

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-10744

THE REAL ESTATE BAR ASSOCIATION FOR
MASSACHUSETTS, INC.,

Plaintiff

v.

NATIONAL REAL ESTATE INFORMATION SERVICES and
NATIONAL REAL ESTATE INFORMATION SERVICES INC.,

Defendants

CERTIFICATION OF QUESTIONS FROM UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

**BRIEF OF AMICI CURIAE
LEGAL ASSISTANCE CORPORATION
OF CENTRAL MASSACHUSETTS;
NEIGHBORHOOD LEGAL SERVICES, INC.;
SOUTH COASTAL COUNTIES LEGAL SERVICES, INC.;
METROWEST LEGAL SERVICES, INC.; AND COMMUNITY
LEGAL SERVICES AND COUNSELING CENTER**

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STATEMENT OF INTEREST OF AMICI

The amici curiae provide vital legal services to poor and disadvantaged individuals and families in the Commonwealth. Each amicus is the recipient of grants derived from the interest generated from attorney trust accounts (IOLTA funds).

Amicus Legal Assistance Corporation of Central Massachusetts (LACCM) provides legal representation to low-income, elderly, and other disenfranchised persons in Central Massachusetts. Last year, LACCM helped nearly 3,500 clients remain in their homes, obtain benefits to meet their basic needs, and provide a safe environment in which to raise their children. In 2009, approximately 30% of LACCM's funding came from IOLTA funds.

Amicus Neighborhood Legal Services, Inc. (NLS) provides free civil legal services to low income and elder residents of Essex and Northern Middlesex Counties. NLS staff provide a range of services and representation in such traditional areas as housing, public benefits, employment, consumer and elder law. NLS also provides services in such emerging areas as foreclosure law. In 2009, approximately 68% of NLS's funding came from IOLTA funds.

Amicus South Coastal Counties Legal Services, Inc. (SCCLS) is a non-profit corporation that serves poor and low-income individuals and families in Barnstable, Bristol, Dukes, Nantucket and Plymouth Counties and the towns of Avon and Stoughton in Norfolk County. SCCLS provides civil legal services in the areas of housing law, family law, government benefits including social security disability, elder law, education law, immigration, and consumer law. In 2009, approximately 75% of SCCLS's funding came from IOLTA funds.

Amicus MetroWest Legal Services, Inc. (MWLS) provides legal advocacy to protect and advance the rights of the poor, elderly, disabled and other disenfranchised people in thirty-six communities in South and Central Middlesex and Southern Norfolk counties. In 2009, MWLS represented 2,543 low-income and elderly clients in matters ranging from contested family law cases to landlord-tenant disputes. In 2009, approximately 32% of MWLS's funding came from IOLTA funds.

Amicus Community Legal Services And Counseling Center (CLSACC) is a non-profit agency in Cambridge that provides free civil legal aid to low-income

individuals and families in eight communities in Suffolk, Middlesex, and Norfolk counties, including Boston and Cambridge (and statewide for immigration law work). CLSACC assists approximately 900 legal clients annually in the areas of housing/homelessness prevention, disability benefits, family law/domestic violence, and immigration law. In 2009, approximately 30% of the funding for its legal program came from IOLTA funds.

Approximately 50% of IOLTA funds in Massachusetts come from the interest derived from home mortgage proceeds. Julia Reischel, Bar: IOLTA Funds 'Drastically' Reduced by Closing Companies, Massachusetts Lawyers Weekly, December 1, 2008 (quoting Stephen M. Casey, Chief Financial Officer, Massachusetts IOLTA Committee). If this Court holds that conveyancing is not the practice of law, and home mortgage proceeds are not required to be deposited in attorney IOLTA accounts, IOLTA funds will be dramatically reduced, and public interest law organizations that rely on IOLTA funds --- like LACCM, SCCLS, NLS, CLSACC, and MWLS --- will be placed in jeopardy.

SUMMARY OF ARGUMENT

Under the Massachusetts IOLTA program, interest from attorneys' client accounts are pooled together and remitted to the Massachusetts IOLTA Committee, which in turn disburses the funds to the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation, and the Boston Bar Foundation. These organizations provide grants to legal assistance programs and organizations across the Commonwealth.

The Chief Financial Officer of the IOLTA Committee has estimated that about 50% of IOLTA funds are derived from the interest generated by home mortgage proceeds placed in attorney trust accounts. If this Court rules that conveyancing is not the practice of law, the result will be a dramatic decrease in IOLTA funding, jeopardizing legal services across the Commonwealth at a time when many of its citizens are in dire economic straits and need legal services more than ever.

ARGUMENT

I. HISTORY OF THE INTEREST ON LAWYERS TRUST ACCOUNTS (IOLTA) PROGRAMS

A. History of IOLTA Nationally

Traditionally, most lawyers placed deposits from their clients in a single checking account. Brown v.

Legal Foundation of Washington, 538 U.S. 216, 221 (2003); Petition by the Massachusetts Bar Association, 395 Mass. 1, 4 (1985) (quotation omitted). The funds were therefore available on demand when the client requested them, but they did not generally earn interest.¹ Banking institutions had full use of these funds while they were deposited and retained all income derived from that use. This was tantamount to an interest-free loan to banking institutions, thus creating for these institutions "a great windfall from these accounts." Washington Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835, 842 (9th Cir. 2001) (en banc).

In 1980, Congress passed the Consumer Checking Account Equity Act, codified at 12 U.S.C. §1832, which for the first time permitted banks to pay interest on certain demand accounts (known as "Negotiable Order of

¹ An exception was possible in the relatively unusual situation in which a client did not need immediate access to the funds and the amount of money was large enough or length of time was long enough to generate more interest than needed to cover administrative costs. With the client's agreement, the lawyer could place these funds in a savings or time account which did pay interest but did not guarantee immediate access. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (July 23, 1982).

Withdrawal" or "NOW accounts"). NOW accounts are available only to one or more individuals, government agencies, and non-profit philanthropic, religious, educational or political organizations. See 12 U.S.C. §1832(a)(2); 12 C.F.R. §204.130. An attorney could place funds in a NOW account only if the beneficiaries were themselves eligible to maintain NOW accounts. See 12 C.F.R. §204.130(e). Likewise, escrow accounts could be held as NOW accounts only "if the entire beneficial interest is held by individuals or other entities eligible to maintain NOW accounts directly." 12 C.F.R. §204.130(b)(2).

IOLTA was first adopted by Florida in 1981. Brown, 538 U.S. at 222.² Every state in the Nation and the District of Columbia eventually followed suit and developed their own IOLTA programs. Id. IOLTA enabled states to take advantage of the change in federal law authorizing interest on checking accounts and direct funds that would otherwise have been

² IOLTA programs were first developed in several Australian states and Canadian provinces. Petition by the Massachusetts Bar Association, 478 Mass. at 716-717 (citing England & Carlisle, History of Interest on Trust Accounts Program, 56 Fla.B.J. 101, 102 (1982)).

captured by banks to fund public interest

organizations:

The availability of interest through the establishment of NOW accounts provided a unique opportunity for the legal profession to further two of its most important ethical obligations-ensuring that all individuals, regardless of their financial circumstances, have access to the judicial system and segregating client trust funds from the lawyers' own accounts-without imposing additional societal costs. By pooling client deposits that individually were so small or held for such a short period of time that they would not earn a net positive interest, the States could use the interest earned on the combined deposits-otherwise enjoyed as a windfall by the banks-to fund indigent legal services at no cost to the owner of the principal.

Washington Legal Foundation, 271 F.3d at 843.³

Today, IOLTA programs nationwide fund worthy legal assistance projects across the country - from legal aid hotlines for senior citizens in Iowa to home foreclosure prevention initiatives in Mississippi.

See Bonnie Allen, Grantee Spotlight: Mississippi Center for Justice's Pro Bono Foreclosure Prevention Program, Dialogue, ABA Division of Legal Services,

³ As the Ninth Circuit noted, Congress' timing in changing the banking laws could not have been better because interest rates had soared in the 1970s and states needed new sources of funding for legal aid. Washington Legal Foundation, 271 F.3d at 843.

Volume 14, No. 3 (Summer 2010); Dennis Groenenboom, Grantee Spotlight: Iowa Legal Aid's Legal Hotline for Older Iowans, Dialogue, ABA Division of Legal Services, Volume 14, No. 1 (Winter 2010). IOLTA funded programs across the country help those of our fellow citizens who might otherwise be denied access to justice and the protection of the courts.

B. History of IOLTA in Massachusetts

The Massachusetts IOLTA program was established in 1985 by amendment to Canon 9, DR 9-102 of Rule 3:07 of the Rules of the Supreme Judicial Court (hereinafter sometimes referred to as the "IOLTA Rule"). Petition by the Massachusetts Bar Association, 478 Mass. at 720-21. From 1985 until 1990, the IOLTA program was voluntary. Washington Legal Foundation v. Massachusetts Bar Foundation, 993 F.2d 962, 968 (1st Cir. 1993).

In 1989, this Court converted the voluntary IOLTA program into a mandatory program by amending the IOLTA Rule. Id. As amended, the Rule required all Massachusetts lawyers to deposit client funds into interest bearing accounts: either (1) a pooled IOLTA account if, in the judgment of the lawyer, the deposits were nominal in amount or to be held for only

a short period of time; or (2) individual accounts for all other client funds. Id. The Rule required lawyers or law firms to direct the banks holding their IOLTA accounts to disburse accrued interest to a charitable entity selected by the lawyer or firm from a group designated by this Court. Id. The designated charities were the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation, and the Boston Bar Foundation. Id.

The IOLTA Rule was amended again in 1993. Instead of having attorneys select the recipients of IOLTA funds, the amendment vested responsibility for disbursement of all IOLTA funds in an IOLTA Committee. Id. at 969. The IOLTA Committee must disburse 67% percent of all IOLTA funds to the Massachusetts Legal Assistance Corporation and the remaining 33% percent to "other designated charitable entities," id., namely, the Massachusetts Bar Foundation and the Boston Bar Foundation. In 1998, this Court adopted the Massachusetts Rules of Professional Conduct, and the IOLTA Rule was replaced with Massachusetts Rule of Professional Conduct 1.15(e), which sets forth detailed rules for the creation and maintenance of IOLTA accounts.

In July 2006, the IOLTA Committee adopted guidelines for IOLTA accounts, including detailed requirements for the creation of accounts, for record keeping, and for the remittance of interest earned on account. Supreme Judicial Court Rules, IOLTA Guidelines (Adopted July 2006).

Since its inception, the Massachusetts IOLTA Program has funded programs that help provide countless individuals of limited means with desperately needed access to our system of justice. In 2009, IOLTA funded \$9.1 million in grants to over one hundred and twenty legal assistance programs across the Commonwealth. Massachusetts Interest on Lawyers Trust Accounts Committee Annual Report (2009). The programs funded range from guardianship services for indigent and incompetent senior citizens in Bristol County to bankruptcy clinics in Essex County to legal services for homeless veterans in Suffolk County. Id.

II. IF THE INTEREST FROM HOME MORTGAGE PROCEEDS ARE DIVERTED FROM IOLTA, THE CONSEQUENCES FOR THE DELIVERY OF LEGAL SERVICES IN THE COMMONWEALTH WILL BE CATASTROPHIC

An estimated 50% of Massachusetts IOLTA funds come from the interest generated by the proceeds of

mortgage funds according to the Chief Financial Officer of the IOLTA Committee. Julia Reischel, *Bar: IOLTA Funds 'Drastically' Reduced by Closing Companies*, Massachusetts Lawyers Weekly, December 1, 2008 (quoting Stephen M. Casey, Chief Financial Officer, Massachusetts IOLTA Committee). In all but three of the states that permit non-attorneys to engage in conveyancing, the interest generated by home mortgage proceeds is not remitted to IOTLA programs.⁴ If the interest derived from conveyancing is diverted away from IOLTA, IOLTA revenues could be slashed by as much as 50%. The impact upon the provision of legal

⁴ Of the states that permit non-attorney conveyancing, only Washington, Connecticut and Ohio require non-attorney conveyancers to deposit mortgage funds into an account whose interest is remitted to a legal services organization. See, Connecticut General Statutes, Chapter 876, § 51-81c (West 2010); Ohio Revised Code, Chapter 3953.231 (West 2010); Washington Admission to Practice Rules, Rule 12, Limited Practice Rule for Limited Practice Offices; Washington Limited Practice Officer Rules of Professional Conduct, Rule 1.12A. Ensuring compliance, however, requires enforcement mechanisms and sanctions for non-compliance. Thus, even if Massachusetts required non-attorney conveyancers to remit the interest on mortgage proceeds to IOLTA, through judicial or legislative action, it would also be necessary to establish enforcement rules and an entity tasked with enforcing compliance.

services and the promise of equal justice for all would be catastrophic.

**III. IT IS THE POLICY OF THIS COURT TO PROMOTE
AND ENSURE EQUAL JUSTICE UNDER THE LAW AND
EQUAL ACCESS TO THE COURT FOR ALL**

The ideal of equal access to justice is the official policy of this Court, as reflected in Supreme Judicial Court Rule 3:07, Massachusetts Rule of Professional Conduct 6.1, which calls on all attorneys of the Commonwealth provide *pro bono publico* legal services to persons of limited means. "The purpose of this rule is to make the system of justice more open to all by increasing the *pro bono publico* legal services available to persons of limited means." Rule 6.1, *cmt.* [2]. This Court's commitment to access to justice is further underscored by the Court's creation of the Massachusetts Access to Justice Commission in February 2005, and the creation of a new position in the Administration Office of the Trial Court, a Special Advisor for Access to Justice Initiatives. Fourth Annual Report of the Massachusetts Access to Justice Commission (June 2009).

In promulgating Rule 6.1, the Court has properly exhorted the Commonwealth's bar to contribute its resources to the promise and ideal of equal justice

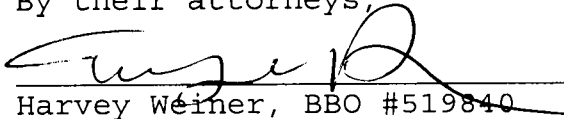
and equal access. The Court, in keeping with the ideals it has set forth in Rule 6.1, should act to ensure that the organizations that depend on IOLTA funding to carry out these ideals are not eviscerated.

CONCLUSION

If this Court determines that conveyancing is not the practice of law, a crucial source of IOLTA funds will likely vanish, jeopardizing vital legal services upon which many citizens of the Commonwealth rely to provide them with access to the courts. For the less affluent among us, who are already suffering from the current economic crisis, such a blow to essential legal assistance could not come at a worse time.

LEGAL ASSISTANCE CORPORATION
OF CENTRAL MASSACHUSETTS;
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CERTIFICATE OF SERVICE

I, Timothy M. Pomarole, hereby certify that on this 18th day of October, 2010, I served the above document by first-class mail, postage pre-paid, upon the following:

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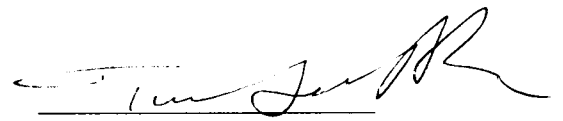
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