



## From the Chair...

by Jonathan D. Asher

### Chair of the ABA Commission on IOLTA

It was a pleasure to see so many good friends and colleagues from the Interest on Lawyers' Trust Accounts (IOLTA) community at the Winter 2009 IOLTA Workshops, and to participate in productive sessions on the challenges of navigating the new economic reality. Certainly the operations and the challenges the IOLTA programs face differ greatly in each state. An IOLTA program's current reality depends upon a number of factors including reserve policies, whether programs are making grants from the current year's or the previous year's revenue, whether the programs receive non-IOLTA sources of funding, and their agreements with their major banks. Despite IOLTA program differences and their state specific issues, however, there clearly are common concerns among IOLTA programs, and common themes that surfaced during the Workshops.

Programs in states with benchmark interest rates as part of their comparability rule are reevaluating how benchmarks have frequently been tied to the federal funds target rate. Now that a percentage of the federal funds target rate and other traditional indicators may no longer accurately reflect rates being paid by banks on comparable accounts, a number of programs are looking for a way to express benchmark rates so as to ensure that they provide more accurate and true interest rate comparability.

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## Recovery: What IOLTA Programs Can Do Now to Maximize Revenue and Protect Revenue in the Future

by Jane E. Curran

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*This article will report on the current state of Interest on Lawyers' Trust Accounts (IOLTA) revenue, recount past IOLTA revenue cycles, describe current efforts by IOLTA programs to address the revenue drop,<sup>1</sup> and explain how IOLTA programs are dealing with the historically low Federal Funds Target Rate (FFTR). Finally, the article will describe steps IOLTA programs and their grantees can take to prepare for the next revenue increase.*

### IOLTA Revenue

It is an understatement to say that in 2008, IOLTA revenues began to decline significantly from their high watermark in 2007. National data is not available yet for 2008, but it is clear that the down cycle we are presently experiencing is far deeper than such cycles have been in the past.

Using data from Florida as an example, 2008-09 Interest on Trust Accounts (IOTA) revenue is projected to decline 71% from the prior year. Balances in IOTA accounts dropped 23% from May 2007 to January 2009. Florida's statewide weighted interest rate<sup>2</sup> is down 79% for the same period. The decrease in Florida's IOTA revenue is primarily the result of dropping interest rates. However, IOTA account balances have also fallen for the first time since 1981, reflecting the troubled economy. At workshops held jointly by the American Bar Association Commission on IOLTA and the National Association of IOLTA Programs ("IOLTA Workshops") in Boston this February, several IOLTA programs from around the country reported similar trends.<sup>3</sup>

Since at least 1993, national IOLTA revenue has run in cycles of roughly three years interrupted with occasional one-year or two-year cycles, tracking the national economy.<sup>4</sup> Overall, IOLTA revenue has grown steadily over the past 15 years. Much of that growth has been fueled by states' implementation of mandatory IOLTA<sup>5</sup> or comparability.<sup>6</sup>

Because of the depth of the current recession, 2008 may not simply be the first year of the next regular down cycle for IOLTA revenue. Several IOLTA programs are projecting much steeper declines than usual in IOLTA revenue for 2009-10.

### What IOLTA Programs Can and Are Doing about Falling Revenue

IOLTA programs have already embarked on or are exploring a number of actions in an effort to soften further revenue declines. Responding effectively to falling IOLTA revenue was the topic of a full afternoon's discussion at the IOLTA Workshops. However successful these efforts may be, it is unlikely that they can offset the full effect of the current recession on interest rates and IOLTA account balances.

### Mandatory IOLTA

In most states, it is now mandatory for attorneys to maintain IOLTA accounts. In several of the remaining states, programs have begun to advocate for mandatory IOLTA rules. Programs that converted to mandatory IOLTA before the recent drop in interest rates garnered

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Programs are also evaluating their reserve policies. IOLTA programs with reserves are deciding whether and how to distribute all or a portion of the reserves over the next few grant cycles in the face of a very uncertain future. Programs with and without reserves are contemplating how to design and implement policies that will best compensate for future, but inevitable, cycles in interest rates. This is a critical time in the evolution of IOLTA; many programs are taking this opportunity to consider policies which will make IOLTA funding more stable and, hopefully, less vulnerable to economic volatility in the future.

Brainstorming sessions provided for the broad exchange of ideas on funding for civil legal aid as well as how to best work with grantees during these turbulent times. Some common themes from sessions on the funding of civil legal aid included exploring new funding sources (such as rules providing for *cy pres* allocations to civil legal assistance) and creating IOLTA-like accounts for

court-held funds.

Sessions on working with grantees focused on increasing opportunities for cooperation, including shared contracts for services, and providing support for grantees' fundraising needs and initiatives. A full list of ideas from each of the brainstorming sessions will be prepared and circulated to the IOLTA community shortly. Susan Erlichman, President of the National Association of IOLTA Programs (NAIP), and I will be working with ABA staff to identify those items, if any, that should be explored and given additional attention at the national level.

IOLTA programs are also deciding what role, if any, they should play in educating the bar as to the details of the Temporary Liquidity Guarantee Program (TLGP). Specifically, programs are considering how and whether to assist attorneys in identifying banks which provide unlimited insurance on their IOLTA accounts and those that have chosen not to provide full insurance coverage. Some programs, such as the Massachusetts IOLTA Committee and the Arizona Foundation for Legal Services and Education, have posted information on their

websites regarding the TLGP with a link to the Federal Deposit Insurance Corporation (FDIC) website, where a complete list of the banks that have opted out of the TLGP program can be found.

The success of our efforts to include IOLTA accounts in the unlimited insurance provision of the FDIC's Temporary Liquidity Guarantee Program is a true testament to the strength, responsiveness and the dedication of the IOLTA community. It also demonstrated the very effective collaboration among the organized bar, the access to justice community, and particularly between the ABA and NAIP. Difficult times have always brought out the best in our community and will do so again in these trying times. We have seen that in our success with the FDIC and in the creativity and energy with which we are confronting our economic challenges.

Please join us at the 2009 Summer IOLTA Workshops to be held July 30th and 31st in conjunction with the ABA Annual Meeting in Chicago. The Workshops will provide another valuable opportunity to share ideas and develop strategies to more successfully chart our future together. I look forward to seeing you in Chicago.

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significant increases in revenue. Programs taking this step now may increase revenue somewhat in the near term, but any increase will be limited by low interest rates and reduced IOLTA account balances. Still, making this change now may generate a substantial increase in revenue in the future.

### Comparability

Some IOLTA programs have considered amending their IOLTA rules or guidelines to include an

interest rate comparability provision, while in the process of converting to mandatory or where rules making IOLTA participation mandatory already exist. As is the case with converting to mandatory in the present economic climate, adopting a comparability provision now may not result in much, if any increased revenue in the near-term because of low interest rates and reduced IOLTA account balances. However, IOLTA programs adding comparability provisions are setting the stage for revenue growth as the economy recovers.

It is important to point out that comparability is not a "one size fits all" proposition. To benefit from comparability, a portion of a program's IOLTA accounts must regularly hold balances in excess of \$100,000. That is the common threshold over which banks make higher-paying products available to customers and the minimum break-even point to offset the higher fees that go along with higher-paying products. Some IOLTA programs have, after analyzing their IOLTA accounts, concluded that comparability

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would not yield better results than they have already achieved by negotiating directly with banks for higher interest rates or reduction or elimination of service charges. Those programs usually revisit their analysis periodically to determine if changes in various factors have created more favorable conditions for pursuing comparability.

### Reducing Bank Service Charges

Some IOLTA programs, which have drafted revisions to their rules or guidelines, have taken the opportunity to delineate which service charges can be deducted from IOLTA account interest and which are the responsibility of the lawyer or law firm.<sup>7</sup> In addition, these programs have added provisions that prohibit banks from deducting service charges that exceed the interest earned on one IOLTA account from another IOLTA account, a practice called “negative netting.”

### Tweaking “Benchmarks”

In some more recent comparability rules or guideline changes, participating banks are offered the option to comply with comparability requirements by paying a “benchmark” rate. A “benchmark” refers to a rate that reflects overall comparability in that state’s market. This is determined based on the IOLTA program’s analysis of the highest interest rate or dividend generally available to non-IOLTA customers holding similar balances at banks holding IOLTA accounts in its state. Benchmark rates are an attractive alternative because they are easier for both the bank and for the IOLTA program to administer.<sup>8</sup>

State or jurisdiction-wide benchmark rates have, until recently, been expressed as a

percentage of the prevailing FFTR set by the Federal Reserve. The FFTR was used to express the benchmark because, historically, it has been the major influence on interest rates paid on repurchase agreements and the earnings of money market mutual funds.

Although the FFTR was and may again in the future be the appropriate index for expressing a benchmark rate, when it recently plunged to .00% - .25%, it was no longer an accurate approximation of what banks were actually paying comparable, non-IOLTA customers. As a result, some programs in states where the IOLTA rule includes a benchmark rate have been seeking formal IOLTA rule changes or amending their guidelines in order to ensure receiving comparable interest rates.

Several new models are now being implemented to adjust existing benchmark provisions to allow flexibility in how the benchmark is expressed. Importantly, all of these models retain the guiding principle that however the benchmark is expressed it must reflect an overall comparable rate for that state. Also, these models continue to be premised on the analysis of the interest rate banks pay comparable, non-IOLTA customers and the requirement that qualifying IOLTA accounts must be paid the same rate of return.

One model requires banks that had voluntarily chosen to pay the benchmark rate to now pay the *higher* of the existing FFTR-linked benchmark rate or a flat interest rate that *currently* approximates the state or jurisdiction-wide interest rate banks are paying comparable, non-IOLTA customers. Banks that can demonstrate to the IOLTA program that the benchmark rate described above is higher than what they pay their comparable, non-IOLTA customers, may pay their own, lower comparable interest rate.<sup>9</sup> Another model gives the IOLTA

program flexible authority to periodically reset the benchmark rate that reflects the state’s overall comparability rate. However, it does not require that the benchmark use a numerically flat rate or to express the rate in relation to a specific index.

A third model combines elements of the two previous models. It includes a provision that the bank pay the higher of a flat interest rate or a percentage of the FFTR, but allows the IOLTA program flexibility in determining how that interest rate may be expressed in terms of the FFTR or another recognized market index. It also permits the flexibility found in the second model so that the program can periodically adjust the benchmark to reflect the state’s overall comparability rate.

All of the models, which modify the traditional expression of benchmark rates, are consistent with the principle of comparability. They are premised on the analysis of the interest rate banks pay comparable, non-IOLTA customers and the requirement that qualifying IOLTA accounts must be paid the same rate of return.

## NEGOTIATION WITH BANKS FOR HIGHER INTEREST RATES

### IOLTA Programs without Comparability

IOLTA programs without comparability requirements are re-doubling their efforts to negotiate higher interest rates. These efforts generally produce better results where IOLTA accounts are maintained in regional or community banks among which there is greater competition for lawyer/law firm business. Negotiations are most fruitful when grantees, bar leaders and state justice commissions work in concert with their IOLTA programs.

### IOLTA Programs with Comparability

Some of the more recently

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implemented comparability provisions of IOLTA rules or guidelines include clauses allowing for negotiated interest rates or inviting banks to pay rates higher than required under the comparability provision. Banks are then recognized by IOLTA programs in accordance with the level of interest that they pay. For example, an IOLTA program may publish a list of "Prime Partner" banks, which pay a rate above the comparable level and may highlight the highest-paying banks as "Leadership Banks." Banks can also be recognized for reducing or eliminating service charges. For the same reasons noted above, it is generally the regional or community banks that voluntarily choose to pay higher rates. Accordingly, where the majority of IOLTA accounts are maintained in larger or multi-state banks, revenue increases due to banks voluntarily paying rates above comparable levels are often lower.

### If We Knew Then What We Know Now...

Looking back, many IOLTA programs now wish that they had been able to establish grant and operating reserves with the significant revenue increases earned through the implementation of mandatory IOLTA rules and comparability provisions. Those without reserves cannot reasonably be expected to maintain any measure of stable grant funding given the sharp decline in interest rates and therefore IOLTA revenues. This is true even if the IOLTA revenue enhancement activities described above achieve their maximum potential, and will remain so until the economy improves.

### Looking Ahead

Recognizing that IOLTA revenue rises and falls in fairly regular cycles, IOLTA program and

grantee leaders can plan now for the future and strike a balance between increasing funding to make up for past grant funding cuts and setting aside grant and operating reserves when IOLTA revenue enters its next up cycle to help stabilize grants in the next down cycle.

The next up cycle will come, as will the next down cycle. In this sense, there may be no such thing as an IOLTA revenue "crisis" given that, historically, revenue goes up and down at fairly predictable intervals. Both IOLTA programs and legal aid grantees need to build that reality into their planning. Grantees should carefully consider IOLTA revenue cycles when increasing staff. One estimate is that it costs about \$39,000 for each staff position added and then eliminated when grant funds go down.

For IOLTA programs, there are a number of reserve policy models in place. Although, as we have learned, none is foolproof in a recession as severe as the present circumstances when interest rates plummet and investments lose ground and when none of us knows for sure whether our reserves will last longer than the recession.

IOLTA programs need to carefully project best and worst-case scenarios for IOLTA revenue and share those forecasts with their grantees. A number of accurate forecasting models are available that use interest rate and economic activity.

Grantee leaders need to have strategic plans in place for when IOLTA grants next decline; as they will inevitably do. Those plans should include building their own reserves as funding sources permit, and discussing with their IOLTA programs how much of the IOLTA grant may be held in reserve.

IOLTA programs and grantee leaders should decide together if reserve policies or grantee strategic plans should contemplate the type of economic collapse, we are currently experiencing.

The best future for IOLTA grant funding will come from careful and cooperative planning between IOLTA programs and their grantees.

It will be challenging in the future, as it has been in the past, for IOLTA programs to hold back increased IOLTA revenue and for grantees to do the same with their IOLTA and other sources of funding. Client services, infrastructure improvements for grantee organizations, and adequate IOLTA program staffing to administer IOLTA and maintain or generate increased income are all pressing needs.

We may have several years before which IOLTA revenues will rise. During this time, we can work together as a community and develop plans to avoid or substantially reduce future instability in IOLTA grant funding, grantee operations and IOLTA program operations.<sup>10</sup> About three years following the next rise in IOLTA revenue, we will be able to look back and gauge our success.

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### Endnotes

- <sup>1</sup> This article deals only with increasing revenue from IOLTA. However, many IOLTA programs are strengthening or considering expanding their activities to raise revenue from non-IOLTA sources such as fundraising, *cy pres*, state appropriations, filing fee increases and through other means. These efforts are often led or aided by state justice commissions.
- <sup>2</sup> A weighted interest rate reflects the rate paid on the majority of IOLTA account funds.
- <sup>3</sup> It is important to note, however, that while IOLTA income is declining precipitously, in many states this will not translate into a similar percentage decline in IOLTA grants due to grant reserves established during the recent "up" cycle in IOLTA revenue.
- <sup>4</sup> 1993-1995 down; 1996-1998 up; 1999 down; 2000-2001 up;

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## Grantee Spotlight

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Marta and Daniel obtained food and temporary housing at the local shelter. EC provided Marta legal representation on her restraining order, divorce, child support and custody cases and found a pro bono lawyer to assist with her immigration concerns. EC provided counseling services in Spanish for Marta and play therapy for Daniel.

Nine months after entering the program, EC helped Marta find a job and her own efficiency apartment where she lives safely with Daniel. She remains in poverty, but manages to provide a decent home for her son. Daniel now sleeps through the entire night without waking from a nightmare. Marta attends English classes on site at EC and talks positively about the future.

### Legal Services to Immigrant Victims of Domestic Violence

Like Marta, women who access EC's services typically have many needs beyond the direct effects of violence, including housing, clothing, food, employment, childcare, and emergency

services. While EC has helped meet its clients' needs in most of these areas by collaborating with other organizations, the need for legal representation and advocacy has become more difficult to address. EC has long recognized that, in addition to emergency legal services to obtain restraining orders, domestic violence victims need legal assistance with divorces, child custody cases and immigration issues. EC's immigrant clients need these services in their own language and at little or no cost. In 2005, with funds from Interest on Lawyers' Trust Accounts (IOLTA) and other resources, EC added a legal services component to its spectrum of counseling and support services for victims and their children to meet this need.

Since then, the EC Legal Services Project has formalized its relationships with several providers of legal services, recruited and trained pro-bono attorneys, recruited students from the University of New Mexico Law Clinic for legal clerical support, and enhanced its existing relationships with private immigration attorneys. In addition to the development of a

highly functional infrastructure, EC's legal project has been successful in providing an array of quality services to the immigrant community. Direct legal representation has been provided to more than 500 domestic violence victims in cases that included custodial issues, restraining orders, divorce and international child abduction. Hundreds of domestic violence victims have received legal advice and thousands of others have received a variety of referral services and education about the legal system through EC's Legal Services Project.

A recent study has demonstrated that access to legal services is the only public service that reduces domestic abuse.<sup>1</sup> Leslie Orloff, Vice President and Director of the Immigrant Women Program at Legal Momentum: Advancing Women's Rights states, "isolated by violence, fear and misinformation on laws in this country, access to legal services and justice system remedies is vital to immigrant victims' ability to achieve safety and well-being in this country. Further, immigrant victims' ability to

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2002-2004 down; 2005-2007 up; as reported in the *IOLTA Handbook* published by the ABA Commission on IOLTA, 2008.

- <sup>5</sup> Rules making it mandatory for attorneys to maintain IOLTA accounts.
- <sup>6</sup> Comparability requires banks to pay interest rates on IOLTA accounts, which are comparable to those paid to other customers when IOLTA accounts meet the same minimum balance or other requirements. The recommended features for IOLTA comparability are: 1) mandatory IOLTA; 2) that banks choosing to participate in IOLTA must pay the highest interest rate or dividend generally available from the bank to

its non-IOLTA customers with similar account balances; 3) allowing the use of higher rate products including repurchasing agreements (REPOs) and government Money Market Funds; and 4) that lawyers may only hold IOLTA accounts at banks that have agreed to pay comparable interest rates or dividends.

- <sup>7</sup> Although IOLTA rules and guidelines differ, they generally permit banks to deduct standard checking account transaction charges as well as a reasonable IOLTA account administrative fee for reporting and remitting interest. Special services such as wire transfers or account reconciliation are the responsibility of the lawyer or law firm.
- <sup>8</sup> Traditional comparability provisions require the IOLTA program to work with each bank to determine the

comparable interest rate and then monitor remittances from that bank to ensure ongoing compliance if the bank has raised or lowered interest rates for comparable, non-IOLTA customers. Benchmark rates eliminate this need for constant monitoring.

- <sup>9</sup> This approach is likely to be effective over the long term as it allows for the use of either a flat interest rate or the original benchmark expressed as a percent of the FFTR in contemplation of a return of higher FFTR rates when the economy turns around.
- <sup>10</sup> It is important that any grantees interested in the kinds of strategies noted in this article work together with their IOLTA program in light of IOLTA programs' expertise about the banking system and technical aspects of IOLTA accounts.