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April 29, 2008

Mr. Ronald R. Carpenter
Clerk of the Court
Washington Supreme Court
415 12th Avenue SW
Olympia, WA 98504-0929

Re: Consolidated Comment on Proposed Amendment to RPC 1.15A and Proposed LPO RPC 1.12A
Oral Argument Requested

Dear Mr. Carpenter:

Please see the attached comment regarding the proposed amendment to RPC 1.15A and proposed LPO RPC 1.12A. The undersigned 41 entities have worked together to present this consolidated comment in lieu of this Court receiving dozens of comments from interested industry associations and individual companies. This consolidated, single comment voices these entities' mutual concerns regarding these proposed rules.

Given that the proposed rules would significantly impact segments of the community that are not normally affected by the Court's regulatory authority, these entities also join in requesting oral argument on the proposed rules. The unique circumstance of these proposed rules mitigates in favor of greater-than-usual transparency in the Court's decision-making process.

We appreciate your assistance.

Very truly yours,

STAFFORD FREY COOPER

T D Buck

Ted Buck
Darrin E. Bailey
Counsel for Consolidated Comment Signatories

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ADMITTED IN Washington □

Associations:

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Representing title insurers nationwide

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Representing over 12,500 businesses

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Re: Comment on Proposed Amendment to RPC 1.15A and Proposed LPO RPC 1.12A

Dear Mr. Carpenter:

The undersigned 41 parties present this combined comment to the proposed amendment to RPC 1.15A and proposed LPO RPC 1.12A (a) as they apply to IOLTA accounts. Washington's IOLTA program has served a valuable purpose in providing funds for the unmet legal needs of the indigent. We recognize the importance of providing equal access to justice and support appropriate funding vehicles to accomplish that task. Support for IOLTA's traditional role in generating funding for that purpose, however, will continue only if there is general agreement that the revenue is generated appropriately and that the funds are expended for purposes that are not objectionable. The proposed rules would violate the first of those premises, and in so doing undermine IOLTA in general jeopardizing the very goal of the program. These proposals would expand IOLTA beyond the practice of law, and even the limited practice of law, into overt business regulation. Together with the reality that IOLTA funds are being used for lobbying and political purposes, the new rules would create a significant opening for the opponents of IOLTA not just to challenge these additions, but to challenge the IOLTA program as a whole. This Court should bear in mind the potential harm to the entire IOLTA structure that these proposals present in considering their adoption. This Court should err on the side of caution to maintain that portion of the IOLTA structure that serves this useful end, not provide IOLTA opponents another tool to disassemble the program altogether.

I. Comment on Proposed Rules.

As an initial matter, we note that it is undisputed that the Court has the authority to regulate the practice of law by LPOs. This comment is not addressed to that issue. Instead, we believe that it is neither reasonable nor within the Court's authority to apply IOLTA to LPO services that are merely tangential to the LPOs' employers' contractual relationships, over funds that are not the product of the limited legal practice involved, and often where the LPOs are not even engaged in the practice of law. Simply put, it is

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a fiction – however desirable – to compare the attorney-client relationship with that of the contractual relationship between closing firms and their customers. Indeed, the differences between these two relationships are manifest in how each receives and holds client funds incident to providing their respective services.

Attorneys hold client funds under several circumstances, including retainers, advance legal fees, and settlement funds awaiting disbursement; they are not allowed to commingle client funds with their own or divert client funds for their personal use. As a result, attorneys are required to hold client funds in trust. Attorneys only receive and hold client funds, therefore, as a direct consequence of providing legal services to the client; the client funds are necessarily an appendage to the attorney-client relationship.

LPOs, on the other hand, do not have clients, and they do not hold client funds in trust as a necessary appendage of providing legal services to the closing firm's customers. In fact, the opposite is true. LPOs are typically employees of and functionaries in closing firms. Closing firms hold customer funds in trust because of contractual relationships between the closing firm and its customers, not as a necessary appendage to legal services performed by the LPOs. Instead, the services LPOs provide during closing transactions are adjunct to the closing firm's contractual relationship with the customer and do not implicate any of the traditional obligations or responsibilities created by the attorney-client relationship. Bluntly, with attorneys the money follows the legal service; in closing firms, the limited legal service follows the money via the contract.

Historically, attorneys held client funds in non-interest bearing bank accounts because Congress did not allow federal banks to pay interest on checking accounts. In 1980, Congress created NOW accounts which permitted federal banks to pay interest on certain deposits. Many states, including Washington, took advantage of these accounts by establishing IOLTA programs. A majority of these programs require attorneys to place certain client funds into interest-bearing accounts, with the interest going to organizations that provide legal services for the indigent.[1] The attorney's fiduciary obligation to his client was protected because the attorney was only allowed to place client funds into these accounts that were either too small in amount or were to be held for too short of time to generate interest for the client (net of banking and administrative fees).

In 1995, despite concerns about the separation of powers doctrine, this Court expanded Washington's IOLTA program to include customer funds held in trust by closing firms. It appears that no other state has applied IOLTA accounts to LPOs and title and escrow companies by court rulemaking authority. The few that have expanded

[1] In at least 16 jurisdictions IOLTA programs are either opt-out or voluntary for attorneys. *See* http://www.abanet.org/legalservices/iolta/ioltus.html.

the program beyond the strictures of the traditional attorney/client relationship have done so by legislative action, not by court regulation. That only a few states have ventured into this arena, and only by legislative action, evidences the extreme caution the Court should exercise in further refining and expanding the IOLTA program beyond the traditional attorney/client relationship; the application of IOLTA beyond professional legal services has already pushed the program to the very edge of, and possibly beyond, the dividing line between legislative and judicial authority.

Unfortunately, proposed LPO RPC 1.15A(a) also hoists the IOLTA program even farther a-field by requiring LPOs to ensure their employers are handling customer funds in a certain way (e.g., depositing them into IOLTA accounts). It places LPOs in the untenable position of being responsible for the conduct of their employers – conduct over which they have no control. LPOs have no control over the contractual relationship between the sellers, buyers, and closing firm. The net effect would be that LPOs become regulators of contractual relationships where they have no attorney-client relationship and no authority in the master/servant relationship.

The uniqueness of the attorney-client relationship gives rise to important ethical and social responsibilities, responsibilities that are not implicated where licensed lay persons select certain documents adjunct to the contractual relationship between closing firms and their customers. By extending IOLTA programs to LPOs the distinct responsibilities of the lawyer to the client are transferred onto the shoulders of laypersons. As noted by the dissent when this Court originally extended IOLTA programs to LPOs, such extension imperiled the traditional separation of powers between the Court and the legislature. By requiring LPOs to become entangled in the contractual relationships of closing firms and their customers, the Court would impermissibly move well beyond the regulation of the lay practice of law and into the realm of contract regulation, an arena in which the Court simply has no authority to act.

To the extent the Court concludes that LPO services to their employers are comparable to attorney services to clients for purposes of IOLTA, we urge the Court to exhibit restraint in expanding the program beyond the Court's powers to do so. As drafted, proposed LPO RPC 1.12A (a) would control both transactions that do not involve the actual practice of law as well as transactions that do involve the practice of law but are capable of being performed by unlicensed lay persons. This Court has no constitutional or statutory authority to regulate closing firm practices that do not constitute the licensed practice of law.

To provide historical context, in 1978, this Court ruled in *Great Western* that the selection, preparation, and completion of loan documents constituted the practice of

law.[2] The legislature disagreed, and within months of that ruling enacted RCW 19.62.010 permitting banks, lenders, title companies, and licensed escrow companies to select, prepare, and complete certain real estate documents. In 1981, the Court struck down this legislation as an unconstitutional violation of the separation of powers doctrine.[3] In the face of a threat of constitutional amendment, APR 12, a compromise, was enacted. APR 12 authorized certain laypersons to engage in the limited practice of law for purposes of closing transactions. Since the *Great Western* case, this Court has further clarified the situation by ruling that unlicensed lay persons can select and prepare legal documents so long as they do not exercise any legal discretion.[4]

There has never been any contention that the Court's authority to regulate in the IOLTA arena stems from any authority other than to regulate the practice of law. Given that fact, as an initial matter LPO RPC 1.12A is impermissibly broad. It states in part, "For all transactions in which a limited practice officer...or a lawyer has selected, prepared, or completed documents, the limited practice officer must insure that all funds received by the closing firm...are held and maintained as set forth in this rule."[5] IOLTA should only apply to those transactions that involve the actual practice of law; however, the provision fails to make this distinction and requires IOLTA compliance even where the LPO is not engaged in the limited practice of law. This is exactly the separation of powers problem the Supreme Court highlighted when it initially rejected APR 12.1. Writing for the Court, Justice Durham explained that APR 12.1 must only apply in those situations where the employed LPO is actually "engaged in the practice of law." Otherwise, Justice Durham warned, the judiciary might "usurp the legislative function of regulating escrow and title companies, banks, and financial institutions."

Now, in its attempt to close an apparent "loophole" which was itself required by this Court before it would approve APR 12.1 – the bar's recommendation seeks to impose IOLTA requirements on escrow and title companies regardless of whether LPOs (or any other employees, for that matter) are engaged in the practice of law. The bar has again asked this Court to impermissibly regulate the escrow accounts of escrow and title companies in order to fund legal services, an *ultra vires* effort notwithstanding the laudable goal of IOLTA.

Likewise, if IOLTA is to be applied to the services rendered by LPOs during closings, it should only apply to those transactions in which LPOs perform the types of

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[2] *Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n.*, 91 Wn.2d 48, 50 (1978) (holding that lay person who modified legal documents while closing both the loan and sale engaged in unauthorized practice of law).

[3] *Hagan & Van Camp, P.S. v. Kassler Escrow, Inc.*, 96 Wn.2d 443 (1981) (holding that practice of law is determined by the nature and character of the service rendered).

[4] *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93 (1999) (distinguishing practice of law from the unauthorized practice of law).

[5] Proposed LPO RPC 1.12A(a).

legal services that an unlicensed layperson would not be authorized to perform. In the vast majority of closings, LPOs only engage in the practice of law by entering objective data into pre-prepared documents. Under this Court's ruling in *Perkins*,[6] lay persons may perform these actions without violating the unauthorized practice of law, and therefore are impliedly outside of this Court's regulatory authority. Moreover, it is illogical to force a closing firm to comply with IOLTA merely because an LPO performs actions that any other employee could perform, licensed or not. It is doubly illogical to force employee LPOs to assure their employers meet the requirement under those circumstances.

The proposed changes take the court beyond its legitimate authority and enhance the already significant problems with the IOLTA program. For these reasons, the undersigned encourage the Court to reject the proposals.

II. IOLTA's Questionable Foundation.

The proposed changes to IOLTA cannot be properly evaluated without exploring and understanding the underlying problems Washington's IOLTA program already faces. The proposed changes amount to new construction on an already ponderous structure built upon a foundation of sand. Some of IOLTA's difficulties are manifest, some subtle, but together they present a precarious vehicle that the proposed changes would only further imperil.

A Violation of Free Speech

In addition to the apples-oranges application of IOLTA to LPO services, we believe that Washington's IOLTA program suffers deeper, more troubling defects. Foremost, Washington's IOLTA program violates both federal and state constitutional protections against compelled speech. This pernicious development has been foretold in earlier decisions on the program.[7] Client funds deposited into Washington's IOLTA accounts are used by the state to fund legal services for the indigent as well as political and lobbying activities.[8] However, this hasn't always been the case.

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[6] *Perkins*, 137 Wn.2d at 105-106.

[7] *See, e.g., Brown v. Legal Foundation of Washington*, 538 U.S. 216, 253 (2003) (IOLTA likely violates First Amendment despite assurances to Court that its funds were not being used to finance political activities); *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624 (W.D. Tex. 2000) (*overruled on other grounds*) (Texas IOLTA program does not violate First Amendment where funds are not used to fund political activities); Dissent to Order on Rules, Washington Supreme Court, No. 25700-A-851 (July 10, 2006), at 2 (Justice Johnson commenting that Washington's IOLTA program likely violates both federal and state prohibitions against compelled speech).

[8] *See, e.g.,* Dissent to Order on Rules, Washington Supreme Court, No. 25700-A-851 (July 10, 2006).

The potential misuse of public funds for political purposes has long been a concern in Olympia. In the mid 1990s, the Washington Legislature wanted to increase funding for indigent legal services, but was concerned that those public funds could be used for political or lobbying purposes. In 1996, after significant debate (and assurances from Columbia Legal Services [CLS] – which receives IOLTA funds from the Legal Foundation of Washington – that it would never use public funds to engage in political activities) the Legislature reached a compromise and enacted legislation controlling the use of state funds for legal services, now codified at RCW 2.53.030. This statute enables public funds raised through grants from the state general fund to be used for indigent legal services, but prohibits such funds from being used for, among other things, political activities like lobbying.

Prior to 2004, CLS accepted public funds through the federal and state grant system as well as IOLTA. However, beginning in July, 2004, CLS decided that it would no longer apply for federal or state grants and took the position that it was now free to use public funds from IOLTA to engage in legislative advocacy, lobbying, and other political activities. In other words, CLS seeks to avoid the legislature's express prohibition against the use of public funds for political activities by accepting public funds generated by the judiciary.

It is well established that public funds generally cannot be used to finance political speech.[9] Indeed, even strident supporters of IOLTA concede that IOLTA funds must not be used to engage in political activities like lobbying.[10] Although the U.S. Supreme Court has not yet decided the issue of whether IOLTA programs violate the First Amendment, past decisions portend that it would find Washington's current IOLTA program unconstitutional. The only federal court to address this issue concluded that the IOLTA program in question did not violate the First Amendment because the public funds were not being used for lobbying or attempting to influence legislation.[11] There is strong indication that the Supreme Court would agree with this approach and find IOLTA programs that use public funds for political activities to be unconstitutional. For example, in *Brown v. Legal Foundation of Washington*,[12] the parties assured the Court that the IOLTA fund would be used for indigent legal services and not for political activities. Nevertheless, Justice Kennedy commented in his dissent:

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[9] *Abood v. Detroit Brd. of Ed.*, 431 U.S. 209, 234-235 (1977); *see also Keller v. State Bar of California*, 496 U.S. 1 (1990) (use of bar dues to finance political or ideological activities with which members disagree violates First Amendment).

[10] *E.g.,* Hillary A. Webber, *Equal Justice Under the Law: Why IOLTA Programs Do Not Violate the First Amendment*, 53 Am. U. L. Rev. 491, 528 (2003).

[11] *Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 86 F. Supp. 2d 624 (W.D. Tex. 2000) *overruled on other grounds, Wash. Legal Found. v. Tex. Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001), *judgment vacated by, Phillips v. Wash. Legal Found.*, 538 U.S. 942 (2003).

[12] *Brown*, 538 U.S. at 253.

> "The First Amendment consequences of the State's action have not been addressed in this case, but the potential for a serious violation is there. . . One constitutional violation (the taking of property) likely will lead to another (compelled speech)."

Further, at least three Washington Supreme Court justices have concluded that Washington's IOLTA program likely violates both federal and state constitutional protections for free speech. In 2006, the Supreme Court rejected an attempt by the Washington Farm Bureau to limit IOLTA funds from being used for political activities. In dissent to the rulemaking decision, Justice J.M. Johnson wrote that "our IOLTA system will likely be ruled an unconstitutional violation of the First Amendment."[13] The dissent continued:

> Because the Washington Constitution has stronger protection for free speech values and stronger prohibition on taking property, it should go without saying that this program is also problematic under our Washington Constitution.[14]

These same concerns related to political speech apply to commercial speech, and the right to conduct contractual affairs without undue restriction from the courts. Accordingly, adopting the proposed changes to the LPO rules would only exacerbate an already problematic situation.

Impermissible Takings

Washington's IOLTA program is also significantly vulnerable to a takings claim. In *Brown*, the U.S. Supreme Court unanimously held that the seizure of client interest through Washington's IOLTA program constituted a taking under the Fifth Amendment, but that no compensation was required because the takings were too small.[15] However, Justice Johnson of this Court has noted: "Of course, this is only correct if we assume all trust funds must be in segregated, separate accounts. For if the funds are aggregated, as they are in IOLTA accounts, there is certainly a net gain of client interest – currently about $7 million per year."[16]

Of course, lawyers can place client funds into pooled accounts that generate interest on behalf of their clients. Indeed, Washington's IOLTA provisions regarding client reimbursement are clear, if rarely enforced by the bar: lawyers must place client funds into interest bearing accounts, and the interest generated on these accounts must

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[13] Dissent to Order on Rules, Washington Supreme Court, No. 25700-A-851 at 2.
[14] *Id.*, at 9.
[15] *Id.* at 4.
[16] *Id.* at 7.

be given to the client, unless the administrative costs of managing those accounts exceeds the interest generated. RPC 1.15A. This rule emphasizes the otherwise obvious fact that the lawyer's fiduciary duty to his client is stronger than his duty to place client funds into IOLTA accounts. Unfortunately, the bar's current practice of auditing lawyer trust accounts focuses only on whether or not lawyers are placing client funds into IOLTA accounts, as opposed to placing client interests above the bar's by ensuring clients are receiving the benefit of their own funds whenever possible. The current audit system emphasizes the inappropriate nature of expanded IOLTA schemes for financing otherwise legitimate equal access to justice programs – the bar now sees the program not as a fallback to the original duty to the client, but rather primarily as a fund raising vehicle without regard to client obligations.[17]

Because IOLTA accounts can only be used in those situations where client funds cannot generate interest for the client, lawyers arguably have an ethical and fiduciary duty to affirmatively investigate banking options that enable clients to profitably generate interest. In fact, many – if not all – banks now offer sweep and sub-account products that enable cost-effective sub-accounting on pooled accounts where interest can be calculated daily. Such products could generate profitable interest on small amount or short-term deposits, which interest net administrative costs must be paid to the clients. Failure to take advantage of these accounts not only potentially violates RPC 1.15A, but the client can rightly complain that the attorney is using his money to generate profit (which, under IOLTA, is frequently paid to other attorneys to advance issues wholly unrelated to the client's interests). On account of technology, consequently, the line between client funds and IOLTA funds is far hazier than it once was, and the problem of an improper taking looms larger over the program.

Further, there is reason to believe that IOLTA programs constitute a taking under Article IV of our state constitution. The same state justices quoted above questioning the *Brown* Court's rationale also noted that Washington's constitution has a "stronger prohibition on taking property." Moreover, these justices also noted that "we have yet to reconsider the IOLTA rule in light of our limited judicial power bestowed by Article IV of our state constitution, which does not include the power of eminent domain."

Finally, on a more fundamental level, there is a real question as to whether the judiciary has constitutional authority to raise revenue from the public's use of legal services. Certainly, courts do not have the power to tax – this power is vested in the legislature.[18] IOLTA is an enforced contribution that raises revenue for public purposes,

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[17] At a minimum, prior to any expansion of the IOLTA program, this Court should emphasize that the lawyer's primary fiduciary duty is to his client, and direct the bar to ensure through the auditing process that lawyers are only placing funds into IOLTA accounts when those funds could not generate interest for the client's benefit.

[18] *See* Tony Mauro, *IOLTA Opponents Receive Grilling*, Conn. L. Trib., Dec. 16, 2002, at 13 (quoting Justice Scalia at oral argument: "Courts have the power to tax?")

and therefore it effectively functions as a tax, despite its judicial, rather than legislative, origination.[19] Furthermore, any showing that IOLTA is actually a tax invites the additional claim that it is an impermissibly selective tax: it targets only certain users of legal services.

These evident problems with the application of IOLTA requirements to actual attorneys holding funds incident to the provision of legal services are only amplified by the extension to LPOs performing tasks that typically do not even amount to the limited practice of law adjunct to their employers' contractual agreements with clients. The Court's further interference with the contracting process can only enhance the grave taking issues IOLTA already faces.

Further expansion of IOLTA requirements beyond the Court's established regulatory sphere – the licensed practice of law and the attorney-client relationship – can only imperil a laudable device that already suffers from potentially fatal flaws. We feel it is better for our clients, the Court, and IOLTA users themselves if these issues are addressed and remedied through the appropriate venue – the legislature – rather than through judicial regulation that would lead inevitably to litigation and could undermine the entire IOLTA program. It is our earnest and jointly held desire to continue supporting indigent legal services. However, this noble undertaking should and must be accomplished in a way that is constitutionally sound; the proposed amendments are not.

Respectfully submitted,

STAFFORD FREY COOPER

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[19] "[T]he question whether a particular contribution or charge is to be regarded as a tax depends upon its real nature. If it is in the nature of a tax, it is not material that it may be called a different name...." Rev. Rul. 57-345, 1957-2 C.B. 132-33. *See also* Tarra Morris, *The Dog in the Manger: the First Twenty-Five Years of War on IOLTA*, 49 St. Louis U. L.J. 605, 625-626 (2005) (concluding that IOLTA "effectively functions as a tax" and noting "the likely success of such a challenge.").

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