



A Program of the Center for Civic Values

# IOLTA News

An Update from the New Mexico Interest on Lawyer Trust Accounts Program

## State Supreme Court Approves Mandatory IOLTA

Created by the State Supreme Court in 1984, the New Mexico IOLTA (Interest on Lawyer Trust Accounts) program generates interest that helps fund civil legal services for the poor, law-related education for the public and improvements in the administration of justice.

On September 10, 2008, the Court announced that it had approved a request from its Access to Justice Commission to convert New Mexico's IOLTA program from opt-out to mandatory. As a result, the state joins 37 other jurisdictions in which attorneys in private practice are required to maintain pooled client trust funds in IOLTA accounts. Also with conversion, New Mexico joins 21 other IOLTA programs that have comparability requirements in their IOLTA Rules. The changes are effective January 1, 2009.

Comparability requires attorneys to place their IOLTA funds in "eligible financial institutions," defined as those that voluntarily offer IOLTA accounts and pay the highest rate of interest or dividends generally available from the institution to its non-IOLTA customers, when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications.

In comparison with other states, rates paid on New Mexico IOLTA accounts are among the lowest in the country. One local bank, for

instance, pays one-tenth of one percent. The switch to mandatory with comparability is projected to provide hundreds of thousands of additional dollars annually to help meet the legal needs of the state's poverty population.

Under the new Rules, the Center for Civic Values ("CCV") will be responsible for certifying as eligible those financial institutions at which attorneys may hold their IOLTA accounts. In preparation, CCV has established a conversion team and is working with national experts who have assisted others states in their conversions. The team will launch a massive campaign aimed at persuading financial institutions in New Mexico to get certified by paying comparable rates.

IOLTA Directors in states that have already implemented comparability report nearly all financial institutions have cooperated because they do not want law firms to move their trust accounts elsewhere.

**"Shrinking the gap between the number of poor people in the state who need legal services and those who actually receive them was our primary goal in seeking the conversion."**

*Sarah Singleton, Co-Chair  
Access to Justice Commission*

## Mandatory IOLTA Q & A

**Q** Do the new Rules impose requirements creating additional administrative burdens and costs for attorneys, particularly sole practitioners?

**A** Currently the New Mexico Rule requires every lawyer in private practice who holds client trust funds to establish and maintain a trust account. This is true regardless of the size of the firm or whether the account is enrolled in IOLTA.

The current Rule also requires every lawyer who holds client funds to make a good faith judgment about whether those funds belong in a pooled trust account or one set up solely for the benefit of that client.

Under the new Rule all that really changes in terms of administration of the account is the following: if upon review of the list of “eligible financial institutions” certified by the Center for Civic Values (“CCV”), the attorney discovers her or his bank is not included, then s/he will need to relocate the trust account to a different institution.

CCV will work diligently to ensure that as many banks as possible are compliant and on the approved list. In the unlikely event a bank refuses to comply, one trip to an eligible bank to open a new trust account is all that will be necessary. This will be a one-time act and will have the same impact for both a large firm or for a sole practitioner.

**Q** Do the new Rules require attorneys to conduct complex financial analyses, monitor interest rates, or bank only at certain financial institutions?

**A** In collaboration with national experts who have assisted other jurisdictions with conversion and comparability initiatives, CCV will have responsibility for implementation of the comparability requirements in the proposed Rule. For instance, CCV will negotiate with financial institutions; CCV will provide to attorneys a list of “certified” banks; and, CCV will monitor interest rates to ensure compliance by banks.

At this moment, 80% of New Mexico IOLTA accounts are held at either Bank of America or Wells Fargo, both of which are already compliant with comparability requirements in multiple jurisdictions.

Further, financial institutions have a clear incentive to cooperate because they want to retain their banking customers, large or small. Upon being advised that they will be required to pay the same rates on IOLTA accounts as they do on non-IOLTA accounts with similar balances, or risk those accounts being moved to other institutions, most will agree to pay comparable rates. With very few exceptions, that has been in the case across the country, according to national data.

**Q** Why was CCV given authority over attorneys and named to be the entity that “monitors” compliance by banks?

**A** CCV will not have authority over attorneys and instead will only report to the Court those attorneys who fail to comply with the requirements of the Rules.

For example, upon CCV’s receipt of a non-compliant *Trust Account*

*Certification* (this is the form that is sent to lawyers each year with the State Bar’s *Dues Statement*), it will notify the attorney and request that s/he submit a compliant form within 30 days. If after 30 days, the attorney has not done so then, and only then, will CCV certify the attorney to be non-compliant and report her or him to the Court.

Simply put, compliance with IOLTA provisions will be managed in much the same way that other administrative requirements related to the practice of law (such as non-payment of dues) are managed. As a result, it will be the State Supreme Court—not CCV—that has authority over attorneys.

Finally, CCV is really in the best position to monitor banks and to certify them as eligible, because it is CCV that has established and maintained for nearly a quarter century cooperative working relationships with the 60-plus banks in New Mexico that currently participate in IOLTA.

**Q** Do the new Rules require attorneys to make contributions to CCV, faith-based charities or other nonprofits whose causes they may not support? Who decides what programs are funded?

**A** Regardless of enrollment in IOLTA, under no circumstances are the interest earnings on pooled client funds the property of the attorney. As a result, participation in IOLTA (whether voluntary, opt-out or mandatory) cannot be construed to be a charitable contribution by the attorney.

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**Equal justice under law...is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society....It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”**

**Justice Lewis Powell, Jr.**

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## Why New Mexico Needs Mandatory IOLTA



David M. Berlin, Chair  
CCV Board of Directors

In 2007, the State Supreme Court issued an Order approving the Access to Justice Commission (“ATJ”) Annual Report. The Order directed the Commission to prepare for the Court’s consideration Rule revisions that would convert the New Mexico IOLTA program from opt out to mandatory and that would require IOLTA accounts to be held at financial institutions that pay no less than the highest interest or

dividend rate generally available to non-IOLTA account holders with similar account balances..

Thus began a deliberative, in-depth process undertaken by the ATJ Commission’s Legislation and Rules Committee to draft proposed amendments for the Court’s consideration. Rules were drafted over the course of several months in collaboration with the Center for Civic Values (“CCV”) and the ABA Commission on IOLTA/National Association of IOLTA Programs Joint Technical Assistance Committee. This was a monumental undertaking, and it was not approached lightly by any of those involved.

The amended Rules were approved unanimously by the Commission, submitted to the Court for its consideration and posted on the Court’s website for comment from the legal profession. At the conclusion of the comment period, a review of the submissions showed that people were overwhelmingly in favor of mandatory IOLTA with a comparability requirement *by a margin of 3 to 1*. Since then, the IOLTA language has been removed from Rule 16-115 and a new rule, 24-109, created. Effective January 1, 2009, participation in IOLTA at financial institutions that pay comparable rates will be required of all New Mexico attorneys in private practice who hold pooled client trust funds.

Revenues from the current opt out IOLTA program are significantly lower than those that will be earned with the new mandatory program—75% lower, in fact, according to national experts. Because participation is

not mandatory, more than 400 firms opt out annually: some do so operating under the erroneous belief that even with a pooled trust account, they or their clients are allowed to keep the interest, while others claim that they do not support the charities that are recommended for funding by the IOLTA Grant Committee. Still others receive certain benefits from their banks such as lower interest rates on lines of credit and other loans, as long as they do not participate in IOLTA. This, of course, enables the banks to have the free use of what would otherwise be interest earnings paid to the IOLTA program. Because of this ethically-questionable practice, there are less funds available to help those who desperately need free representation because they cannot afford to hire an attorney.

In addition, without a comparability requirement banks can (and do) pay next to nothing in interest on IOLTA accounts. Some are paying as little as *one-tenth of one percent*. Worse yet, some banks take the interest earned on one firm’s IOLTA account to pay the fees on a different firm’s IOLTA account, if the latter firm does not earn interest adequate to cover the fees. The new Rule eliminates a bank’s ability to engage in this so-called “negative netting” process.

A recent study found that as many as 80% of the legal needs in New Mexico are unmet annually, and an ATJ study of the issue concluded that \$8 million would be needed *each year* to actually provide services to all those who need them. While much progress has been achieved since the establishment of the New Mexico Civil Legal Services Commission and with funding from Equal Access to Justice, *Pro Hac Vice* and IOLTA, we are, nevertheless, still millions away from meeting that need.

The recent downward spiral in economic conditions in the US is likely to make the situation even worse as the most needy will suffer the worst. The poor are often taken advantage of by others, in part, because they cannot afford legal representation. Mandatory IOLTA with comparability will help to level the playing field.

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The New Mexico nonprofits that are recommended for funding are under the purview of the IOLTA Grant Committee, an independent body. If a Committee member has or may be perceived to have an affiliation with an applicant, that member neither participates in discussions about the application nor votes to approve or deny the request. The Committee's recommendations are reviewed by the 13-member CCV Board of Directors and then submitted for final approval to the State Supreme Court.

Since the first IOLTA grants were awarded in 1987, only two "faith-based" organizations have received funding, representing less than 4.0% of the \$4 million distributed to date. And, those grantees are expressly prohibited under the terms of their IOLTA Grant Agreements from using any of their IOLTA funds for religious activities.

**Q** What if I don't have a trust account, or I do but it's not enrolled in IOLTA?

**A** If you are an attorney engaged in the private practice of law and you receive IOLTA-eligible client funds (those that cannot earn income for the benefit of the client

in excess of the costs incurred to secure and distribute that income to the client), then you or the law firm where you work must establish and maintain a pooled IOLTA trust account. In addition, that account must be held at a financial institution certified as eligible by CCV. A list of eligible institutions will be posted on CCV's website at [civicvalues.org](http://civicvalues.org) in December 2008.

This means that on January 1, 2009, you will be non-compliant with Rule 24-109 unless you have established an IOLTA account at an eligible financial institution. The *Trust Account Certification* that you complete and submit with your payment of annual dues to the State Bar of New Mexico will be forwarded to CCV. If upon CCV's review the *Form* reflects non-compliance, you will be contacted and so advised. You will have 30 days to provide whatever information is requested. Unless you do so and return your form to CCV timely, you will be certified to the Court as non-compliant and the next communication you receive will be from the Clerk of the Court.

**Q** I'm not in private practice. How do the new Rules affect me?

**A** If you are not in private practice in New Mexico, you are "exempt" from participation in IOLTA. For instance, if you are a judge, an employee of a local, state, federal or tribal government, corporate counsel, a teacher of law, or are otherwise not engaged in the private practice of law, you are exempt. If any of the following applies to you, you are also exempt.

- The nature of your practice is such that you do not hold IOLTA-eligible funds of any client or third person;
- You do not have an office within the State of New Mexico and you have the client's or third person's permission to hold the funds out of state; or,
- You have applied for and obtained an exemption from CCV for undue hardship based on the geographic distance between your principal office and the closest eligible financial institution (CCV has established the exemption distance to be one that exceeds 25 miles).

If you have questions or need additional information, please contact IOLTA.

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History of IOLTA Grant Awards—1987 to Present		
Funding Category	Dollars Awarded	Percentage Awarded
Civil Legal Services for the Poor	\$3,247,270	80.60%
Legal Education for the Public	\$598,593	14.86%
Administration of Justice	\$182,831	4.54%
<b>Total</b>	<b>\$4,028,694</b>	<b>100.00%</b>