

June 17, 2002

HIGH COURT TO CONSIDER WLF CHALLENGE TO WASHINGTON IOLTA PROGRAM *(WLF v. Legal Foundation of Washington)*

The U.S. Supreme Court this week agreed to review the Washington Legal Foundation's challenge to Washington State's IOLTA (Interest on Lawyers' Trust Accounts) program on the grounds that the program violates the constitutional rights of Washington citizens. IOLTA is a program under which Washington (and all other states) require many professionals to turn over interest generated by their clients' trust funds to a fund used to finance legal aid organizations.

The High Court's decision to hear the case sets the stage for the climactic battle in WLF's decade-long struggle to protect the property rights of those whose interest income is being confiscated by IOLTA programs across the country. If the Supreme Court rules in WLF's favor, all such programs are likely to cease. The Court is expected to hear oral arguments in the case in January and to issue a decision by June 2003.

The federal appeals court in San Francisco last November issued a ruling upholding the Washington IOLTA program, while the federal appeals court in New Orleans last October issued a ruling striking down the Texas IOLTA program. Now that the Court has agreed to hear the Washington case, it may well decide to hear the Texas case as well; Texas officials are expected to seek Supreme Court review of the Texas IOLTA ruling by the end of June. The Supreme Court's decision to grant review was not surprising in light of the conflicting appeals court decisions; it very often agrees to hear cases for the purpose of resolving such conflicts.

In its petition seeking review in *Washington Legal Found. v. Legal Found. of Washington*, WLF argued that the IOLTA program violates the Fifth Amendment rights of Washington citizens by taking their property without just compensation. WLF's brief noted that a 1998 Supreme Court decision, *Phillips v. Washington Legal Found.* (which arose in connection with the Texas IOLTA litigation), determined that interest earned on IOLTA accounts belongs not to the state but to those whose funds generated the interest. WLF argued that, in light of the *Phillips* ruling, the

government may not confiscate interest earned on IOLTA accounts without compensating the owners of that interest income.

Established in 1984, the Washington IOLTA program initially applied only to client trust funds being held by attorneys. The Washington Supreme Court recently expanded the program to cover real-estate-closing professionals as well. Under the expanded rule, nonlawyers licensed by the court to draw up legal documents to effectuate real estate closings (known as "Limited Practice Officers" or "LPOs") must turn over interest earned on funds held in connection with the closings to the Legal Foundation of Washington ("LFofW"), a nonprofit corporation established by the court to administer the Washington IOLTA program. WLF's lawsuit focuses in particular on the application of the IOLTA program to LPOs.

Besides WLF, other plaintiffs in the lawsuit are Allen Brown and Greg Hayes (two Washington citizens who regularly engage in real estate transactions and object to the diversion of their interest income to LFofW), and Dennis Daug and Dian Maxwell (two LPOs who object to being forced to participate in the IOLTA program).

IOLTA programs have become increasingly popular with the organized bar in recent years as a method of funding legal services programs that are unable to obtain funding from state legislatures. The Washington program requires attorneys and LPOs to place all client trust funds into interest-bearing checking accounts. An attorney or LPO who so desires may establish a separate account for a client so that all interest earned accrues to that client. But if doing so is administratively infeasible -- either because the funds being held are too small in amount or are being held for too short a time period -- then the attorney or LPO is required to place the funds into a special IOLTA account, and all interest earned on that IOLTA account must be forwarded to the LFofW, which in turn distributes the funds to a variety of nonprofit organizations that provide legal services.

IOLTA programs, now in existence in all 50 states, have become a major source of funding for legal services groups. In recent years, between \$100 and \$150 million per year has been raised through IOLTA programs nationwide, between \$2.5 and \$4.0 million per year in Washington alone.

WLF prepared its petition with the *pro bono* assistance of Harvard Law Professor Charles Fried, former Solicitor General of the United States and former Justice on the Massachusetts Supreme Judicial Court; Donald B. Ayer and Cynthia L. Bauerly of the Washington, D.C. office of Jones, Day, Reavis & Pogue; and James J. Purcell of Seattle, Washington.

WLF is a public interest law and policy center with supporters in all 50 states, including many in Washington. It devotes a substantial portion of its resources to promoting economic liberty and a limited and accountable government.

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