORICAL PERSPECTIVE*

This historical perspective will illustrate the constitutional issues that courts have addressed in connection with the IOLTA program. These issues were relevant to the Fifth Circuit's recent decision in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* and are incorporated into the analysis that follows this perspective.

1. *The Fifth Amendment Takings Clause*

The Fifth Amendment to the United States Constitution, the Takings Clause, states, "[N]or shall private property be taken for public

48. TEX. R. EQUAL ACCESS, Rule 6.

49. TEX. R. EQUAL ACCESS, Rule 23.

50. TEX. R. EQUAL ACCESS, Rule 4. Conversely, in voluntary and opt-out states, lawyers and their clients are permitted to deposit such funds into a non-interest-bearing account. Worthington, *supra* note 33, at 419.

51. TEX. R. EQUAL ACCESS, Rule 9. IOLTA programs are binding on lawyers, not financial institutions. Compliance among financial institutions, therefore, is voluntary in all states. However, most institutions have accepted IOLTA accounts in an effort to compete for lawyers' deposits that otherwise might be transferred, thereby depriving the institutions entirely from those funds. Johnson, *supra* note 21, at 727 (citing Florida Justice Institute, IOLTA Update, NATIONAL IOLTA CLEARINGHOUSE 5 (Summer 1983)).

52. TEX. R. EQUAL ACCESS, Rule 9.

53. TEX. R. EQUAL ACCESS, Rules 10-12.

54. *IOLTA Handbook*, *supra* note 2, at 176.

55. *Id.*

use, without just compensation."[56] The United States Supreme Court has declined to establish a fixed standard that can be used to determine when government action violates the Takings Clause.[57] As a starting point, however, the Court has maintained that governmental interference with recognized and protected property rights can be an unconstituional taking.[58] Additionally, the Court has consistently employed three factors, found in *Penn Central Transportation Co. v. New York City*,[59] to determine whether the government interferes "with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes."[60] Those factors are as follows: "(1) the 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."[61] The Supreme Court has declined to find an unconstitutional taking where a governmental regulation promotes a public benefit,[62] as long as it does not force some people to bear burdens which the public as a whole should endure.[63] The Court has, however, labeled two particular government actions as per se takings,[64] (1) action that compels private property owners to

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56. U.S. CONST. amend. V.

57. *See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (acknowledging Court's inability to set a rule for determining a taking); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224 (1982) (avoiding any one set formula for determining a taking); Andrus v. Allard, 444 U.S. 51, 65 (1979) (noting that there is no fixed point where government action becomes a taking); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-34 (1978) (recognizing that the Court essentially engages in "ad hoc, factual inquiries," when analyzing a takings claim).

58. *See Penn Cent. Transp. Co.*, 438 U.S. at 124-25 (stating that government conduct must interfere with property to constitute a taking); Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972) (stating that the nature of the property interest is fundamental to a takings analysis).

59. 438 U.S. 104 (1978).

60. *Id.* at 124.

61. *Id. See, e.g.*, Hodel v. Irving, 481 U.S. 704, 714-15 (1987); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

62. *See Penn Cent. Transp. Co.*, 438 U.S. at 124 (concluding that there was no taking where the government program adjusted economic "benefits and burdens" for the public's common good).

63. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that the Takings Clause "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). *See also* Andrus v. Allard, 444 U.S. 51, 65 (1979) (recognizing that some rights are implicitly affected whenever the government acts for the public good).

64. The Court states that these two categories are automatically, or "per se," "compensa-

acquiesce in permanent physical invasion[65] and (2) regulation that denies any beneficial or economically productive use of property.[66]

2. Webb's Fabulous Pharmacies, Inc. v. Beckwith[67]

In *Webb's Fabulous Pharmacies, Inc.*, the United States Supreme Court invoked the Takings Clause to strike down a Florida statute,[68] which required that "[m]oneys deposited in the registry of the court shall be deposited in interest-bearing certificates. . . . All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court investing such moneys. . . ."[69] The plaintiffs, Eckerd's of College Park, Inc., entered into an agreement to purchase Webb's assets for $1,812,145.77.[70] However, Webb's debts ultimately exceeded the purchase price.[71] Accordingly, Eckerd's filed an interpleader complaint[72] against both Webb's and its creditors and tendered the purchase price to the court.[73] The clerk deducted $9,228.74 as a statutory fee, which was not contested.[74] However, after a receiver was appointed, nearly a year later, the court clerk refused to return more than $100,000 in interest that was earned on the interpleader fund.[75]

The Florida Supreme Court held that the statute was constitutional,

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ble without [any] case-specific inquiry into the public interest[s]" that may support the governmental conduct. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

65. *See* Dolan v. City of Tigard, 512 U.S. 374, 385-86 (1994) (finding physical invasion where city ordinance required property owners to deed portions of their real property as a condition to obtaining a building permit). *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982) (finding a physical invasion regardless of minimal economic impact on the property owner); *Penn Cent. Transp. Co.*, 438 U.S. at 124 (1978) (acknowledging that the Court is more likely to find a taking where the government physically invades private property).

66. *See Lucas*, 505 U.S. at 1020 (holding that a "taking" has occurred when a state deprives a landowner of all economically viable uses of the land). *See also* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that a zoning law was a per se taking because it denied the claimant any economically viable use in the claimant's property).

67. 449 U.S. 155 (1980).

68. *Id.* at 156 (citing FLA. STAT. § 28.33 (1977), enacted as 1973 FLA. LAWS, ch. 73-282, § 1).

69. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 156 n.1.

70. *Id.* at 156.

71. *Id.*

72. Interpleader enables a person in the position of stakeholder to require two or more claimants to litigate among themselves to determine which, if any, has the valid claim. FED. R. CIV. P. 22. *See also* 28 U.S.C. § 1335.

73. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 156-57.

74. *Id.* at 157.

75. *Id.* at 157-58.

reasoning that the funds became public money upon deposit with the circuit court's registry account and, therefore, there was no unconstitutional taking because interest earned on the account was not private property.[76] The United States Supreme Court reversed that decision and held that where private funds are deposited pursuant to a state interpleader statute and a service fee is charged by the court clerk, the county's appropriation of the interest that accrues on the private funds, in addition to the fee, is a taking in violation of the Fifth and Fourteenth Amendments.[77]

The United States Supreme Court decision involved two steps. First, the Court stated that the interpleader funds "plainly [were] private property," not public.[78] The Court reasoned that Webb's creditors had a state-created property right in the interpleader fund, because the state of the creditors held the funds for the ultimate benefit of the creditors, not the countys'.[79] Second, the Court explained that just because the state directed that interpleader funds be deposited into an interest-bearing account did not mean that a court was entitled to assume ownership of the interest.[80] Rather, the Supreme Court focused on the "usual and general rule [that] any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal."[81] In addition, the Court stated that the statute did not take "only what it creates," because the fund could generate interest for the creditors absent the statute.[82] Consequently, the Court ruled that the interest is an incident of ownership, which is property, just as the fund itself is property.[83]

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

77. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 164-65. The Fifth Amendment is applicable only to the Federal Government; the Fourteenth Amendment makes the Fifth Amendment applicable to the States and to its subdivisions. Gitlow v. New York, 268 U.S. 652, 664 (1924).

78. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 160.

79. *Id.* at 161. The Court cited *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), for the proposition that "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978) (indicating that the Court considers the extent to which governmental action interferes with distinct investment-backed expectations).

80. *Webb's Fabulous Pharmacies, Inc.*, 449 U.S. at 162.

81. *Id.*

82. *Id.* at 163.

83. *Id.* at 162-63.

3. In re Interest on Trust Accounts[84]

In structuring the IOLTA program, the Florida Supreme Court acknowledged that it must address the Fifth Amendment takings issue, especially in light of the *Webb's Fabulous Pharmacies, Inc.* decision.[85] In discarding the issue, however, the Florida Supreme Court distinguished *Webb's* on the ground that IOLTA-generated interest is not client property, thereby halting any takings claim. In so doing, the court stated that:

> [t]he most relevant distinction, plainly, is the fact that no client is compelled to part with 'property' by reason of a state directive, since the program creates income where there had been none before, and the income thus created would never benefit the client under any set of circumstances. . . . It follows that no client has a 'property interest,' in the constitutional sense, which is being taken from him by this program.[86]

A number of State Supreme Courts that have judicially authorized IOLTA programs have explicitly turned to Florida's 1981 takings issue conclusion that clients do not have property interests in IOLTA-generated income.[87]

4. Cone v. State Bar of Florida[88]

Relying in part on In re *Interest on Trust Accounts*,[89] the Eleventh Circuit held in *Cone v. State Bar of Florida* that, in order to demonstrate a constitutionally cognizable property right in IOLTA-generated interest, a client must demonstrate that she has a specific and legitimate "claim of entitlement."[90] Further, when a client's deposit alone will not produce sufficient income to offset account administration charges and federal banking laws do not permit the funds to be placed

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84. 402 So. 2d 389 (Fla. 1981).

85. *Id.* at 393.

86. *Id.* at 395-96.

87. *See In re* Interest on Lawyers' Trust Accounts, 675 S.W.2d 355 (Ark. 1984), *modified*, 689 S.W.2d 352 (Ark. 1985), *modified*, 709 S.W.2d 400 (Ark. 1986); *In re* Massachusetts Bar Ass'n, 478 N.E.2d 715 (Mass. 1985); *In re* Interest on Lawyers' Trust Accounts, 672 P.2d 406 (Utah 1983); *In re* New Hampshire Bar Ass'n, 453 A.2d 1258 (N.H. 1982). *See also* Carroll v. State Bar of Cal., 213 Cal. Rptr. 305, 312 (1985) (holding that California's IOLTA program is not an unconstitutional taking without, explicitly referring to the Florida Supreme Court's quoted language).

88. 819 F.2d 1002 (11th Cir. 1987).

89. *See id.* at 1006 n.5.

90. *Id.* at 1004 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

into a pooled NOW account, the client fails to demonstrate a specific and legitimate claim of entitlement.[91]

In *Cone*, the plaintiff, Ms. Glaeser, paid a $100 deposit to a law firm in February, 1969.[92] The law firm placed the deposit into a non-interest-bearing trust account.[93] The fund at issue in the case was a $13.75 residual which the firm inadvertently failed to refund to Ms. Glaeser upon completion of her representation in 1970.[94] In December, 1981, the firm began participating in the Florida IOLTA program and consequently transferred all of its nominal or short term trust accounts, including the $13.75, to an interest-bearing NOW account.[95] Nearly three years later, the law firm discovered its error and returned the $13.75 principal, but gave the interest, which totaled $2.25, to the Florida Bar Association pursuant to the IOLTA program.[96] Ms. Glaeser, claiming to represent all persons similarly situated, alleged that the appropriation of the $2.25 in interest constituted an uncompensated taking of private property, in violation of the Fifth Amendment.[97]

In reaching the conclusion that clients do not have a property interest in IOLTA-generated interest, the Eleventh Circuit Court of Appeals cited three Supreme Court cases for support of its view regarding constitutionally protected property interests.[98] As a result, to invoke the Takings Clause and receive compensation for any impaired interest, the claimant had to prove that she had a specific and legitimate "claim of entitlement" to the $2.25 in interest.[99] This claim to entitlement could be based on positive rules of substantive law or mutually explicit understandings.[100] However, the claimant must be protecting a reasonable, often investment-backed, expectation rather than an inchoate unilateral expectation.[101]

In affirming the lower courts' conclusion that the interest earned

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91. *Id.* at 1006-07.
92. *Id.* at 1003.
93. *Id.* at 1003-04.
94. *Id.* at 1004.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 1004-05 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972)).
99. *Cone*, 819 F.2d at 1004 (citing *Board of Regents*, 408 U.S. at 577).
100. *Id.* (citing *Perry*, 408 U.S. at 601-02).
101. *Id.* at 1005 (citing *Penn Cent. Transp. Co.*, 438 U.S. at 124-25).

was not Ms. Glaeser's property,[102] the *Cone* court adopted the district court's reasoning that Ms. Glaeser did not identify substantive law or mutually explicit understandings which would give her a legitimate claim of entitlement to a share of the interest.[103]

Because the legal profession's ethical standards require that the funds be available for prompt delivery to the client,[104] lawyers typically place nominal or short term client funds in demand accounts that do not pay interest.[105] The court deduced, consequently, that Ms. Glaeser could not have an expectation of receiving interest income on her deposit.[106] In addition, banking regulations prohibit NOW accounts from benefitting for-profit organizations.[107] Although IOLTA-NOW accounts can circumvent the prohibition against law firms using NOW accounts, by designating a non-profit organization as the sole beneficiary,[108] that was not the case here. Ms. Glaeser, as a client with a nominal deposit, thought she was unilaterally entitled to the interest which, the court maintained, is an unreasonable expectation.[109] Furthermore, the subaccounting[110] costs required to maintain an interest-bearing account on individual deposits like Ms. Glaeser's precluded any reasonable expectation that the deposit would accrue net interest.[111] The Eleventh Circuit, quoting the district court, stated that "[t]he end result of these economic and practical impediments to individual investment of IO[L]TA funds is to negate any reasonable unilateral expectation, much less a mutually explicit understanding, that a client such as Mr. [sic] Glaeser should receive interest generated by the IO[L]TA program."[112]

The court's analysis concluded by distinguishing the Supreme

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102. *Id.* at 1004.

103. *Id.* at 1005.

104. *Id.* (citing Integration Rule of Fla. Bar, Rule 11.02(4); DR 9-102(B)(4), Fla. Bar Code of Prof. Resp.). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15 (1995); *supra* note 16.

105. *Cone*, 819 F.2d at 1005 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982)).

106. *Id.* at 1006.

107. *Id.* at 1005 (citing 12 U.S.C. § 1832(a)(1) (1982)).

108. *Id.* at 1006.

109. *Id.*

110. Subaccounts calculate interest and administration charges on individual deposits that are pooled together with other deposits in one, single account. *Id.*

111. *Id.*

112. *Id.* Some courts, such as the *Cone* court, refer to IOLTA accounts as "Interest on Trust Accounts," or "IOTA." *Id.* This Comment, however, will refer to the accounts as IOLTA accounts.

Court's decision in *Webb's Fabulous Pharmacies, Inc.* The *Cone* court found that the interest earned on the interpleader funds in *Webb's* gave rise to a legitimate claim of entitlement, because the funds were sufficient in amount and were held for a sufficient time period to earn net interest.[113] The *Cone* court emphasized that it was not making a minimal standard whereby a state may constitutionally appropriate very small pieces of property.[114] Rather, unlike the interpleader funds in *Webb's*, the *Cone* court determined that Ms. Glaeser did not have a legitimate expectation of earning net interest because, but for the IOLTA account, her deposit could not earn anything.[115]

5. Washington Legal Foundation v. Massachusetts Bar Foundation[116]

There were five plaintiffs in *Massachusetts Bar Foundation*: the Washington Legal Foundation,[117] two Massachusetts lawyers, and two Massachusetts citizens.[118] The plaintiffs claimed that Massachusetts' mandatory IOLTA program violated the Takings Clause of the Fifth Amendment, by depriving them of the right to exclude others from the beneficial use of their money.[119] They also claimed that the program violated their rights under the First Amendment to freedom of speech and association.[120]

The First Circuit Court of Appeals dismissed both claims.[121] The court held that the clients did not have a constitutionally protected property right under the Fifth Amendment to exclude others from the beneficial use of their funds, while the funds were deposited in IOLTA accounts.[122] Additionally, the court held that the Massachusetts pro-

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113. *Id.* at 1007.

114. *Id.*

115. *Id.*

116. 993 F.2d 962 (1st Cir. 1993).

117. "The Washington Legal Foundation . . . is a non-profit, public interest law and policy center operating in Washington, D.C." *Id.* at 969.

118. *Id.* One citizen previously had money deposited in an IOLTA account and both citizens anticipated hiring a lawyer in the future, which would cause their money to be deposited in an IOLTA account. *Id.*

119. *Id.* at 969-70. The Massachusetts Supreme Judicial Court ("SJC") established the Massachusetts IOLTA program in 1985 by amending the "Rules of the SJC." *Id.* at 968. The First Circuit and the plaintiffs refer to the Massachusetts program as the "IOLTA Rule." *Id.* In 1989, the SJC converted Massachusetts' program, which was voluntary, into a mandatory program. *Id.*

120. *Id.*

121. *Id.* at 980.

122. *Id.* at 976. The court suggested that perhaps the plaintiffs based their claim on the right to control and to exclude others from the beneficial use of their funds, as opposed to a

gram did not compel "financial support" of IOLTA-recipient organizations and, therefore, did not violate the plaintiffs' First Amendment rights of freedom of speech and association.[123]

The First Circuit began its takings analysis by acknowledging that many courts have held that clients do not possess protected property rights to the interest earned on IOLTA accounts.[124] Next, the court explained that depositing client funds in an IOLTA account does not transform a lawyer's fiduciary relationship with a client into a formal trust relationship, whereby the client possesses a recognized property right to control the beneficial use of the funds.[125] Further, the court noted that no other jurisdiction had found a constitutionally protected property right to control or exclude others from intangible property, like IOLTA-generated interest, as opposed to real property.[126]

Without affirmatively stating whether or not the plaintiffs had a property interest in the beneficial use of the funds, the court maintained that even if the plaintiffs could establish a property interest, the IOLTA program did not cause an illegal taking of that interest.[127] In doing so, the court analyzed the IOLTA program, subjecting it to the three factors enunciated in *Penn Central Transportation Co. v. New York City*.[128] First, the court refused to characterize the IOLTA program as a physical invasion.[129] Instead, the court noted that the IOLTA program leaves clients' funds untouched and available to clients at all times.[130] Furthermore, the court found it significant that the plaintiffs

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right to the interest itself, because numerous courts, including the Eleventh Circuit in *Cone v. State Bar of Florida*, have held that clients do not have a constitutionally protected property right to the interest earned on IOLTA accounts. *Id.* at 973.

123. *Id.* at 976.

124. *Id.* at 973. See court holdings in favor of IOLTA Programs, *supra* note 91 and accompanying text.

125. *Massachusetts Bar Found.*, 993 F.2d at 974 (reasoning that deposits into IOLTA accounts do not require a trust agreement and that simply using the word "trust" in the acronym "IOLTA" does not create a trust relationship).

126. *Id.* The plaintiffs did not discuss, and the court dismissed as not analogous, intangible rights which by their nature or by agreement require the exclusion of others to preserve the property interest, such as trade secrets. *Id.*

127. *Id.*

128. *Id.* at 974-76. See the three factors articulated in *Penn Cent. Transp. Co. v. New York*, *supra* notes 59-61 and accompanying text.

129. *Massacusetts Bar Found.*, 993 F.2d at 975. While acknowledging that a physical invasion of private property is a per se taking, the court rejected the plaintiffs' characterization that the IOLTA program was a "permanent" physical invasion of their private property becasue it "borrow[ed]" their funds. *Id.* at 974-75.

130. *Id.* at 976.

did not claim a right to the actual interest.[131] Rather, they pursued the right to control and exclude others from the use of their funds.[132] As such, the court found no logical connection between the IOLTA program's abstract operation and a taking, characterized by a physical invasion of real property.[133]

In addressing *Penn Central Transportation Co.'s* remaining two factors, the court analyzed the IOLTA program's economic impact on the plaintiffs, in conjunction with the extent to which the program interfered with distinct investment-backed expectations.[134] The court reasoned that there is no economic impact on the plaintiffs' claimed right to control and exclude others from the use of the interest because, without the IOLTA program, the clients would not otherwise receive or expect to receive those funds.[135] Similarly, the court determined that there were no "investment-backed" expectations in the plaintiffs' claimed right to control and exclude others from the funds' beneficial uses.[136] As a result, the court ultimately held that the IOLTA program did not cause an unconstitutional taking.[137]

Having dismissed the takings issue, the First Circuit addressed the plaintiffs' claim that the IOLTA program violated their freedom of speech and association, as guaranteed under the First Amendment.[138] Specifically, the plaintiffs claimed that the mandatory IOLTA program compelled lawyers, and therefore clients, to support ideological and political causes by forcing participation in the IOLTA program.[139]

In dismissing the plaintiffs' claim, the First Circuit engaged in a two-part test. Under the test's first prong, the court examined "whether

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131. *Id.* at 975.

132. *Id.* The court distinguished the property interest in the interest accrued on the interpleader funds found in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* as tangible. *Id.* (citing Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So. 2d 951 (Fla. 1979)).

133. *Id.*

134. *Id.* at 976. The court began by noting that the Takings Clause is violated only where the governmental interference is "significant."

135. *Id.*, 993 F.2d at 976.

136. *Id.* The court acknowledged that the plaintiffs did not assert that they had an "investment-backed" expectation in their claim to control and exclude others from the beneficial use of the funds. *Id.*

137. *Id.* The court characterized the plaintiffs' claim as, "at best, a thin strand in the commonly recognized bundle of property rights." *Id.*

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

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

the IOLTA Rule burdens protected speech by forcing expression through compelled support of organizations espousing ideologies or engaging in political activities."[140] If the court had determined that the IOLTA program burdened protected speech, it would next inquire whether the IOLTA program "serves compelling state interests through means which are narrowly tailored and germane to the state interests."[141] In this case, however, the court did not go beyond the first prong, because it found that the plaintiffs had failed to allege that the IOLTA Program compelled them to support the program's recipient organizations.[142]

In reviewing the district court's decision to dismiss the plaintiffs' claims, the First Circuit accepted the plaintiffs' factual allegations as true and acknowledged that the IOLTA program required participation from both lawyers and clients.[143] One lawyer-plaintiff alleged that the IOLTA program "significantly limited" his practice and "negatively affected his livelihood," while the other lawyer-plaintiff alleged that the IOLTA program "compel[led] him to support politics and ideologies with which he disagrees."[144]

In addition, the court found that the client-plaintiffs were obligated to participate in the IOLTA program, because lawyers generally deposit nominal or short-term funds into IOLTA accounts without the client's knowledge or consent.[145] Further, for purposes of appeal, the court assumed that obtaining legal representation in certain circumstances would necessarily compel clients to allow their funds to be deposited into IOLTA accounts.[146]

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140. *Id.* at 977.

141. *Id.* (citing Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 656 (1990); Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1, 19 (1986); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977)).

142. *Id.* at 980.

143. *Id.* at 978. The plaintiffs appealed the district court's decision that the IOLTA program did not compel participation, because lawyers could avoid establishing IOLTA accounts by choosing not to hold client funds, or by establishing individual client accounts as not applicable to them. *Id.* at 997-98 (citing Washington Legal Found. v. Massachusetts Bar Found., 795 F.Supp 50, 55 (D. Mass. 1992)).

144. *Id.* The plaintiffs characterized the IOLTA program as "more than an inconvenience, although it is less extreme than forcing loss of employment." *Id. See also Austin*, 494 U.S. at 663 (stating "[L]ess extreme disincentives than the loss of employment" can force association affecting First Amendment rights); Keller v. State Bar of Cal., 496 U.S. 1, 10 (1990) (explaining that government action cannot force citizens to forego First Amendment rights as a condition to retaining employment).

145. *Massachusetts Bar Found.*, 993 F.2d at 978.

146. *Id.*

Having found that the IOLTA program compels participation, the court analyzed whether it also compelled speech and association in a manner that violated the First Amendment.[147] The court explained that First Amendment rights can be violated when an organization that espouses ideological or political activities compels financial support[148] and where "there [is] a connection between dissenters and the organization so that dissenters reasonably understand that they are supporting the message propagated by recipient organizations."[149]

In its analysis, the court distinguished the Supreme Court cases relied upon by the plaintiffs, where compulsory dues levied by labor unions and bar associations were found unconstitutional.[150] Unlike the compulsory fees found in those cases, the court found that the plaintiffs did not adequately allege that they were compelled to financially support the IOLTA program.[151] As such, the court determined that the IOLTA process does not affect the plaintiffs' funds, for it does not require any expenditures or efforts by the plaintiffs and the interest generated is not the client's money.[152] Further, the court explained that "the IOLTA program recipient organizations benefit from an anomaly created by the practicalities of accounting, banking practices, and the ethical obligation of lawyers."[153]

As a result, the First Circuit held that the plaintiffs failed to allege any connection between themselves and any IOLTA recipient, because they were not compelled to financially support the IOLTA program.[154] Consequently, the court found that the IOLTA program did

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147. *Id.* at 978-79.

148. *Id.* at 977.

149. *Id.* at 979.

150. *Id.* at 979-80. *See* Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990) (finding that the California Bar Association's compulsory dues could not be used to finance activities which were not germane to the bar association's administrative purposes); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (holding that unions could charge dues from non-members but could not use those dues for political or ideological causes that were not germane to the collective-bargaining benefits enjoyed by all employees, whether union or non-union). The court also cited numerous unsuccessful "student-fee" cases where university students claimed that they were compelled to contribute to organizations to which they objected, through their mandatory student fees. *Massachusetts Bar Found.*, 993 F.2d at 979 n.15.

151. *Massachusetts Bar Found.*, 993 F.2d at 979-80. The plaintiffs had alleged that "[t]he collection of and use of interest, under color of state law, generated by funds in the IOLTA accounts" violated their freedom of speech and association. *Id.*

152. *Id.* at 980. The court stated: "[t]he interest . . . belongs to no one, but has been assigned, . . . to be used by the IOLTA program." *Id.*

153. *Id.*

154. *Id.*

not violate the plaintiffs' First Amendment rights.[155]

6. Washington Legal Foundation v. Texas Equal Access to Justice Foundation[156]

This section will examine the District Court and the Fifth Circuit decisions in *Texas Equal Access to Justice Foundation.* The Fifth Circuit remanded the case, but the defendants subsequently sought an *en banc* rehearing and Supreme Court review.[157]

a. The District Court Decision[158]

In *Texas Equal Access To Justice Foundation,* the plaintiffs — The Washington Legal Foundation, a lawyer and a citizen who uses legal services—claimed that the Texas IOLTA program constituted an uncompensated taking and violated their rights to freedom of speech and association.[159] Relying mostly upon precedent, the District Court disagreed and, consequently, awarded summary judgment to the defendants.[160] In doing so, the court held the following: (1) there was no taking because the funds deposited into IOLTA accounts were not reasonably capable of earning a net interest in individual accounts and the plaintiffs thus did not have a property interest in the IOLTA-generated interest;[161] (2) the client's First Amendment rights were not burdened because the IOLTA program did not compel clients to financially support recipient organizations;[162] and (3) the attorney's First Amendment rights were not violated because the mandatory IOLTA program did not sufficiently compel attorneys to associate with the program's recipient organizations.[163] In large part, the District Court's analysis adopts the reasoning found in the *In re Interest on Trust Accounts,*[164] *Cone v. State Bar of Florida,*[165] and *Washington Legal*

155. *Id.*

156. 94 F.3d 996 (5th Cir. 1996).

157. Rehearing and suggestion for rehearing *en banc* were denied by *Washington Legal Foundation v. Texas Equal Access to Justice Foundation,* 106 F.3d 640 (5th Cir. 1997). Certiorari was granted in part by *Phillips v. Washington Legal Foundation,* 117 S. Ct. 2535, 138 L. Ed. 2d 1011 (1997).

158. Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F.Supp. 1 (W.D. Tex. 1995), *affirmed in part, vacated in part,* and *reversed in part* by Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996).

159. *Id.* at 3.

160. *Id.* at 11.

161. *Id.* at 7.

162. *Id.* at 9.

163. *Id.* at 10.

164. 402 So. 2d 389 (Fla. 1981).

Foundation v. Massachusetts Bar Foundation[166] decisions, while factually distinguishing *Webb's Fabulous Pharmacies, Inc. v. Beckwith.*[167] The District Court did, however, address one new argument involving the plaintiffs' claim that clients have a protectable property interest in IOLTA account proceeds.[168] The plaintiffs cited two cases where prison inmates sued prison officials and alleged that the officials withheld paying inmates interest earned on bank accounts.[169] The District Court agreed with the plaintiffs that the cases did assert that the prisoners lawfully possessed property rights in the interest generated by their inmate trust accounts.[170] However, because the property right existed only in the interest that remained after deducting any applicable account charges, the court distinguished the cases from IOLTA accounts where "[b]y definition, the only funds eligible for deposit . . . are incapable of earning net interest if deposited by themselves. . . ."[171] Consequently, the District Court concluded that these cases were inapplicable.[172]

The District Court also elaborated upon its holding that lawyers working within the mandatory Texas IOLTA program do not suffer unconstitutional trespasses upon their First Amendment rights of free speech and association. The court found that even if the IOLTA program forced lawyers to associate with the recipient groups, any such compelled association did not give rise to a constitutional violation,

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165. Cone v. State Bar of Fla., 819 F.2d 1002 (11th Cir.).

166. Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962 (1st Cir. 1993).

167. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980). The district court in *Texas Equal Access to Justice Foundation* found "[t]he logic . . . compelling" in the *Cone* and *Massachusetts Bar Foundation* opinions. *Texas Equal Access to Justice Found.*, 873 F.Supp at 7.

168. *Texas Equal Access to Justice Found.*, 873 F. Supp. at 7-8.

169. *Id. See* Tellis v. Godinez, 5 F.3d 1314, 1316 (9th Cir. 1993) (holding that interest earned on a prisoner's bank account belongs to the prisoner, not the state prison system); Eubanks v. McCotter, 802 F.2d 790, 793-94 (5th Cir. 1986) (reversing district court for erroneously dismissing sua sponte inmates' Fifth Amendment claims that they had not received interest on their funds being held in pooled accounts by prison officials).

170. *Texas Equal Access to Justice Found.*, 873 F.Supp at 8.

171. *Id.* at 7.

172. *Id.* at 8. The court also found *Webb's* inapplicable, citing the Eleventh and First Circuit Courts' decisions in *Cone v. State Bar of Florida*, 819 F.2d 1002 (11th Cir. 1987), and *Massachusetts Bar Foundation.*, 993 F.2d 962 (1st Cir. 1993). *Id.* at 6-7. *See also* Sellers v. Harris County, 483 S.W.2d 242, 244 (Tex. 1972) (holding a Texas state statute, that authorized the court clerk to retain all interest earned on $1,000,000 interpleader, unconstitutional because the sum retained was not reasonably related to the service performed by the county in safeguarding and investing the funds).

because the program's purpose is to provide funding for legal services to a substantial segment of the Texas population.[173] In addition, the court explained that the IOLTA program merely requires that lawyers handle client funds in a slightly different fashion and did not require lawyers to contribute their own funds.[174] Furthermore, the court found that providing indigent Texans with the means to gain access to the legal system was a significant state interest and working in accord with the IOLTA program imposed minimal burdens upon any alleged First Amendment rights.[175]

The court held, therefore, that the Texas mandatory IOLTA program did not violate lawyers' First Amendment rights. The court ultimately awarded summary judgment to the defendants.[176]

b. The Fifth Circuit Decision[177]

In reversing the District Court, the Fifth Circuit Court of Appeals followed the traditional Texas rule that "interest follows principal."[178] The court applied this rule to clients' funds that are deposited in IOLTA accounts and held that clients have property interests in the interest accruing on those funds.[179]

The Fifth Circuit criticized the Eleventh Circuit for not giving proper weight to the decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[180] and for "erroneously" redefining property as "an interest that must necessarily benefit its owner."[181] The Fifth Circuit found that in *Cone v. State Bar of Florida*, the Eleventh Circuit inherently incorporated the value of the client's deposit in its determination that the client did not have a cognizable property interest in the IOLTA account proceeds.[182] According to the Fifth Circuit, however, the

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173. *Texas Equal Access to Justice Found.*, 873 F.Supp. at 10 (citing Keller v. State Bar of Cal., 496 U.S. 1, 14 (1990)).

174. *Id.*

175. *Id.*

176. *Id.*

177. Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir. 1996).

178. *Id.* at 1000.

179. *Id.* at 1002.

180. *Id.* at 1000.

181. *Id.* at 1002 (quoting Mary O. Sinibaldi, Note, *The Takings Issue in California's Legal Services Trust Account Program*, 12 HASTINGS CONST. L. Q. 463, 492 (1985)).

182. *Id.* The Fifth Circuit, nonetheless, acknowledged that the Eleventh Circuit explicitly stated that it was not incorporating the value of the clients' deposits in its determination whether or not the clients had a cognizable property interest. *Id.* (citing Cone v. State Bar of

Webb's Court created a rule that exists independently from the value or amount of the property interest at issue, when it held that a property interest existed in the accrued interest because "[t]he earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."[183] By observing the *Webb's* rule, together with Texas' "traditional rule that 'interest follows principal,'"[184] the Fifth Circuit vacated and remanded the District Court's decision, because it was premised on the rejected notion that clients do not have a valid property interest in IOLTA account earnings.[185]

Having found that clients possessed a property interest in proceeds generated by IOLTA accounts, the Fifth Circuit continued, in dicta, presenting three potential infirmities regarding the IOLTA program. First, the Fifth Circuit stated, "[i]t appears . . . that a bank pays interest on an account and then deducts fees."[186] Consequently, the *Cone* court's finding that a property right exists only in the interest that remains after a bank deducts its fees ignores that the property interest is created at the instant the interest is earned.[187]

Further, the court reiterated that, historically, when lawyers deposited clients' funds in accounts bearing no interest, clients could not make a takings claim because there was no accrued interest in which to claim a property right.[188] However, because the IOLTA program requires that attorneys place certain client funds in interest-bearing accounts, the rule that interest-follows-principal dictates that the clients have a property right in any accrued interest and, therefore, creates a foundation for a takings claim.[189]

Second, the Fifth Circuit stated that the defendants' argument, that deposits into IOLTA accounts would not generate any interest but for

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Fla., 819 F.2d 1002, 1007 (11th Cir. 1987)).

183. *Id.* (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

184. *Id.* at 1000-01 (citing Sellers v. Harris County, 483 S.W.2d 242, 243 (Tex. 1972)).

185. *Id.* at 1004-05. In doing so, the Fifth Circuit clearly distanced itself from the First and Eleventh Circuit holdings. The court stated that "the district court adopted the theory espoused by the First and Eleventh Circuits which circumvents [the 'interest follows principal]' rule." *Id.* at 1000.

186. *Id.* at 1003. The Fifth Circuit calls the operation a bank's "two-part process." *Id.*

187. *Id.* (citing Cone v. State of Florida, 819 F.2d at 1007).

188. *Id.*

189. *Id.* The Fifth Circuit noted that the Texas IOLTA program operates under the same rules as the interpleader statute found in *Webb's Fabulous Pharmacies Inc. v. Beckwith,* 449 U.S. 155 (1980), in that lawyers, like Florida courts, were not ordinally obligated to place deposited funds into interest-bearing accounts, but once they did so, any interest that accrued became the principal owner's property. *Id.*

banking practicalities, ignored that IOLTA programs became possible as a result of an Internal Revenue Service ruling that the interest generated would not be taxed if the clients had no choice but to participate in the program.[190] The Fifth Circuit asserted that the Texas IOLTA program, in the process of avoiding taxable income, established a monopoly by mandating lawyer participation and then keeping the interest proceeds for itself.[191] The court, however, found this result troublesome when tested with a hypothetical situation, in which private charities established private IOLTA programs that allowed clients to choose the program to which their funds would be sent.[192] According to the court, this situation would create an illogical result, whereby the interest generated would not exceed account administration fees, thus falling outside the *Cone* definition of property, yet clients would still have to pay income tax on the accrued interest.[193]

The third point in the Fifth Circuit's dicta cautioned that government agencies would be encouraged to dissect banking regulations to find other "anomalies" that can create an "unclaimed interest," if the interest generated in IOLTA accounts were not characterized as property.[194] For example, the court illustrated the situation where a check's "float time," the time between when a check is actually debited and credited in the respective parties' bank accounts, creates the potential for an interest-free loan for the bank that receives and deposits the check.[195] Despite acknowledging that depository banks must now pay interest during the float-time, the court emphasized its concern that opportunities exist to create an "unclaimed interest" by noting that credit-unions need not pay interest during float-time.[196] Consequently,

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190. *Id.* (citing Rev. Rul. 81-209, 1981-2 C.B. 16). *See also* Rev. Rul. 87-2, 1987-1 C.B. 18 (restating the decision announced in Rev. Rul. 81-209).

191. *Texas Equal Access to Justice Found.*, 94 F.3d at 1003.

192. *Id.*

193. *Id.*

194. *Id. See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 980 (1st Cir. 1993) (recognizing that IOLTA programs operate in response to an anomaly created by the practicalities of banking and accounting and the legal profession's ethical obligations).

195. *Texas Equal Access to Justice Found.*, 94 F.3d at 1003-04. In the court's example, the depository bank presents a check to the Federal Reserve Board and receives a provisional credit in its reserve account. The Federal Reserve Board then presents the check to the payor bank, whose account is debited and who must send a notice of dishonor within a defined period or be liable for the amount. Because this process takes one or two days, the depository bank enjoys credit on the funds for that time period. *Id.* (citing Robert D. Cooper & Edwin L. Rubin, *Orders and Incentives as Regulatory Methods: The Expedited Fund Availability Act of 1987*, 35 UCLA L. REV. 1115, 1127 (1988)).

196. *Id.* at 1004 (citing 12 U.S.C.A. § 4005(a), (b) (West 1989)).

the court declared that the interest-follows-principal rule must apply because it effectively compensates depositors whenever their funds are manipulated to create interest.[197]

The court remanded the case for reconsideration and further factual development, having held that clients have property interests in the IOLTA account's interest proceeds and that the rule, "interest follows principal," applies to IOLTA accounts.[198] With regard to the plaintiffs' taking claim, the court stated that to prevail on the merits, the plaintiffs must demonstrate the taking was against the property owner's will.[199] The court also stated that the same, or a similar showing, is necessary to prevail on the First Amendment claim.[200]

B. *AUTHOR'S ANALYSIS*

This analysis contains four sections. The first section analyzes the Fifth Circuit's holding in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation* and the second section examines that decision's dicta. Sections three and four discuss Fifth and First Amendment arguments, both for and against the IOLTA program's constitutional validity.

1. *The Fifth Circuit Decision*

The Fifth Circuit analysis must be credited for removing the illusion that IOLTA accounts miraculously create something from nothing.[201] Explanations such as, "the interest belonged to no one" and IOLTA accounts "have unlocked the magic that eluded the alchemists" have needlessly perpetuated the image that IOLTA accounts are "magic."[202] In the process, however, the Fifth Circuit failed to acknowledge the difference between "net" and "gross" interest and held steadfast to the inapplicable common law rule that interest-follows-principal. Consequently, the court replaced the unrealistic IOLTA program characterizations with its own unsound descriptions.

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197. *Id.* The court cautioned that as technology increases the speed at which financial transactions occur, depositors will have a harder time making a claim to interest accrued during the "float-time." *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 1000.

202. *Id.* (citing AMERICAN BAR ASS'N CIVIL JUSTICE: AN AGENDA FOR THE 1990S 56-72 (1989)).

First, the Fifth Circuit misconstrued the Eleventh Circuit's takings analysis in *Cone v. State Bar of Florida*, as well as those cases that have applied the same or similar analysis, both before and after the *Cone* decision. The Fifth Circuit concluded the following: (1) the *Cone* court's takings analysis inherently incorporated the IOLTA account's minimal monetary value; (2) the *Cone* court erroneously redefined property as an interest that must necessarily benefit the owner; and (3) the rule in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[203] should apply because it exists independently from the property value or amount at issue.[204]

The Fifth Circuit's first two conclusions are incomprehensible, because the *Cone* court specifically stated that it did not wish to imply that it was establishing a minimal standard whereby the state could constitutionally appropriate property that has little value to the owner.[205] Further, the *Cone* court held that there was no taking, only after its Fifth Amendment analysis found that the interest earned by the IOLTA program was not within the principal owner's reasonable expectation.[206]

The Fifth Circuit's third conclusion is no more valid than its built-in assumption that the Supreme Court would apply the rule in *Webb's* to interest generated in an IOLTA account. Considering, however, that numerous courts have distinguished the Florida interpleader statute in *Webb's*, by recognizing that the depositor in *Webb's* had a legitimate expectation that his funds would generate net interest, the Fifth Circuit's assumption is still tenuous, at best.

The Fifth Circuit circumvents the logic found in the decisions that have already addressed the IOLTA takings issue by applying Texas' "traditional rule that 'interest follows principal.'"[207] The Fifth Circuit should recognize that this rule can be found in most, if not every, state's common law, including states that have a reported decision affirming the IOLTA program's validity.[208] IOLTA programs are,

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203. "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

204. *Texas Equal Access to Justice Found.*, 94 F.3d at 1002.

205. Cone v. State Bar of Fla., 819 F.2d 1002, 1007 (11th Cir. 1987). See *supra* Part III.A.4. for a discussion of the *Cone* decision.

206. *Id.* at 1005.

207. *Texas Equal Access to Justice Found.*, 94 F.3d at 1000.

208. *See generally* Wilson v. City of Fayetteville, 835 S.W.2d 837 (Ark. 1992); Metropolitan Water Dist. v. Adams, 197 P.2d 543 (Cal. 1948) (*en banc*); Burnett v. Brito, 478 So. 2d 845 (Fla. Dist. Ct. App. 1985); Johnson v. Hazen, 132 N.E.2d 391 (Mass. 1956).

nonetheless, consistent with the "interest follows principal" rule because IOLTA accounts, by definition, only hold principal that could not earn interest for the client.[209] Consequently, the factual distinctions between the Texas IOLTA program in *Webb's* suggests that the Fifth Circuit inappropriately applied the interest-follows-principal rule to the IOLTA context, where the owner cannot realize any interest on his principal.

Finally, the Fifth Circuit oversimplified and mischaracterized the IOLTA program, stating that it views "IOLTA interest proceeds . . . as the fruit of the clients' principal deposits."[210] From this limited viewpoint, IOLTA interest could just as easily be called the fruit of the banking regulations. IOLTA interest proceeds depend upon both client funds and interest-bearing demand accounts. With respect to generating interest income, which the client can never realize, both are necessary. For the court to characterize the process that generates interest in IOLTA accounts in a one-dimensional manner is unrealistic.

2. *The Fifth Circuit Dicta*

Apart from the court's holding, the Fifth Circuit purported to illustrate three weaknesses in the IOLTA program.[211] The illustrations offered by the court, however, are either inconsequential or erroneous.

In the first illustration, the Fifth Circuit's statement that "a property interest attaches the moment that interest accrues, from which the bank then deducts its charges"[212] is inconsequential. The Fifth Circuit analogized the Florida interpleader statute in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* to the IOLTA program and, without any supporting precedent, found that once a state obligates its attorneys to place clients' funds in interest-bearing accounts, the rule is that any accruing interest belongs to the clients.[213]

Despite the Fifth Circuit's contention, this two-part banking practice does not impact the court's finding in *Cone v. State Bar of Florida* that clients do not have a reasonable expectation that they will receive interest proceeds from IOLTA accounts.[214] Whether or not a bank

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209. *See* TEX. R. EQUAL ACCESS, Rule 6.

210. *Texas Equal Access to Justice Found.*, 94 F.3d at 1000.

211. See *supra* notes 186-197 and accompanying text for a discussion of the Fifth Circuit's dicta in *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 94 F.3d 996 (5th Cir. 1996).

212. *See Texas Equal Access to Justice Found.*, 94 F.3d at 1003.

213. *Id.*

214. Cone v. State Bar of Fla., 819 F.2d 1002, 1006-07 (11th Cir. 1987).

pays interest before it deducts fees, an issue that the court raises but does not definitively answer,[215] a client cannot reasonably expect to receive interest on funds that would not earn interest if the IOLTA program did not exist. Accordingly, the precise banking transactions introduced by the Fifth Circuit are irrelevant when considering a client's expectation interests.

The court declared in its second illustration that in order to avoid creating taxable income for clients, "Texas gave itself [a] . . . monopoly, [by] reserving all the IOLTA interest proceeds for itself and requiring all attorneys to participate."[216] This statement reflects glaring misunderstandings about the IOLTA program. IOLTA accounts are not established to avoid taxes and "Texas" does not "give" nor "reserve for itself" anything. Rather, the Texas State Bar Association transfers interest income from banks to non-profit organizations as is permitted under federal banking laws.[217] The fact that the Internal Revenue Service allows IOLTA programs, to avoid generating taxable income for clients, merely exemplifies that clients do not have a reasonable expectation in receiving IOLTA interest proceeds. Further, a client's tax status under the IOLTA program is no different than it was prior to the program's initiation.[218] Attorneys in Texas do not receive any particular benefit from IOLTA accounts, and by mandating participation, the Texas Supreme Court has merely required attorneys to deposit eligible client funds in an IOLTA account, instead of other ethically permissible client accounts. Furthermore, if the IOLTA program is to be compared to a monopoly, then it can only be compared to a lawful natural monopoly, because the program has no control over the banking laws that have created the "market."[219] Finally, the court's hypothetical, where a client gets to select an IOLTA account that is established by a private charity, is irrelevant. The IOLTA program's recipient organizations, unlike the hypothetical, are not chosen by clients, nor are the IOLTA accounts established by private charities.

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215. *Texas Equal Access to Justice Found.*, 94 F.3d at 1003. The Fifth Circuit merely stated that "[i]t *appears* . . . that a bank pays interest on the account and then deducts fees[,]" without substantiating the statement any further. *Id.* (emphasis added).

216. *Id.*

217. *See supra* text accompanying notes 22-27.

218. *Texas Equal Access to Justice Found.*, 94 F.3d at 1003 n.41 (citing Rev. Rul. 81-209, 1981-2 C.B. 16). *See also* Rev. Rul. 87-2, 1987-1 C.B. 18 (restating the decision announced in Rev. Rul. 81-209).

219. A natural monopoly is a monopoly "which is created from circumstances over which the monopolist has no power." BLACK'S LAW DICTIONARY 1007 (6th ed. 1990).

The court's third illustration, that government agencies will be encouraged to dissect banking laws to discover "unclaimed interest,"[220] is faulty in two respects. First, the court inappropriately compares governmental agencies with the non-governmental Texas State Bar Association. Secondly, while the court correctly refrains from characterizing IOLTA-generated interest as non-property,[221] the court neglects to go one step further in this illustration and acknowledge that the property belonged to financial institutions prior to institution of the IOLTA program. Accordingly, the court fails to recognize that financial institutions compete by offering IOLTA accounts, which enables non-profit organizations to own a percentage of the interest. The court's fear that governmental agencies will cause a "gold rush" by seeking unclaimed interest within federal banking regulations is unfounded.[222]

3. *The Fifth Amendment Takings Claim*

In order to sustain a takings claim under the Fifth Amendment, the claimants must set forth facts showing that they have a recognized property interest, and that such interest has been impermissibly taken.[223] This analysis section will consider three arguments, both for and against the constitutional validity of IOLTA programs in light of the Fifth Circuit's recent holding.

a. Property Rights in IOLTA Account Interest

First, an argument can be made that *any* interest earned on deposited funds is property that belongs to the depositor, although any right to the interest may be subject to administrative charges, which may or may not exceed that interest amount. In addition to the rule in *Webb's*, a "takings" claimant might cite *Eubanks v. McCotter*,[224] where the Fifth Circuit did not distinguish between "net" and "gross" interest. The Fifth Circuit held that the District Court had erred in dismissing a Fifth Amendment claim that prison officials had not paid inmates' in-

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220. *Texas Equal Access to Justice Found.*, 94 F.3d at 1003.

221. *Id.*

222. The court feared that by declaring the interest as non-property, it would "incite a new gold rush, encouraging government agencies to dissect banking regulations to discover other anomalies that lead to 'unclaimed' interest." *Id.*

223. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-35 (1978) (referring to numerous U.S. Supreme Court takings decisions).

224. 802 F.2d 790 (5th Cir. 1986).

terest from funds being held in pooled, interest-bearing accounts.[225] Similarly, the Ninth Circuit held in *Tellis v. Godinez*[226] that interest earned on a prisoner's bank account belongs to the prisoner, not to the state prison system.[227] Whereas *Tellis* acknowledged state prison officials' right to deduct any applicable charges before crediting interest to a prisoner's account,[228] the case does not explicitly state that a property right to interest is created only after a net gain in interest is produced. Consequently, the claimant's argument would be that they have property rights in any interest earned on their funds.

The counter-argument, however, is that the claim fails the *Penn Central Transportations Co.* test, whereby the government must interfere with "interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property.'"[229] In particular, the claim fails to demonstrate an "economic impact . . . on the claimant," or that the IOLTA program "interferes with distinct investment-backed expectations."[230] *Webb's, Eubanks* and *Tellis* do not support a claim against the IOLTA program because these cases are based upon the premise that the principal could earn net interest for the depositor. Further, the *Webb's* decision arguably stands for the proposition that the Florida Supreme Court violated the Fifth Amendment by retaining interest for itself that exceeded the amount required to compensate the court clerk for administrative costs. In addition, the Fifth Circuit in *Eubanks* simply held that the prisoner's claims were "not wholly insubstantial or frivolous" and should not have been dismissed as such, *sua sponte*[231] by the district court.[232] Furthermore, while the court in *Tellis* did not explicitly state that an interest is created only after deducting administration charges, the court, nonetheless, only recognized a property interest in the interest proceeds that remained after the ad-

225. *Id.* at 793-94.

226. 5 F.3d 1314 (9th Cir. 1993).

227. *Id.* at 1316.

228. *Id.* (quoting NEV. REV. STAT. § 209.241 (1996) (stating in relevant part, "[t]he interest and income earned on the money in the fund, after deducting any applicable charges, must be credited to the fund.").

229. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978). *See supra* notes 56-66 and accompanying text.

230. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

231. *Sua sponte* means of "its own . . . motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

232. Eubanks v. McCotter, 802 F.2d 790, 793 (5th Cir. 1986) (citing Bell v. Hood, 327 U.S. 678, 682-83 (1945)).

ministration charges had been deducted.[233] Based on the foregoing, the argument that clients have a property interest in any interest earned on their funds should fail.

b. Trust Law and the Right to Exclude Others from the Beneficial Use of the Funds

Regardless of whether the funds can earn net interest, a second takings argument might involve a claimant invoking trust law to establish a protectable property right to control the beneficial use of his funds. An attorney's standard for managing trust funds is typically the "ordinary prudent man standard."[234] While this standard is silent regarding a trustee's duty with respect to trust property that cannot be made productive for the beneficiary,[235] the standard does include 'the duty . . . to administer the trust *solely* in the interest of the beneficiary."[236]

The First Circuit stated in *Massachusetts Bar Foundation*, "[w]e are not convinced that the deposit of clients funds into IOLTA accounts transforms a lawyer's fiduciary obligation to clients into a formal trust with the reserved right by the client to control the beneficial use of the funds as claimed by the plaintiffs."[237] Despite the First Circuit's lack of conviction, it is undisputed that attorneys hold client funds in trust accounts and assume fiduciary obligations on the client's behalf that are analogous to a trustee in a formal trust agreement.[238] In this attorney-client relationship, clients hold a beneficial interest in their deposit, or the trust principal, in addition to a property interest in the trust principal itself.[239] The property interests include any beneficial income that is earned from the trust principal as well as the use of the trust principal.[240] Consequently, the argument would conclude that the

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233. *Tellis*, 5 F.3d at 1316.

234. *See e.g.*, TEX. PROP. CODE ANN. § 113.056 (West 1998) (stating that the trust management standard is that which "persons of ordinary prudence, discretion, and intelligence exercise in the management of their own affairs.").

235. ROUNDS, LORING: A TRUSTEE'S HANDBOOK, 147-150 (7th ed. 1994).

236. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959) (emphasis added).

237. Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 974 (1st Cir. 1993). See *supra* notes 116-155 and accompanying text for a discussion of *Massachusetts Bar Foundation*.

238. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.15 cmt. (1996); *supra* note 16.

239. ROUNDS, LORING: A TRUSTEE'S HANDBOOK, 78-79 (7th ed. 1994).

240. *Id. See also* Mary O. Sinibaldi, Note, *The Taking Issue in California's Legal Services Trust Account Program*, 12 HASTINGS CONST. L.Q. 463, 493 (1985) (recognizing prop-

IOLTA program "takes" a client's property right in controlling who benefits from the use of his funds.

The problem here is that this argument fails to recognize the distinction between net and gross income under trust law. Trust law recognizes that the trustee is entitled to offset administration charges, including trustee's fees, prior to attributing interest that is earned in a trust account to the beneficiary.[241] Accordingly, the beneficiary is only entitled to whatever benefits that the trust principal "nets." Where trust law dictates that a trust beneficiary is not entitled to gross income, the IOLTA program does not take any property rights because, by definition, IOLTA accounts pool funds that are individually incapable of producing net income for clients.

The argument also fails to recognize the relationship between a bank and its depositors. Because money is fungible, a depositor (client) does not retain title to the actual funds that are deposited.[242] Rather, a "depositor-creditor" relationship is established, whereby the depositor is the bank's creditor and is entitled to withdraw funds in accordance with the parties' depository agreement.[243] Accordingly, the depositor has no right to control any benefit that a bank derives when the bank independently pools deposited funds and obtains a consequent benefit. IOLTA accounts merely transfer this interest income from banks to the indigent and, consequently, any perceived property right in the interest is nothing more than an unprotected unilateral expectation.[244] As a result, even by analogizing to trust law, IOLTA programs do not appear to "take" a client's right to exclude others from the beneficial use of IOLTA account deposits.

c. Private Property Law and the Right to Exclude Others from the Beneficial Use of the Funds

The third argument that clients could assert is the claim that their deposits are private property and, therefore, that the clients have a right

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erty interests in a trust principal's usage).

241. W. FRATCHER, SCOTT ON TRUSTS, §§ 242, 244 (4th ed. 1988). *See also* TEX. PROP. CODE ANN. §§ 113.102, 113.111 (West 1997).

242. United States v. Banco Cafetero Panama, 797 F.2d 1154, 1158 (2d Cir. 1986) (recognizing that a bank is not a bailee of its depositors money). *See also In re* Nat Warren Contracting Co., 905 F.2d 716, 718 (4th Cir. 1990) (holding that banks acquire legal title in deposits).

243. *Banco Cafetero Panama*, 797 F.2d at 1158.

244. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) (stating that a mere unilateral expectation is not a property interest entitled to protection).

to exclude others from the beneficial use of the funds. The Supreme Court has recognized property, even where the actual property did not produce income and was of little consequence.[245] In *Loretto v. Teleprompter Manhattan CAFV Corp.*,[246] the Court found a taking, wiring an apartment building for cable television, even though the taking increased the owner's property value.[247]

The Supreme Court has also recognized that "[o]ne of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others."[248] In *Kaiser Aetna v. United States*,[249] the Court found a taking where federal law required private marina owners to provide public access to the marina's navigable portions.[250] In *Dolan v. City of Tigard*,[251] the Court found a taking had occurred where a city ordinance required a private property owner to allow public access to the owner's undevelopable floodplain as a condition to obtaining a building permit within the city.[252] Arguably, it is irrelevant whether or not a client's deposit generates net interest, because that fact does not affect the deposit's status as private property.

The assertion can be made that clients' funds cannot be distinguished by the fact that they are personal property and not real property. The Supreme Court has held that takings claims are not limited to protecting real property interests, and that certain "intangible rights" warrant Fifth Amendment protection.[253] Although the First Circuit[254] and the District Court in *Texas Equal Access to Justice Foundation* disagree,[255] the intangible property right to exclude others from using

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245. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) (recognizing that a physical invasion, no matter how small, may violate the Takings Clause).

246. 458 U.S. 419 (1982).

247. *Id.* at 438.

248. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). *See also* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

249. 444 U.S. 164 (1979).

250. *Id.* at 165-66.

251. 512 U.S. 374 (1994).

252. *Id.* at 385-86.

253. *See* Lynch v. United States, 292 U.S. 571, 579 (1934) (finding contracts are property that are protected by the Takings Clause); James v. Campbell, 104 U.S. 356, 357-58 (1881) (finding that patents are protected by the Takings Clause).

254. In a footnote, the First Circuit stated, "[t]he plaintiff has not discussed, and we do not find analogous, intangible property rights which, by their nature or by agreement, require the exclusion of others to preserve the property interest." Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 974 n.10 (1st Cir. 1993). The First Circuit then distinguished the "intangible nature of a trade secret." *Id.*

255. Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F.Supp. 1,

one's money *does* require the exclusion of "others to preserve the property interest."[256] Alternatively, there is little to prevent the government from appropriating all monies that are not held in accounts that pay interest, so long as the depositor can withdraw that money on demand. Similar to a landowner's right to keep land unoccupied and unproductive,[257] the Fifth Amendment protection arguably extends to a client's decision to leave his funds unproductive.

The argument that clients have a right to exclude others from the beneficial use of their deposits because the deposits are private property would most likely fail because interest generated in an IOLTA account is not a protected intangible property right and IOLTA programs do not physically invade clients' property rights. The United States Supreme Court indicated what can constitute a protected intangible property right when it stated, "[b]ecause of the intangible nature of a trade secret, the extent of the property right therein is defined by the extent to which the owner of the secret protects his interest from disclosure to others."[258] Relying on this, the First Circuit in *Massachusetts Bar Foundation* and the District Court in *Texas Equal Access to Justice Foundation* found that the right to exclude others from the interest earned in IOLTA accounts is not a protected intangible property right.[259] Without more, these courts reasoned that clients do not need to exclude others from the interest in the IOLTA accounts.[260] What these courts indicate is the fact that clients cannot stake a claim to interest generated in IOLTA accounts in the first place, and therefore cannot logically cannot have a need to exclude anyone.

IOLTA accounts cannot accurately be analogized to the physical property invasions found in *Loretto, Kaiser* or *Dolan.* Regardless of the fact that the Supreme Court has found a taking compensable, even where the property interest is trivial, or has declared that a "right to exclude" is within a real property owner's bundle of rights, the IOLTA program does not physically appropriate anything from clients. In fact,

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8 (W.D. Tex. 1995) (finding that "inherent in [intangible property] is the necessity of excluding others to preserve the property interest").

256. *See id.*

257. The right to keep land unproductive and unoccupied is an incident of ownership. W. FRATCHER, SCOTT ON TRUSTS, § 130 (4th ed. 1988).

258. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984).

259. *Massachusetts Bar Found.*, 993 F.2d at 974 n.10. *See also Texas Equal Access to Justice Found.*, 873 F. Supp. at 8.

260. *Massachusetts Bar Found.*, 993 F.2d at 974 n.10. *See also Texas Equal Access to Justice Found.*, 873 F. Supp. at 8.

real property and *intangible* property are, by definition, contradictory. Consequently, an analogy to real property cases discredits a claim to an intangible property right.

In summary, simply because someone other than the client can earn net interest from pooling deposits into one bank account, thereby lowering administration charges, does not mean that property rights are taken from clients. In an IOLTA account, the principal deposit is never affected, no funds are appropriated and no expectations are diverted.

4. *The First Amendment Claim*

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."[261]

While the Fifth Circuit in *Texas Equal Access to Justice Foundation* did not analyze the appellants' First Amendment claim, both the District Court in that case and the First Circuit in *Massachusetts Bar Foundation* have rejected that claim.[262] However, assuming for the purpose of analysis that the United States Supreme Court would agree with the Fifth Circuit decision that clients have a property right in interest accrued in IOLTA accounts, the First Amendment argument becomes more plausible. Accordingly, this author's analysis assumes that clients possess a property right in IOLTA account interest and examines arguments both for and against a claim that the IOLTA program violates the First Amendment.

a. The Connection Between Claimants and the Recipient Organizations

The Supreme Court has made clear that compelling financial support for a private organization's benefit implicates constitutional rights against compelled speech.[263] Accordingly, First Amendment rights are imperiled by compelled support to a state bar association[264] or a labor union by a public-sector employee.[265] In *Hays County Guardian v.*

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261. U.S. CONST. amend. I. The Fourteenth Amendment makes this limitation applicable to the States and to its subdivisions. Gitlow v. New York, 268 U.S. 652, 653 (1925).

262. *See Massachusetts Bar Found.*, 993 F.2d at 979-80; *Texas Equal Access to Justice Found.*, 873 F.Supp at 9-10; *supra* notes 138-76 .

263. *See supra* Part III.A.1-2.

264. Keller v. State Bar of Cal., 496 U.S. 1 (1990) (holding that compulsory bar dues may not be expended to endorse or advance goals that are not reasonably related to attorney regulation).

265. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (holding that non-union em-

Supple,[266] the Fifth Circuit acknowledged the First Amendment's broad scope by declaring that compelled student support for the university's public newspaper implicated the students' First Amendment rights.[267]

The First Amendment protects not only the freedom of speech, but also the freedom not to speak.[268] Indirect methods of compelling speech can be prohibited. For example, in *Wooley v. Maynard*[269] the Supreme Court held that the First Amendment was violated, even though the State of New Hampshire did not technically require residents to display the state motto, but instead merely prohibited all driving by those who would not display the state motto on mandatory state license plates.[270] Similarly, the First Amendment is violated if a state conditions government employment on support for a political party, regardless of whether the plaintiff may avoid the "compelled" speech by declining the job offer.[271]

Once clients' property rights are recognized in IOLTA account interest, the issue becomes whether the "connection" between clients and the recipient organizations is such that the clients "reasonably understand that they are supporting the message propagated by the recipient organizations."[272] The recipient organizations, not the nonprofit corporations that hold and administer the interest, engage in the activities in question.[273] An argument can be made, however, that mandatory contributions which go directly to an offensive organization have not been a significant constitutional issue in compelled-speech cases.

In *Lehnert v. Ferris Faculty Association*,[274] a union case where

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ployees had a constitutional right not to have their service fees used for support of ideological causes of which they disapproved).

266. 969 F.2d 111, 122-23 (5th Cir. 1992).

267. *Id.* The Fifth Circuit ultimately allowed the compulsory student fees after finding that the newspaper "advances an important educational purpose in a narrowly tailored manner." *Id.* at 123. The court found "the University's educational goals sufficiently weighty to justify" impinging First Amendment rights. *Id.*

268. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 713-15 (1977) (regarding state motto, "Live Free or Die," displayed on automobile license plates); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (regarding the recitation of the Pledge of Allegiance).

269. 430 U.S. 705 (1977).

270. *Id.* at 715.

271. Elrod v. Burns, 427 U.S. 347, 372-73 (1976).

272. *See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 979 (1st Cir. 1993).

273. *See supra* note 42 and accompanying text.

274. 500 U.S. 507 (1991).

mandatory dues were used to fund litigation that was unrelated to the unions' collective bargaining obligations, the Supreme Court stated that "[t]o force employees to contribute, albeit *indirectly*, to the promotion of such positions implicates core First Amendment concerns."[275] Similarly, the Second Circuit rejected an attenuation argument in *Carrol v. Blinken*.[276] In *Carroll*, university students objected to their mandatory student association dues, because the association made contributions to an interest group whose political activities the plaintiffs found objectionable.[277] The defendants claimed that "the connection between the [objecting students and the interest group] was too attenuated" and, hence, the students could not sustain a First Amendment compelled speech claim.[278] The Second Circuit dismissed that argument as a matter of law, concluding that a tight relationship between the plaintiffs and the ultimate financial beneficiaries is not required to bring a compelled speech claim.[279]

If the First Circuit's "reasonable connection" position were absolute,[280] then the First Amendment protections against compelled financial contributions could be avoided by delegating potentially objectionable conduct to an organization that is established specifically for that purpose. However, the bar and union cases cited in *Massachusetts Bar Foundation*[281] certainly would not have been decided in the organizations' favor if the organizations had contributed money to a third-party, which agreed to use those funds to carry out the endeavors to which the dissident members objected. Moreover, a claimant's first concern may not be that some objective observer thinks that the claimant supports a certain interest group's activities. Rather, the objection is to being required to financially support the IOLTA program.

The argument against this First Amendment claim is that speech and association cases always involve a clearly identifiable relationship between the claimant and a group's expressive activity. For example, the Supreme Court found in the union and bar cases that the state was

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275. *Id.* at 516 (holding employees could be charged a pro rata share of costs associated with activities of state and national union affiliates even if those activities did not directly benefit objecting employees' bargaining unit, but the union could not charge objecting employees for expenses of lobbying) (emphasis added).

276. 957 F.2d 991 (2d Cir. 1992).

277. *Id.* at 997.

278. *Id.*

279. *Id.* at 998.

280. *See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 979 (1st cir. 1993).

281. *Id.*

justified in compelling membership in a professional union or association and could require members to pay mandatory dues.[282] It was only when the dues were used to promote an agenda that was not "germane" or "fitting" to the organization's purpose that the Supreme Court found a First Amendment violation.[283] Similarly, in *Carrol v. Blinken*[284] and in *Hays County Guardian v. Supple*,[285] the courts stated that the mandatory student fees at issue essentially conscripted the students into membership with the offending public interest groups, thereby associating the students with the groups' expressive activities.[286] Despite this close association, the students' First Amendment claims were rejected because the courts found that the fees were justified by enhancing the overall exchange of information, ideas and opinions on the campuses.[287]

The common thread in the union, bar and student-fee cases is that publicly identified groups required their members to fund expressive activities that were associated with the group. The IOLTA program is distinguishable, however, because lawyers' dues are not used to fund the IOLTA program and clients are not required to contribute to or become a member of an IOLTA recipient organization. It is not reasonable to conclude that the expressive activities, if any, engaged in by IOLTA's recipient organizations are associated with lawyers or their clients. Therefore, a First Amendment claim against the IOLTA program should fail as it did in the First Circuit.

b. The IOLTA Program's Expressive Quality

In *Massachusetts Bar Foundation*, the First Circuit found that the IOLTA program did not force "expression" because it did not compel financial support for organizations that "espous[e] ideologies or engag[e] in political activities."[288] Despite the First Circuit's position, an argument can be made that the First Amendment is implicated by compelled speech if it is in any form, not just financial support for ideologies or political activities.[289] The Ninth Circuit recently held

282. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 211 (1977); Keller v. State Bar of California, 496 U.S. 1, 4 (1990); Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 510 (1991).

283. *Abood*, 431 U.S. at 212-13; *Keller*, 496 U.S. at 4; *Lehnert*, 500 U.S. at 520.

284. 957 F.2d 991 (2d Cir. 1992).

285. 969 F.2d 111 (5th Cir. 1992).

286. *Carroll*, 957 F.2d at 997-98; *Hays*, 969 F.2d at 123.

287. *Carroll*, 957 F.2d at 998; *Hays*, 969 F.2d at 123.

288. Washington Legal Found. v. Massachusetts Bar Found., 993. F.2d 962, 977 (1st Cir. 1993). *See supra* notes 140-55 and accompanying text.

289. Moreover, plaintiffs are not required to specify the offensive compelled speech or

that the First Amendment prohibited the federal government from requiring almond producers to promote an industry-wide advertisement program, regardless of the fact that such a program was not "political" or "ideological."[290]

Arguably, the IOLTA program is expressive because it supplies the means necessary for litigation, an inherently expressive activity. The Supreme Court stated in *Lehnert v. Ferris Faculty Association*,[291] "[w]e long have recognized the important political and expressive nature of litigation."[292] In *NAACP v. Button*,[293] the Court acknowledged that, for particular groups, "association for litigation may be the most effective form of political association."[294]

Whether or not IOLTA distributions are awarded in a content-neutral manner,[295] pure motives do not obscure the reality that the money is being used to fund activities that are inherently expressive. Habeas Corpus proceedings for death row inmates seeking to overturn their sentences[296] and litigation on behalf of undocumented aliens seeking political asylum are expressive in nature. Further, it is hard to deny the expressive nature found in a situation where an IOLTA-funded lawsuit is brought against the very person whose interest helped finance the suit. A landlord, for example, being sued by his tenant with IOLTA funds would find little consolation in the fact that the IOLTA program is being used in a content-neutral manner to help provide indigent citizens' ability to obtain free legal assistance.

The counterargument that the IOLTA program is not expressive rests upon an objective examination into the content-neutral manner in which the IOLTA program operates. The program's only goal is to accomplish each state's judicial or legislative directive to provide funds

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the reason for their disapproval. In *Abood,* the Supreme Court found that a requirement that plaintiffs identify the reason for their disapproval would violate the plaintiffs' First Amendment rights. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977).

290. Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 435-36 (9th Cir. 1993).

291. 500 U.S. 507 (1991).

292. *Id.* at 528.

293. 431 U.S. 415 (1963).

294. *Id.* at 431.

295. Content-neutral speech must be "justified without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 786 (1989) (upholding a New York City ordinance that concert performers use only city-provided sound equipment to reduce volume despite the availability of less restrictive alternatives).

296. Habeas corpus proceedings test whether a prisoner's confinement is constitutional, not whether he is guilty or innocent. Moore v. Dempsey, 261 U.S. 86 (1923). *See* U.S. CONST. art. I, § 9. *See also* 28 U.S.C.A. § 2241.

that enable persons who, because of their economic condition, would not otherwise have access to legal services.[297] The grants are awarded upon a basis of economic needs within a geographic region.[298] No consideration is given by the IOLTA program to the political or ideological character that might be attributed to a recipient organization. The grants are not to be used for any reason other than providing individual access to the legal system,[299] nor can they be used to fund class action lawsuits, lawsuits against governmental agencies, or political lobbying.[300]

Subjective perception that the IOLTA program is expressive is not sufficient to characterize the IOLTA program as "expression," within the protection of the First Amendment.[301] If the IOLTA program is perceived as having expressive quality, then objectively, the only reasonable expression that can be attributed to the IOLTA program is the fact that the impoverished should have access to the legal system, so that people with less financial resources can have help in resolving problems that require legal services. The objection that the IOLTA program provides the means for people to assert legal rights, whether or not other people want those rights asserted, does not satisfy the burden of demonstrating expressive communication.

First Amendment protection has traditionally been afforded to political or ideological speech or association.[302] Citizens are likely to have strong and differing opinions regarding political or ideological topics. The First Amendment is intended to prevent the government from forcing citizens to support such opinions.[303] Accordingly, the First Amendment is intended to apply to communication that conveys a message, recognized as such by the public, not to subjective perceptions as is the case here.

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297. *See IOLTA Handbook, supra* note 2, at 1. *See also* TEX. R. EQUAL ACCESS, Rule 1, 10, and 11.

298. *See IOLTA Handbook, supra* note 2, at 2. *See also* TEX. R. EQUAL ACCESS, Rule 11.

299. *See IOLTA Handbook, supra* note 2, at 2. *See also* TEX. R. EQUAL ACCESS, Rule 11.

300. *See IOLTA Handbook, supra* note 2, at 2. *See also* TEX. R. EQUAL ACCESS, Rule 15.

301. *See* City of Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (recognizing that almost all conduct can be perceived by someone to have an expressive quality and, therefore, there must be some communicative element inherent in the conduct in order to invoke First Amendment protection).

302. Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992).

303. *Id.*

Even if clients are found to have a protected property interest in proceeds from IOLTA accounts, a First Amendment challenge to the IOLTA program should fail. First Amendment protection cannot be given to every imaginable expression. Such absolute protection of expression would be likely to produce ridiculous results, for example, where the plaintiffs' perceived "association" with such expression is remote, as is the situation with IOLTA funds. Neither the IOLTA program's purpose nor its operation is an "expression" within the First Amendment context and only by erroneously employing a subjective perception could a court find otherwise.

c. The IOLTA Program's Relation to Governmental Interests

In *Massachusetts Bar Foundation*, the First Circuit found that the IOLTA program did not burden protected speech because it did not compel support for the IOLTA program's recipient organizations.[304] Had the First Circuit found that the IOLTA program burdens protected speech, its next inquiry would have been whether it "serves compelling state interests through means which are narrowly tailored and germane to the state interest."[305] Whether or not the IOLTA program's goal, to provide impoverished citizens access to the legal system, is a compelling state interest, the IOLTA Program arguably does not qualify as "narrowly tailored" to achieve that goal. The program burdens the First Amendment rights of citizens, who have no responsibility for the increased needs of legal services and who obtain no help from the IOLTA program.

Further, in *Keller v. State Bar of California*,[306] the Supreme Court explained that the use of general tax revenue to disperse a political opinion does not raise First Amendment concerns.[307] Consequently, it is reasonable to conclude that the IOLTA program is not less restrictive than a legal services program funded through general tax revenues and, therefore, that the IOLTA program is not narrowly tailored to achieve a compelling governmental interest.

The contrary position is that the IOLTA program is analogous to a time, place and manner regulation[308] because it functions as a vehicle

304. Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 980 (1st Cir. 1993). *See supra* notes 142-59 and accompanying text.

305. *Massachusetts Bar Found.*, 993 F.2d at 977.

306. 496 U.S. 1 (1990)

307. *Id.* at 12-13.

308. Regulations on the time, place and manner, or the "forum", in which an expression

for providing access to the legal system's various forums. A time, place and manner regulation must be content-neutral, narrowly tailored to serve the government's significant interest and leave open ample alternatives for communication.[309] This test is often referred to as the intermediate scrutiny standard.[310]

The IOLTA program satisfies the intermediate scrutiny standard because it is content-neutral and serves a state interest by providing the poor with access to the legal system.[311] This interest is significant because countless citizens with legitimate grievances would otherwise be denied access to the legal system, if the IOLTA program did not exist.[312] Finally, the IOLTA program is narrowly tailored so that any burden on speech resulting from the IOLTA program's operation is minimal. In *Planned Parenthood of South-Eastern Pennsylvania v. Casey*,[313] the Supreme Court held that requiring state physicians to counsel and relate information about abortion to patients was justified by the state's interest in ensuring that the patients make informed decisions.[314] Providing a broad range of legal services, by using funds generated from a process that is only available to banks, is less restrictive than the mandate on physicians found in *Planned Parenthood*, or a sweeping general tax which affects every segment of society. As a result, the IOLTA program appears to pass the intermediate scrutiny

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is communicated often survive First Amendment challenges where the regulation is motivated for reasons that are independent of the speech's content. Ward v. Rock Against Racism, 491 U.S. 781, 788 (1989).

309. *Id.* The regulation does not have to be the least restrictive or intrusive means of achieving the state's interest. Rather, a regulation is narrowly tailored if it promotes a significant government interest that would be achieved less effectively absent the regulation. *Id.* at 793 (citing United States v. Albertini, 472 U.S. 675, 689 (1985)).

310. The Supreme Court has traditionally applied some version of the intermediate scrutiny standard in evaluating speech or associational claims of first impression. *See* Ibanez v. Florida Dep't of Bus. and Prof'l Regulation, 512 U.S. 136 (1994) (applying variation of intermediate scrutiny in analyzing commercial speech regulation). *See also* Edenfield v. Fane, 507 U.S. 761 (1993) (holding that regulation limiting personal solicitation by certified accountants must satisfy First Amendment's intermediate scrutiny standard).

311. The District Court in *Texas Equal Access to Justice Foundation* found that "providing indigent Texans with the means to gain access to the legal system is a significant state interest and the operation of the system imposes minimal burdens upon First Amendment rights of attorneys and their clients." Washington Legal Found. v. Texas Equal Access to Justice Found., 873 F. Supp. 1, 10 (W.D. Tex. 1995).

312. *IOLTA Handbook*, *supra* note 2, at 191-93.

313. 505 U.S. 833 (1992).

314. *Id.* at 866. *See also* Hays County Guardian v. Supple, 969 F.2d 111, 123 (5th Cir. 1992) (holding that student fees used to finance a school newspaper, despite students' objections to the newspaper's editorial positions were justified as facilitating educational goals).

test and should be upheld.

IV. CONCLUSION

By applying the interest-follows-principal rule, the Fifth Circuit concluded that clients do not have a property interest in the interest that is earned in an IOLTA account.[315] The First and Eleventh Circuits have concluded that, but for the IOLTA Program, no interest can be generated and, therefore, the clients do not have a property interest.[316] This issue, whether clients have a property interest in interest that is generated in an IOLTA account, impacts the entire legal profession as well as its clientele.

The IOLTA Program's fundamental premise is one of last resort. The program only allows pooling of individual client deposits where federal banking laws, accounting practicalities and the legal profession's ethical obligations make it possible for that deposit to earn interest only in one, single account established for non-profit organizations.[317] The alternative to the IOLTA Program is to ignore the advent of NOW accounts, interest-bearing accounts that allow withdrawal on demand, and to leave client deposits idle. This would allow banks to pool the funds and retain the interest entirely for themselves.[318] From a legal standpoint, this alternative is unnecessary for two reasons. First, IOLTA accounts do not violate the Fifth Amendment Takings Clause, because clients cannot reasonably expect to earn interest on money that is eligible for deposit in an IOLTA account. Second, IOLTA accounts do not implicate the constitutional freedoms of speech or association, because neither attorneys nor clients can reasonably understand that they are supporting the messages that are propagated by the IOLTA Program's recipient organizations.[319] From a policy standpoint, the alternative to NOW/IOLTA accounts is unacceptable. The IOLTA Program provides legal services, under the American Bar Association's supervision, to countless impoverished citizens, whose legal grievances would remain unheard if the IOLTA program did not exist.[320] As a result, the First and Eleventh Circuit decisions that clients do not have

315. *Texas Equal Access to Justice Found.*, 94 F.3d at 1000-02.

316. Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 976 (1st Cir. 1993); Cone v. State Bar of Fla., 819 F.2d 1002, 1004-06 (11th Cir. 1987).

317. *See supra* notes 17-57 and accompanying text.

318. *See supra* notes 17-57 and accompanying text.

319. *See supra* Part III.A.

320. *IOLTA Handbook*, *supra* note 2, at 191-93.

a property interest in interest that is generated in an IOLTA account should prevail.