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IOLTA INADEQUACIES AND PROPOSED REFORMS

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I. INTRODUCTION

In the United States, the Interest on Lawyers Trust Accounts (IOLTA) program is one of the most significant sources of funding for civil legal service programs representing indigent people.¹ IOLTA revenue totaled approximately \$270.2 million in 2019,² and nearly 90% of IOLTA program grants support legal aid offices and pro bono programs.³ IOLTA's mission to "provide civil legal aid to the poor and support improvements to the justice system."⁴ Although IOLTA is a large source of funding, its basis in the Federal Funds Target Rate (FFTR) hinders its ability to reliably finance low-income civil legal services.⁵ The Federal Open Market Committee (FOMC) of the Federal Reserve System adjusts the FFTR based on economic indicators signaling inflation or recession, slashing the target rate during recessions to encourage market growth.⁶ As a result, IOLTA funds decrease during economic recessions when people are most in need of low-income legal services.⁷

To become a more dependable source of funding, state IOLTA programs can utilize a number of strategies to increase their revenues and diversify their revenue streams. This Comment discusses potential avenues to increase and stabilize IOLTA funding during economic downturns, including launching incentive programs with banks through state bar organizations, following a model that other states have already implemented successfully. This Comment also explores other policy options including setting a mandatory minimum rate on IOLTA accounts uncorrelated with the FFTR, directing more funds from uncollected class action settlement funds toward IOLTA programs, and directing additional court fees toward IOLTA programs during recessions. These strategies have the potential to grow IOLTA funding and increase its predictability, enabling programs to more effectively fulfill their mission of providing civil legal aid to the poor and

¹ *IOLTA Overview*, ABA, https://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview/#:~:text=The%20ABA%20Commission%20on%20IOLTA,the%20creation%20and%20operation%20of (last visited Nov. 22, 2020).

² NAIP, *\$157.4 Million Projected Loss in Critical Sources of State Funding for Civil Legal Aid*, IOLA FUND (May 29, 2020), <https://www.iola.org/all-documents/160-naip-press-release-5-29-20/file>.

³ *IOLTA Overview*, *supra* note 1.

⁴ *What is IOLTA?*, IOLTA, <http://www.iolta.org/what-is-iolta> (last visited Oct. 1, 2020).

⁵ James Chen, *Federal Funds Rate*, INVESTOPEDIA (June 25, 2019), <https://www.investopedia.com/terms/f/federalfundrate.asp>.

⁶ *Id.*

⁷ Andrew Arthur, Comment, *A Good Rule, Poorly Written: How the Financial Crisis Highlighted the Inadequacy of IOLTA Rate Rules*, 64 CATH. U.L. REV. 729, 751 (2015).

supporting improvements to the justice system, without heavily burdening banks, the legal profession, or the general public.

II. BACKGROUND

Nonprofit legal aid organizations are the primary providers of civil legal services for indigent people.⁸ The majority of the funding for legal aid agencies comes from two sources: state-based IOLTA programs and the federal Legal Services Corporation (LSC), which has a congressionally-apportioned annual budget.⁹ State and local grants, federal grants, and private grants account for the remainder of the funding for legal service organizations.¹⁰ The LSC is a larger source of legal aid funding than IOLTA, and the gap between the two has widened in the past decade as IOLTA funds have shrunk, in large part due to low interest rates.¹¹

Although the LSC has a larger pool of funds than IOLTA, the LSC restricts the activities of recipient agencies more than IOLTA programs do.¹² Organizations that accept LSC funding cannot lobby legislative bodies; initiate or participate in class-action lawsuits; defend clients in criminal defense matters; advocate for abortion rights; or represent prisoners, illegal immigrants, or assisted suicide defendants.¹³ The LSC's limitations prompt some legal aid entities to forego LSC funds entirely and rely on IOLTA money, private donations, and state and local grants.¹⁴

In 1981, the Florida Bar Association Foundation launched the first IOLTA program.¹⁵ IOLTA programs now exist in all fifty states, the District of Columbia, and the U.S. Virgin Islands.¹⁶ IOLTA programs are mandatory in all but five states, which have opt-out programs instead.¹⁷ States have discretion to decide how to administer their IOLTA programs and determine what activities they will fund.¹⁸

⁸ Dru Stevenson, *Rethinking IOLTA*, 76 Mo. L. REV. 455, 456 (2011).

⁹ *Id.*

¹⁰ Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J. L. & PUB. POL'Y 571, 579 (2011).

¹¹ LEGAL SERVS. CORP., BY THE NUMBERS, THE DATA UNDERLYING LEGAL AID PROGRAMS 12 (2018).

¹² Stevenson, *supra* note 8, at 456.

¹³ *Id.*

¹⁴ *Id.* at 456–57.

¹⁵ *Id.* at 458, at n.12.

¹⁶ *IOLTA Overview*, *supra* note 1.

¹⁷ *Status of IOLTA Programs*, ABA (Apr. 13, 2017), https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/.

¹⁸ *IOLTA Overview*, *supra* note 1.

While IOLTA is mostly localized, two national IOLTA organizations do exist. First, the American Bar Association (ABA) has an IOLTA commission. The ABA Commission on IOLTA collects, maintains, analyzes, and disseminates information on IOLTA programs; makes recommendations for ABA policy relating to IOLTA; acts as a liaison with state IOLTA programs; hosts IOLTA workshops; and oversees the IOLTA Clearinghouse, which provides information, materials, and technical assistance for designing and operating IOLTA programs.¹⁹ The ABA Commission on IOLTA also monitors other fields that may affect IOLTA, such as banking, grants, tax law, and constitutional law.²⁰ The other nationalized IOLTA body is the National Association of IOLTA Programs (NAIP), a 501(c)(3) organization established in 1986 to help grow and develop IOLTA programs.²¹ The NAIP works in tandem with the ABA Commission on IOLTA to IOLTA's mission of providing civil legal aid to the poor and improving the justice system."²²

A. Interest Collection and Allocation to State IOLTA Programs

Lawyers often hold client funds to pay expenses like court fees or future attorneys' fees.²³ If the funds are substantial enough or held long enough to generate net interest, the client receives the interest from their money.²⁴ However, when the clients' funds are held only for a short-term or when the fiscal amount is nominal as determined by state rules, the clients' money may earn less interest in a trust account than the costs of collecting interest for the client.²⁵ As such, when the cost of securing the income for the client would be higher than the interest itself, attorneys deposit client funds into an IOLTA account.²⁶ ABA Model Rule of Professional Conduct 1.15 describes IOLTA accounts as "pooled trust accounts that contain other nominal or short-term client funds."²⁷ From the inception of IOLTA, banks have forwarded the small amounts of interest earned on these pooled interest-bearing trust accounts to state IOLTA programs.²⁸ IOLTA is generally regarded as

¹⁹ *Id.*

²⁰ *Id.*

²¹ *About NAIP*, IOLTA, <http://www.iolta.org/about-naip> (last visited Oct. 1, 2020).

²² *What is IOLTA?*, IOLTA, <http://www.iolta.org/what-is-iolta> (last visited Oct. 1, 2020).

²³ *IOLTA Overview*, *supra* note 1.

²⁴ *What is IOLTA?*, *supra* note 22.

²⁵ *IOLTA Overview*, *supra* note 1.

²⁶ *What is IOLTA?*, *supra* note 22.

²⁷ *IOLTA Overview*, *supra* note 1.

²⁸ *Id.*

a convenient way to fund legal services without increasing taxes or depriving clients of collecting interest, as IOLTA is funded only by nominal, uncollectable interest amounts.²⁹

State IOLTA programs internally determine the allocation of funds among indigent civil legal aid providers and activities to improve the justice system.³⁰ Most states include IOLTA regulations within their state rules of professional conduct.³¹ Some states regulate IOLTA with court rules, while others codify IOLTA regulations in statutes or state bar rules.³² Some states specifically define what constitutes a “nominal” amount of funds, while others give discretion to the depositing attorney. For example, Maryland Business Occupations and Professions Section 10-303 requires a lawyer to deposit funds into an IOLTA account when the lawyer reasonably expects that 1) the interest would not exceed \$50; or 2) the interest would exceed \$50 but “would not cover the cost of administering an interest bearing account on which interest is payable to the client or beneficial owner.”³³ Other states allow the depositing lawyer to decide what constitutes a nominal amount, like Illinois’ Rule of Professional Conduct 1.15, which provides, “The decision as to whether funds are nominal or short-term shall be in the reasonable judgment of the depositing lawyer or law firm.”³⁴

Although IOLTA’s broader purpose is consistent nationally, state IOLTA programs differ in how they distribute funds to various types of recipients.³⁵ In Pennsylvania, for example, IOLTA supports non-profit organizations providing civil legal assistance to poor and disadvantaged populations within the state.³⁶ Arizona uses IOLTA funds more broadly to “assist in the delivery of legal services to the poor and law-related education programs designed to teach young people, educators and other adults about the law. . . [and] fund studies or programs designed to improve the administration of justice.”³⁷ Generally, state IOLTA rules use similar language to express IOLTA’s mission of funding civil legal services for those who cannot afford them.³⁸

²⁹ Stevenson, *supra* note 8, at 458–59.

³⁰ See *IOLTA Overview*, *supra* note 1.

³¹ Arthur, *supra* note 7, at 732.

³² *Id.* at 732–33.

³³ MD. CODE ANN., BUS. OCC. & PROF. § 10-303 (West 2020).

³⁴ ILL. RULE OF PROF’L CONDUCT r. 1.15 (2015).

³⁵ Arthur, *supra* note 7, at 732.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

B. Rate Rules

State rules mandate IOLTA reporting and record-keeping requirements, attorneys' responsibilities, and the terms of eligibility for bank participation.³⁹ Most states have adopted IOLTA comparability requirements, which require IOLTA deposits to earn at least as much interest as comparable non-IOLTA deposits or to earn a certain percentage of the FFTR.⁴⁰ For example, California's comparability rule stipulates that the rate of interest on an IOLTA account "shall not be less than the interest rate or dividends generally paid by the eligible institution to non-attorney customers on accounts of the same type meeting the same minimum balance and other eligibility requirements as the IOLTA account."⁴¹ A minority of states have yet to specify a minimum interest rate for IOLTA accounts.⁴² While rate comparability provisions ensure IOLTA accounts earn as much interest as non-IOLTA accounts, IOLTA accounts likewise endure the fluctuating interest rates that affect other deposit accounts.⁴³ Numerous factors outside the control of IOLTA programs influence deposit rates and banks' rate-setting decisions, giving IOLTA programs little control over the amount of funds they actually receive.⁴⁴

C. IOLTA's Weaknesses

While IOLTA generates millions of dollars for civil legal services,⁴⁵ IOLTA's current structure presents at least one major weakness in supplying a consistent source of funds for legal aid services:⁴⁶ IOLTA program revenues fluctuate with the central interest rate set by the Federal Reserve and with the overall strength of the American economy.⁴⁷ In 1981, when states first began adopting IOLTA programs, the federal funds rate remained above 6% every year until 2002.⁴⁸ In 2003, the Federal Reserve lowered the FFTR to an all-time low of 1% to combat the 2001 recession.⁴⁹ In 2008, the Federal Reserve

³⁹ *Id.* at 730, 732.

⁴⁰ *Id.* at 730–31.

⁴¹ *Id.* at 734.

⁴² *Id.* at 733.

⁴³ *Id.* at 734.

⁴⁴ *Id.*

⁴⁵ Stevenson, *supra* note 8, at 458–59.

⁴⁶ *See id.* at 465.

⁴⁷ *See id.*

⁴⁸ Arthur, *supra* note 7, at 745.

⁴⁹ Kimberly Amadeo, *Fed Funds Rate History with Its Highs, Lows, and Chart*, THE BALANCE (Sept. 19, 2019), <https://www.thebalance.com/fed-funds-rate-history-highs-lows-3306135>.

again set a record low FFTR of just 0.25%, which was the tenth rate cut in just over the span of a year.⁵⁰ Bank interest rates, which were once more than 5% for IOLTA accounts, fell to just above zero for many IOLTA accounts.⁵¹ As a consequence, IOLTA funding decreased significantly while the demand for civil legal services remained high. Betty Torres, the executive director of the Texas Access to Justice Foundation, which distributes funds to eighty-nine legal aid offices throughout Texas, said, “In many states, the bottom fell out of IOLTA.”⁵²

Further precipitating funding decreases, IOLTA deposits often originate from real estate transactions, which diminished when the housing market crashed, leaving generally fewer and smaller deposits to generate interest.⁵³ As a result of the Federal Reserve's efforts to keep borrowing rates low by lowering the FFTR and banks' ensuing actions to decrease interest rates, IOLTA revenues dropped drastically in 2007, with lasting effects.⁵⁴ From 2007 to 2011, IOLTA funding nationwide plummeted nearly 75%, from \$371 million in 2007 to \$93 million in 2011.⁵⁵ In 2013, Jane Curran, executive director of the Florida Bar Foundation, which oversaw the nation's first IOLTA program, said, “Our revenues have gone down 88% since rates dropped. That means cuts in programs, people, offices.”⁵⁶

The 2020 COVID-19 pandemic again illustrated the effect that extraordinarily low interest rates have on IOLTA funding.⁵⁷ In March 2020, the Federal Reserve dropped the FFTR to a range of 0% to 0.25%.⁵⁸ Due to low interest rates, 2020, NAIP members anticipate a \$123 million loss of IOLTA funds, a 46% reduction from 2019 to 2020.⁵⁹ David Holtermann, President of NAIP and Associate Director of the Lawyers Trust Fund of Illinois, said, “Losses of this magnitude are a concern under any circumstance. It is especially worrisome at a time when civil legal aid programs already are responding to increased need from families whose housing, income, safety, and health have been

⁵⁰ *Id.*

⁵¹ Robert J. Derocher, *The IOLTA Crash: Fallout for Foundations*, 37 B. LEADER 1 (2012).

⁵² Terry Carter, *IOLTA Programs Find New Funding to Support Legal Services*, ABA J. (Mar. 1, 2013, 7:29 AM), http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services.

⁵³ Dru Stevenson, *A Million Little Takings*, 14 U. PA. J.L. & SOC. CHANGE 1, 11 (2011).

⁵⁴ Arthur, *supra* note 7, at 742.

⁵⁵ Carter, *supra* note 52.

⁵⁶ *Id.*

⁵⁷ NAIP, *supra* note 2.

⁵⁸ *Id.*

⁵⁹ *Id.*

negatively impacted by the COVID-19 pandemic.”⁶⁰ Both the 2008 recession and the 2020 pandemic have demonstrated how IOLTA's rate rules do not ensure consistent allocation of funding to legal aid programs. When the economy suffers and more people are in need of free or low-cost legal services, less IOLTA funds and fewer legal aid attorneys are available.⁶¹ Additionally, the unpredictability of IOLTA funds results in the inability of legal service providers to garner any semblance of predictability in annual budgetary planning.⁶²

D. Compensating for IOLTA Decreases

To offset reductions in IOLTA funds, states have utilized a combination of other methods to raise funds for legal services.⁶³ Some states have temporarily increased court fees, shifting the costs of funding legal services onto the public in a minor way.⁶⁴ For example, in December 2009, the Supreme Court of Pennsylvania worked with the state legislature to obtain a temporary increase of \$1 in certain court filings.⁶⁵ The fee increase raised approximately \$2,800,000 over the 25-month period that it was in effect.⁶⁶

Alternatively, some states have increased attorneys' professional fees to benefit IOLTA programs and expanded non-compulsory fundraising efforts within the private bar, shifting costs onto private attorneys rather than the general public.⁶⁷ As a potentially large, yet unstable funding source, IOLTA makes budget planning difficult for its recipients.⁶⁸ Many IOLTA programs try to moderate these issues by engaging in regular fundraising and applying for grants from private foundations or government entities.⁶⁹ Despite IOLTA's widely acknowledged success as a funding source for low-income legal services, its heavy fluctuations in available funds are a “continuing source of consternation” for dependent legal aid entities.⁷⁰

⁶⁰ *IOLTA Overview*, *supra* note 1.

⁶¹ Arthur, *supra* note 7, at 742–43.

⁶² Stevenson, *supra* note 8, at 465.

⁶³ Arthur, *supra* note 7, at 744.

⁶⁴ See e.g., Tracy Carbasho, *IOLTA Continues to Fund Legal Services Despite Decrease in Funds, Increase in Need*, 12 LAW. J. 5, 5 (2010).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See Carter, *supra* note 52.

⁶⁸ *Id.*

⁶⁹ Stevenson, *supra* note 8, at 465–66.

⁷⁰ *Id.* at 465.

III. ANALYSIS

At the present moment, IOLTA is an undependable, unstable source of funding for legal aid organizations. Specifically, during economic recessions, IOLTA does not adequately fulfill its mission of funding legal services to the poor and supporting improvements to the justice system. While states have seen increases in IOLTA funds after implementing IOLTA comparability rules, such rules are the bare minimum needed to increase IOLTA funds. Unfortunately, comparability rules do not address the uncertain nature of IOLTA funding, as the rules merely result in IOLTA accounts receiving the same interest rates available to other customers, which may be close to zero.⁷¹ The slump of IOLTA funding during economic downturns, coupled with decreases in LSC funding during these times, creates an unstable financial climate for legal aid organizations and lowers their abilities to provide services when their clients often need them most.⁷² IOLTA programs should utilize a number of strategies to diversify their revenues, including creating mutually beneficial partnerships with banks, setting a mandatory minimum rate on IOLTA accounts that is not based on the FFTR, widely awarding *cy pres* funds to IOLTA programs, and directing more court fees toward IOLTA programs during recessions.

A. State Bar Partnership Programs with Banks

Following the models of states like Oregon and Texas, other state bar associations can likewise begin to actively encourage banks to voluntarily pay higher than the minimum interest rates.

1. Oregon's Approach

The Oregon Law Foundation (OLF), the branch of the Oregon Bar that allocates IOLTA funding, has boosted its pool of IOLTA funds by actively developing relationships with banks and encouraging them to voluntarily provide higher interest on IOLTA accounts.⁷³ In return, the OLF heavily promotes these banks to Oregon attorneys.⁷⁴ The OLF publicizes its partner banks as “Leadership Banks” that fall into one of

⁷¹ *Id.* at 467.

⁷² Carter, *supra* note 52.

⁷³ *Our Strategy*, OR. L. FOUNDATION, <https://olf.osbar.org/our-strategy/> (last visited Oct. 1, 2020).

⁷⁴ *Id.*

two categories of interest rates.⁷⁵ “Visionary” banks pay at least 1.0% interest, while “Advocate” banks pay between 0.75% and 1.0% interest.⁷⁶ Neither Visionary nor Advocate banks charge service fees against the interest paid.”⁷⁷

On its webpage instructions for opening an IOLTA account, the OLF informs attorneys about the Leadership Bank Program and encourages attorneys to establish their IOLTA accounts at one of the participating banks.⁷⁸ The OLF also encourages attorneys with preexisting IOLTA accounts to move their accounts to Leadership Banks.⁷⁹ As of 2012, one-third of Oregon banks were Leadership Banks, including five of the ten largest banks in the state.⁸⁰

The OLF program has succeeded for a number of reasons, including clear and consistent messaging in marketing to attorneys and banks, relationship building with prominent individuals at banks, and inclusion of bankers on the OLF board.⁸¹ The OLF’s website implores attorneys to use careful consideration in selecting a bank, stating, “Using the right financial institution costs nothing but makes up to 175x more for justice for all.”⁸² The OLF’s slogan is: “Where you bank matters!” Such messaging encourages attorneys to prudently consider where they establish their IOLTA accounts because the funds make an impact in the state. Furthermore, the OLF’s relationships with members of the financial community have helped its program flourish, establishing credibility and familiarity with bankers and banks.⁸³ In 2015, the OLF added two additional bankers to its board, for a total of four bankers, further strengthening its partnership with the banking community.⁸⁴

In addition to receiving promotion within the state’s legal community, Oregon banks that pay above-market interest rates receive credit through the Community Reinvestment Act (“CRA”).⁸⁵ The CRA is a federal act dating back to 1977, passed with the intent of encouraging depository institutions to help meet the credit needs of low-

⁷⁵ *Leadership Banks & Credit Unions*, OR. L. FOUNDATION, <https://olf.osbar.org/partners-in-justice/> (last visited Oct. 1, 2020).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *For Lawyers*, OR. L. FOUNDATION, <https://olf.osbar.org/lawyers/> (last visited Oct. 1, 2020).

⁷⁹ *See id.*

⁸⁰ Ken Smith et al., *Partnership Bank Programs: Maximizing IOLTA Revenue in Difficult Times*, 16 DIALOGUE MAG. 1, 1 (2012).

⁸¹ Cliff Collins, *Earning Interest for Justice: IOLTA-Friendly Institutions Assist Legal Aid*, 79 OR. ST. BAR BULL. 23, 26 (Dec. 2018).

⁸² *For Lawyers*, *supra* note 78.

⁸³ Collins, *supra* note 81, at 26.

⁸⁴ *Id.*

⁸⁵ *Id.*; The Community Reinvestment Act, 12 U.S.C. §§ 2901–2908 (1977).

and moderate-income neighborhoods.⁸⁶ After the OLF lobbied federal regulators, the regulators conceded that participation in the OLF's program constituted a "qualified investment" when banks pay over and above interest rates for similar accounts. Thus, Oregon financial institutions receive credit from the CRA for paying above-market interest rates on IOLTA accounts, which boosts the institutions' CRA ratings.⁸⁷ Both through publicity and CRA credits, participating Oregon banks receive tangible benefits from the OLF program.

As a result of OLF's relationships with banks and its participation in the CRA program, Oregon has seen some of the highest average net yields on IOLTA accounts in the country.⁸⁸ Even when the federal funds rate reached nearly zero, Oregon's Leadership Banks continued to pay between 0.7–1% on IOLTA accounts.⁸⁹ Significantly, 69% of IOLTA deposits in Oregon sat in accounts paying an average net yield of 0.71%, compared with an estimated 0.10% yield that the same banks paid their non-IOLTA customers with comparable accounts.⁹⁰

Oregon's voluntary bank partnership approach has proven more successful than the comparability rules used in most states.⁹¹ In 2011, the OLF hired an independent consultant to help determine whether Oregon should join the forty other states currently utilizing comparability rules.⁹² The research revealed that over the previous years, OLF's bank partnership strategy produced higher interest rates than a comparability rule would have.⁹³

2. *Texas's Approach*

In 2007, the Texas Access to Justice Foundation (TAJF) launched a similar program, Prime Partners, to incentivize banks to pay more than required under IOLTA comparability rules.⁹⁴ Similar to the OLF, the TAJF highlights Prime Partners on its website and encourages attorneys to establish IOLTA accounts at these banks.⁹⁵ As Prime Partners, banks benefit from promotion to attorneys on the TAJF website, publicity in quarterly bar newsletters, and awards at local bar association events.⁹⁶

⁸⁶ Collins, *supra* note 81, at 26.

⁸⁷ OFFICE OF THE COMPTROLLER OF THE CURRENCY, COMMUNITY REINVESTMENT ACT PERFORMANCE EVALUATION 61 (2015).

⁸⁸ Smith et al., *supra* note 80.

⁸⁹ *Our Strategy*, *supra* note 73.

⁹⁰ Smith et al., *supra* note 80.

⁹¹ *See id.*

⁹² *See id.*

⁹³ *Our Strategy*, *supra* note 73.

⁹⁴ Smith et al., *supra* note 80.

⁹⁵ *Id.*

⁹⁶ *Id.*

At the offset, Texas Prime Partner banks agreed to pay 70% of the FFTR, compared to the 60% required under the benchmark provision in the rule.⁹⁷ However, when rates dropped below 1% after 2009, the TAJF adjusted the Prime Partner rate to a flat 1%.⁹⁸ Now, a bank can participate as a Prime Partner by paying the higher of at least 75% of the FFTR or a minimum flat rate of 1% on IOLTA accounts. In 2007, when the FFTR was 5.25%, the TAJF estimated that participating banks were paying \$4,000,000 more annually than required under comparability rules.⁹⁹ After the FFTR dipped to almost zero, three of the five largest Prime Partner banks left the program rather than continuing paying higher interest rates.¹⁰⁰ Although the loss was significant, two top-tier banks and several second-tier banks remain among the program's seventy banks.¹⁰¹

As one out of every seven Texas banks is a Prime Partner, this program continues to generate significantly higher IOLTA funds within the state.¹⁰² In 2012, Prime Partner banks' flat 1% contributions generated an additional \$1,500,000 of IOLTA funds, which is enough to fund thirty legal aid attorneys if paid the national average salary of \$50,000 per year.¹⁰³ To maintain strong relationships with partnering banks and assure continued participation is worthwhile, the TAJF sends its partner banks an annual report listing the benefits and visibility the banks received throughout the year.¹⁰⁴

3. Implementation of a Bank Partnership Program

With clear models to follow, the creation of statewide partnership programs with banks is a strong policy suggestion for other states to follow, combining the best of what both Oregon and Texas have created. First, such a program should present banks with a clear business proposition: paying higher-than-required interest on IOLTA accounts will benefit the banks, not just the legal aid organizations. Second, the state bar programs should publicize banks' participation in their email communications, on their websites, and at statewide and local bar events.¹⁰⁵ Third, such programs should continually engage participating banks by sending them updates, inviting bankers to state

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

and local bar association events, recognizing partner banks at bar association functions with awards, and including bank leaders on their management boards when possible.¹⁰⁶ Fourth, the program should present key messaging points to both attorneys and banks about why and how to take advantage of these voluntary programs. Finally, the partnership program should work to attract top-tier banks, knowing that other banks often follow.¹⁰⁷

A notable advantage of such a bank partnership program is its relatively low implementation and operating costs.¹⁰⁸ Every state already has a body that administers IOLTA funds,¹⁰⁹ a website that tells attorneys how to set up IOLTA accounts,¹¹⁰ and periodic bar association newsletters, emails, and events,¹¹¹ ergo, advertising a bank partnership program requires little additional consternation. The financial success of the Texas and Oregon programs suggest that any additional operating costs of running a bank partnership program would be covered by the additional revenues these programs generate.

Additionally, the voluntary nature of this incentive program likely helps the financial community view the program favorably and accept it more readily than a more coercive policy solution, such as a compulsory minimum interest rate. While banks do absorb the costs of the higher-than-required interest rates they pay as part of such a program,¹¹² the benefits received, such as publicity, an increasingly positive reputation within the local legal community, and CRA credits, help to mitigate the increased costs. Other states can and should implement some of these strategies that have helped states like Oregon and Texas generate higher IOLTA revenues than the national averages.

B. Mandatory Minimum Interest Rate Unrelated to the Federal Funds Rate

A second policy option allows state bars to set a mandatory minimum interest rate for banks' IOLTA accounts that is entirely unrelated to the FFTR. IOLTA programs could adopt a range of minimum interest rates that participating banks must apply to IOLTA accounts, with the applicable rate being based on each participating

¹⁰⁶ *Id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ Carole J. Buckner, *IOLTAs and Client Trust Accounts*, ABA (July 31, 2011), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/july_august/ioltas_client_trust_accounts/.

¹¹⁰ *See* Smith et al., *supra* note 80.

¹¹¹ *Id.*

¹¹² *Id.*

bank's profitability over the past twelve months, rather than on the FFTR. Alternatively, state IOLTA programs could set a reasonable minimum interest rate that applies to all IOLTA accounts within the state, regardless of a bank's profitability and the FFTR. Establishing a minimum interest rate that does not fluctuate in tandem with the federal funds rate could not only boost IOLTA income overall, but it would also help stabilize IOLTA funding for the legal aid organizations that rely upon it.

1. IOLTA Rates Tied to Bank Profitability

One way to implement a mandatory minimum interest rate is to tie participating IOLTA banks' minimum interest rates to bank profitability rather than the FFTR, since bank profitability does not necessarily correlate with the FFTR.¹¹³ Despite an almost static federal monetary policy from 2008–2013,¹¹⁴ banks showed positive performance trends due to lower funding costs, “increased portfolios of debt securities,” and an “uptick in lending volumes,” suggesting banks could afford to pay higher IOLTA rates.¹¹⁵

By basing a bank's IOLTA rate minimum on a certain percentage of a bank's annual profit, IOLTA program administrators could create a basis for IOLTA allocations that does not fluctuate with the current state of the national economy, dropping when low-income clients need legal services most. Rather, the interest rate would align with what banks can afford, with the stipulation that the interest rate does not dip below a specified minimum. Interest rates tied to bank profitability would be somewhat akin to a graduated tax income tax structure, in which entities pay more interest as they can afford to pay more. This would be a change from the current structure of most IOLTA accounts, in which banks are free to set interest rates as they wish, as long as they are comparable to other similar, non-IOLTA accounts.¹¹⁶

This policy option has not yet been tested to determine its burdensomeness or effectiveness. Although this option would require participating banks to report their annual profitability to state bar programs, this may not impose a significant additional reporting burden as banks are already subject to significant reporting requirements, such

¹¹³ See JAN SCHILDACH & CLAUDIUS WENZEL, *BANK PERFORMANCE IN THE U.S. AND EUROPE: AN OCEAN APART* 7 (2013).

¹¹⁴ See MARK LABONTE, CONG. RSCH. SERV., RL30354, *MONETARY POLICY AND THE FEDERAL RESERVE: CURRENT POLICY AND CONDITIONS* 18 (2020).

¹¹⁵ SCHILDACH & WENZEL, *supra* note 113.

¹¹⁶ See, e.g., N.C. STATE BAR, *LAWYER'S TRUST ACCOUNT HANDBOOK* 15 (2017), <https://www.ncbar.gov/media/283997/trust-account-handbook.pdf>.

as 10-Ks.¹¹⁷ IOLTA participation is optional for banks, so if a bank did not feel comfortable basing rates on profitability, they could choose not to participate. However, it would be helpful to survey existing IOLTA banks to find out how palatable such a program would be and if enough banks would continue to voluntarily participate in IOLTA to make this feasible. Additionally, this policy option would likely work best in combination with a partnership program between the state IOLTA program and the banks to help the banks become invested in the mission of IOLTA and willing to pay mandatory higher rates than they did previously.

2. *IOLTA Rates Based on a Statutory Minimum*

A second, more simplistic manner of implementing a minimum interest rate is to require banks that offer IOLTA accounts to pay at least a fixed minimum rate. Current comparability rules merely require IOLTA funds to earn at least as much interest as comparable non-IOLTA deposits at the same bank, which could be nearly zero.¹¹⁸ A fixed statutory minimum rate would act as a slightly higher floor beneath which interest rates could not drop, and it could otherwise continue work in tandem with the federal funds rate.¹¹⁹ Although this minimum rate policy shifts more IOLTA costs onto banks, banks that choose to participate can receive benefits from their participation in IOLTA programs, like obtaining more attorney customers, which can help offset some of this burden.

For any policy that shift costs to banks, however, the costs should remain small to encourage banks to continue participating in IOLTA and to avoid straying too far from the generally-appreciated nature of IOLTA, which is how it funds legal services without taxing the public or the legal profession in a noticeable way.¹²⁰ Again, this policy option would likely work best in combination with banks and IOLTA programs working together in some type of partnership program in order to increase cooperation and retention of banks.

¹¹⁷ Will Kenton, *10-K*, INVESTOPEDIA, <https://www.investopedia.com/terms/1/10-k.asp> (last updated Mar. 16, 2020). 10-K's are comprehensive reports filed annually by publicly traded companies about their financial performance.

¹¹⁸ Arthur, *supra* note 7, at 734.

¹¹⁹ See generally Julia Kagan, *Minimum-Interest Rules Definition*, INVESTOPEDIA, <https://www.investopedia.com/terms/m/minimum-interest-rules.asp> (last updated July 31, 2019); Carol M. Kopp, *Fixed Interest Rate*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/fixedinterestrates.asp> (last updated July 31, 2019).

¹²⁰ Stevenson, *supra* note 8, at 458.

C. *Cy Pres* Awards

In addition to one of the aforementioned options, states could utilize *cy pres* awards to increase IOLTA funding and allow legal service organizations to reserve funds for future economic slumps, without shifting burdens onto banks, the public, or the legal profession. *Cy pres* awards direct uncollected class action settlement awards to charitable organizations.¹²¹ *Cy pres* means “as near as possible,” and these awards are an equitable remedy that courts can utilize to make the “next best use” out of the funds.¹²² When direct distribution to class members is not feasible because members cannot be located or transaction costs outweigh members’ potential recovery, distribution to charitable organizations can provide the next best benefit to class members.¹²³ The rationale behind *cy pres* award distributions is similar to the rationale for donating small amounts of trust account interest to IOLTA programs. When direct distribution of interest to clients or class action funds to class members is not feasible, distribution to charitable organizations provides a societal benefit—funding legal services.¹²⁴

Some states award *cy pres* funds directly to IOLTA, typically with courts designating that a portion of the residual funds will go to the program that manages the state’s IOLTA funds.¹²⁵ In 2006, Washington became one of the first states to codify *cy pres* as the preferred method for distributing residual class action funds.¹²⁶ Washington now requires that at least 25% of all residual class action funds be distributed to the legal aid fund that administers Washington’s IOLTA program and provides legal aid services to indigent persons in the state.¹²⁷ Indiana, Pennsylvania, and Kentucky followed suit, mandating that a minimum percentage of residual class action funds be funneled to the programs that manage their IOLTA funds.¹²⁸

As only a handful of states currently have structures for awarding *cy pres* funds to IOLTA programs,¹²⁹ there is significant potential for

¹²¹ John Goodlander, *Cy Pres Settlements: Problems Associated with the Judiciary’s Role and Suggested Solutions*, 56 B.C. L. REV. 733, 734 (2015).

¹²² Cecily C. Shiel, *A New Generation of Class Action Cy Pres Remedies: Lessons from Washington State*, 90 WASH. L. REV. 943, 945 (2015).

¹²³ Goodlander, *supra* note 121 at 738–39.

¹²⁴ *Id.*

¹²⁵ Shiel, *supra* note 122, at 971.

¹²⁶ *Id.* at 965.

¹²⁷ *Id.* at 948; WASH. CT. R. 23(f)(2).

¹²⁸ Shiel, *supra* note 122, at 971–72.

¹²⁹ Bob Glaves & Meredith McBurney, *Cy Pres Awards, Legal Aid and Access to Justice*, ABA (May 19, 2017), https://www.americanbar.org/groups/legal_services/publications/dialogue/volume/20/spring-2017/cy-pres-awards--legal-aid-and-access-to-justice/.

this funding source to grow. *Cy pres* awards can be substantial. In 2010, for example, Texas' IOLTA program received approximately \$2,600,000 in *cy pres* funds, and the Montana Justice Foundation received approximately \$1,380,000.¹³⁰ Due to the windfall nature of *cy pres* funds, they are not stable sources of annual revenue. Nonetheless they are a welcome, largely untapped way to increase IOLTA funding.

States with *cy pres* funds generally award the money to legal service organizations immediately,¹³¹ but for the purpose of improving funding stability long-term, states could reserve part of the *cy pres* funds to distribute during economic downturns. Some states give legal aid organizations discretion to reserve a portion of IOLTA funds to stabilize the amounts available in future years.¹³² Similarly, if a state IOLTA program receives a windfall due to a generous *cy pres* award, it could save some of the funds to have more control over its future budget in economically uncertain times.¹³³

Using *cy pres* awards to distribute residual funds in class action suits has been somewhat controversial,¹³⁴ largely because *cy pres* awards commonly lack judicially-enforced standards.¹³⁵ Without clear rules for how to distribute *cy pres* awards to charities, critics fear that self-interested judges will abuse the appropriation of class funds to charities and use these awards to support the self-interests of the court.¹³⁶ However, the *cy pres* structures that Washington, Indiana, Pennsylvania, and Kentucky use alleviate these concerns because they do not allow judges to hand-pick charities to receive *cy pres* awards.¹³⁷ Rather, *cy pres* awards go directly to the state's IOLTA program, in which the IOLTA administrators decide how to apportion the funds among a variety of civil legal aid organizations and other causes that help improve the justice system.¹³⁸

¹³⁰ Carter, *supra* note 52.

¹³¹ Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 145 (2014).

¹³² See, e.g., MINN. SUPREME COURT LEGAL SERVS. ADVISORY COMM., ANNUAL REPORT 5 (2018) ("The Lawyer Trust Account Board . . . adopted a reserve policy to save money in the higher interest years to offset cuts in the lower interest years.").

¹³³ See, e.g., MASS. IOLTA COMM., OPERATIONS HANDBOOK FOR FINANCIAL INSTITUTIONS (2018) ("A charity may, in its discretion, reserve IOLTA funds from current distribution to stabilize the amounts available for distribution in future years.").

¹³⁴ See Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL'Y & L. 267, 270–71 (2014).

¹³⁵ Shiel, *supra* note 122, at 945.

¹³⁶ *Id.* at 955.

¹³⁷ See *id.* at 971–72.

¹³⁸ *Id.* at 972.

D. Countercyclical Policies for IOLTA Revenues

One final and largely unexplored policy option is building countercyclical elements into IOLTA funding. Currently, IOLTA revenues drop to their lowest when the economy is weak and the need for legal aid services is greatest.¹³⁹ To stabilize IOLTA funding long-term, there must be a way to ensure that funds are available to provide access to justice when it is most needed.¹⁴⁰ To help stabilize IOLTA funding, state IOLTA programs can work ahead to create funding avenues that will activate during economic downturns. For instance, state IOLTA programs could establish rules stipulating that certain additional court or professional fees will automatically activate if the federal funds rate drops below a certain percentage, possibly in areas that surge during recessions, such as foreclosures and consumer credit collection.¹⁴¹

During the 2008 recession, some states implemented additional court filing or professional fees which effectively raised money for limited spurts of time.¹⁴² For instance, Pennsylvania's temporary increase of \$1 in certain court filings beginning in 2009 generated approximately \$2,800,000 annually while it was active and automatically expired after twenty-five months.¹⁴³ In 2013, the Maryland Legal Services Corporation was able to partially offset its reduction in IOLTA revenue by successfully petitioning the legislature for court filing fees.¹⁴⁴ Implementing back-up funding sources or petitioning the court for filing fees takes time and does not provide legal aid organizations with much indication in advance of what their budgets will look like when this new funding becomes available.¹⁴⁵

In order to increase IOLTA stability, state legislatures could pass legislation now, stipulating that similar fee increases benefitting the state's IOLTA program will automatically take effect in the future event of a certain specified low federal funds rate. As a result, during the next economic recession, legal aid organizations may still experience a

¹³⁹ See Carter, *supra* note 52; Debra Cassens Weiss, *Legal Aid Programs Likely to be Hard Hit by Drop in IOLTA Funds, Group Warns*, ABA J. (Apr. 3, 2020, 9:41 AM), <https://www.abajournal.com/news/article/legal-aid-programs-likely-to-be-hard-hit-by-drop-in-iolta-funds-group-warns>.

¹⁴⁰ Richard Zorza, *Stabilizing IOLTA Funding — Long Term Strategy*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Feb. 9, 2011), <https://accesstojustice.net/2011/02/09/stabilizing-iolta-funding-long-term-strategy/>.

¹⁴¹ *Id.*

¹⁴² See Carter, *supra* note 52.

¹⁴³ Carbasho, *supra* note 64, at 5.

¹⁴⁴ MARYLAND LEGAL SERVICES CORPORATION, *2013 Annual Report*, at 2, https://mlsc.org/wp-content/uploads/2010/09/MLSC_AR2013.pdf.

¹⁴⁵ Carter, *supra* note 52.

decline in funds (depending on the amount of money that the court fees or professional fees garner), but they would know that they will also receive the money generated through these activated fees and be able to plan accordingly.

IV. CONCLUSION

By strategically expanding and diversifying their revenue streams, IOLTA programs can become more dependable sources of funding for legal services organizations. Creating mutually beneficial partnerships with banks, setting a mandatory minimum interest rate on IOLTA accounts not based on the FFTR, allocating *cy pres* funds to IOLTA programs, and directing court fees to IOLTA programs during recessions are policy solutions that can lessen the financial strain that IOLTA recipients currently experience due to variations in the FFTR and low interest rates. Most importantly, these strategies can help IOLTA programs grow and more effectively fulfill their mission of providing civil legal aid to the poor and supporting improvements to the justice system.