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10 **IN THE SUPREME COURT**  
11 **STATE OF ARIZONA**

12  
13 In the Matter of  
14 **PETITION TO AMEND RULES 43,**  
15 **44, 46-48, 53-58, 60, 61, 64, 70-72, 75**

Supreme Court No. R-06-0035

**COMMENTS OF THE  
ARIZONA FOUNDATION  
FOR LEGAL SERVICES AND  
EDUCATION**

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17 Pursuant to Ariz. Sup. Ct. R. 28(D), and through its undersigned Directors,  
18 the Arizona Foundation for Legal Services and Education (“the Foundation”)  
19 responds to the above-referenced Petition related to lawyer discipline, including  
20 the administration of trust accounts, as submitted by the State Bar on November  
21 1, 2006. The Foundation is authorized by Rule to administer the interest on  
22 lawyers’ trust accounts (“IOLTA”) program, and to use the IOLTA interest  
23 generated by pooled client money to fund legal services for the poor, law-related  
24 education and other programs related to the administration of justice. The  
25 Foundation believes that the proposed changes to Rule 43 of this Court require  
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1 clarifying language to better guide Arizona lawyers in their responsibilities to the  
2 IOLTA program and to insulate the IOLTA program from legal challenges. The  
3 Foundation's proposed clarification is attached as Appendix A.

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5 A. Overview of the IOLTA Program

6 In 2006 the interest generated from IOLTA accounts provided more than  
7 two million dollars for use in access to justice programs. Arizona's IOLTA  
8 program was established through Court rules, and existing Ariz. Sup. Ct. R. 44  
9 allocates the accrued interest to the Foundation and directs the Foundation to  
10 expend the interest on legal services for the indigent, law-related education, the  
11 administration of justice generally, and the specific administration of the IOLTA  
12 program. Ariz. Sup. Ct. R. 44(c)(2) and (5). A 2004 petition amended Rule 44,  
13 effective June 1, 2005, to delegate joint authority to the State Bar and the  
14 Foundation to approve the list of financial institutions that may participate in the  
15 IOLTA program. Arizona's Rule requires that lawyers deposit client funds in  
16 pooled trust accounts unless the expected interest generated from individual client  
17 funds is more than nominal in amount.

18 Entities and individuals opposed to the use of pooled interest to provide  
19 access to justice for the disadvantaged have challenged IOLTA programs in  
20 several states. Most challenges have focused on takings jurisprudence, and have  
21 argued that the actions of State Bars and Bar Foundations result in the  
22 confiscation of client property, that is, the interest expected to be earned on the  
23 accounts. The United States Supreme Court rejected these challenges in a  
24 detailed 2003 opinion in Brown v. Legal Foundation of Washington, 538 U.S.  
25 216, 238-39 (2003). In Brown, the Court held that IOLTA programs do not  
26 violate the "just compensation" clause provided the program rules require that

1 client funds expected to produce “net” interest (in excess of the costs to produce  
2 the interest) are deposited into a separate account for the benefit of the client.

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4 To recapitulate: It is neither unethical nor illegal for  
5 lawyers to deposit their clients' funds in a single bank  
6 account. A state law that requires client funds that could  
7 not otherwise generate net earnings for the client to be  
8 deposited in an IOLTA account is not a “regulatory  
9 taking.” A law that requires that the interest on those  
10 funds be transferred to a different owner for a legitimate  
11 public use, however, could be a *per se* taking requiring  
12 the payment of “just compensation” to the client.  
13 Because that compensation is measured by the owner's  
14 pecuniary loss -- which is zero whenever the Washington  
15 law is obeyed -- there has been no violation of the Just  
16 Compensation Clause of the Fifth Amendment in this  
17 case.

18 Id. at 240.

19 The Court relied on Washington state court decisions in determining that  
20 Washington’s IOLTA program already used a “net earnings” standard. Arizona’s  
21 Rule infers that lawyers set up individual accounts only when net earnings would  
22 result for the client, Ariz. R. Sup. Ct. 44(c)(3)(A), but the Rule’s suggestion in  
23 Arizona is not reinforced by any case law, and the Rule continues to use  
24 “nominal” rather than “net” to describe the triggering amount of interest. Since  
25 the Brown decision many states in similar positions as Arizona have amended  
26 their IOLTA rules to remove references to “nominal” and/or to add references to  
“net interest”, in order to more fully guide lawyers in making the determination as  
to when funds should be expected to earn net income in excess of the  
administrative and other costs needed to produce the income. See, e.g. Ind.  
R.P.C. 1.15(f); Mich. R.P.C. 1.15(e); Miss. R.P.C. 1.15(g); Ohio R.P.C. 1.15,

1 comment 3A; Ore. R.P.C. 1.15-2(d); S. Car. App. Ct. R. 412(d); and Wisc. Sup.  
2 Ct. R. 20:1.15(c)(3). The pending Petition presents the first meaningful  
3 opportunity, after the development of model language, for Arizona to consider a  
4 change to conform with its sister states.

5 **B. The State Bar’s Rule Change Petition**

6 The State Bar’s Petition does not propose to change the substance of the  
7 IOLTA program, and generally repackages the IOLTA provisions of existing  
8 Rule 44 into a modified Rule 43. The Petition nonetheless affords the Foundation  
9 and this Court the opportunity to clarify the IOLTA program requirements to  
10 ensure compliance with the decision in Brown. Accordingly, the Foundation  
11 participated in the notice and comment process outlined by the State Bar in its  
12 Petition. (Pet. at 2-3.) In particular, the Foundation submitted the clarifying  
13 language in Appendix A. Following the submission, and based on conversations  
14 between Foundation and State Bar staff, the Foundation anticipated that its  
15 submission would be adopted, but it was not included in the final Petition. By all  
16 appearances, the Foundation’s language was inadvertently dropped from the  
17 Petition, but because the State Bar did not submit the final product to the  
18 Foundation or its membership prior to filing the Petition, the Foundation was  
19 unable to file a Petition of its own before the deadline, and therefore must rely on  
20 this Response as a means of protecting the IOLTA program.

21 **C. The Need to Conform the Rule to the Decision in Brown**

22 The suggested language in Appendix A removes the reference to “nominal”  
23 interest in proposed Rule 43(f)(2) and replaces it with the concept of “net”  
24 interest, exclusive of the costs to produce that interest. The suggested language  
25 also replaces the three-pronged guidance for lawyers seeking to deposit client  
26 funds in proposed Rule 43(f)(4), and replaces it with a broader six-pronged

1 guidance which more fully takes into account the factors that lawyers should  
2 consider, to include the amount of the funds deposited, the expected duration of  
3 the deposit, the anticipated rate of return and the considerable administrative and  
4 clerical expenses that a lawyer's office may incur in setting up and maintaining a  
5 separate client trust account. The American Bar Association's Commission on  
6 IOLTA recommends this language, and Michigan, Mississippi, Ohio, Oregon and  
7 South Carolina all use substantially similar language in their Rules. The  
8 Foundation urges the Court to adopt its clarifying language in the pending  
9 Petition.

10 D. Conclusion

11 The IOLTA program is essential to the provision of legal services to the  
12 poor and for other important education-related aspirations of bench and bar. In  
13 order to better guide lawyers on how and where to safeguard client funds, and in  
14 order to fully adhere to Supreme Court precedent, the Foundation respectfully  
15 requests that this Court include the attached clarifying language if it approves the  
16 State Bar's Petition.

17 RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of May, 2007.

18  
19 ARIZONA FOUNDATION FOR LEGAL  
SERVICES AND EDUCATION

20 s/ Gary Restaino

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