March 2, 2020

The Honorable Leigh I. Saufley
Chief Justice
Maine Supreme Judicial Court
205 Newbury Street
Portland, ME 04101-4125

Dear Chief Justice Saufley and Justices of the Maine Supreme Judicial Court,

I am writing you after attending this morning's public hearing on the proposed amendment to the Maine Bar Rules regarding the use of IOLTA funds for lobbying.

Although I am not an attorney, my familiarity with IOLTA funds and legal services goes back more than 20 years to my experiences as the Director of Membership Services for the North Carolina Bar Association (the state's voluntary bar) and having been the staff person responsible for its first Solo and Small Firm Resource Center. In that capacity, I worked to recruit attorneys to participate in the legal services programs of our sister organization, the North Carolina Bar Foundation. Although the structure of the bar in Maine differs slightly from that (at the time) in North Carolina, I remain aware of the critical importance of IOLTA funds in providing legal services to those who cannot afford an attorney.

I also have a particular interest in this rule because of my experience representing the Maine Department of Labor in front of the Legislature for three years and my current role as a registered lobbyist with Maine People Before Politics.

Maine People Before Politics supports the minority reports and the testimony of those who spoke in opposition to the majority report this morning.

Our organization writes this letter after reflecting upon the report's findings and the arguments this morning. Some of the arguments were practical considerations, others legal. Maine People Before Politics respectfully offers the following observations based on our experiences and also our mission, which is "to promote and advance policies that benefit the people of Maine by creating an environment conducive to job growth, with the intent of ultimately fueling Maine's economy, to conduct research and educate the public about issues related to economic growth, and to provide a voice for the people of Maine free of special interests."

First, as a person who has managed a number of nonprofits in my career and who has served on the boards of nonprofits, managing restricted funds is a common, everyday task as well as a mandatory IRS requirement. Cultural organizations, educational organizations, and virtually all nonprofits must manage restrictions whether in the form of a donor-restriction or restrictions placed by the terms of a grant. Restrictions on the use of IOLTA funds are not unreasonable for a well-run 501(c)3 organization. The report states, "Adding restrictions on what IOLTA cannot be used for will add additional administrative and accounting burden,"

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however, when using public funds, the utmost care must be taken to be accountable for those funds and their uses. Accepting the funds means accepting that burden.

Second, it was argued this morning that no one is compelled to hire an attorney on retainer, and therefore this is not compelled speech. This radically understates how people frequently hire attorneys, especially those who have not previously engaged counsel. People hire attorneys because of a looming or immediate legal issue requiring expertise outside one's general or business knowledge. Certain circumstances (e.g., time, limited knowledge of legal processes, specialty requirements) often compel individuals or businesses to hire attorneys by referral, and the attorney and client may not have a previous personal or professional relationship that gives context to the reasons an attorney may request a retainer. An individual in need of legal representation may not have the time or the desire to continue to look for legal assistance or may not understand fully any available options for contracting with an attorney. To argue that people are not "compelled" to hire on retainer so therefore any interest earned by those funds is free from restrictions does not reflect how clients hire attorneys. Such clients are even less likely to understand what happens to the interest on the funds held by an attorney. That does not mean that one should dismiss consideration for their views about how IOLTA funds may be used.

Furthermore, since interest has been determined to be property as noted in the majority report, the taking of such property to be redistributed to others is certainly a tax. In this case, one may see this tax as a separation of powers issue, in that the Judicial Branch is using its authority to take the property—the interest—to redistribute it for purposes deemed to be in the public interest. The provision of legal services to indigent individuals is certainly in the public interest, as those legal services are provided under and are adjudicated to the standards of existing statute. In those cases, the Legislature has established the standard for the public interest. Yet in the case of lobbying, the Judiciary is directly authorizing the use of funds to influence the Legislature. One may argue that the Judiciary is not dictating the policy position of the lobbying entities, however, given the lobbyists' historic track record and their public positions on issues, a member of the public could infer that the Judiciary supports the policy positions of those agencies.

Because there are limited policy restraints on the use of the lobbying funds, the recipients of IOLTA funds have the leeway to determine the "public interest." In some cases, IOLTA funding may even be used at cross-purposes, with one legal services entity lobbying in opposition to another (although likely rare, it is possible). Where there are limited funds and competing interests, public dollars must go to the highest and best use.

It was argued this morning that the information legal services entities provide to the Legislature is valuable. It is. However, the restriction of IOLTA monies in no way prohibits the Legislature from requesting or receiving such information. Neither does the restriction of IOLTA monies prevent any legal services' attorney who finds a systemic problem from bringing that to the attention of his or her local legislator, a legislative committee or the agency of jurisdiction. Indeed, it would seem to go against the interest of the

legal services entity, whether it receives IOLTA funds, not to bring any systemic flaw to the attention of the legislature or the agency.

Maine People Before Politics does not use IOLTA funds to support its lobbying efforts. We raise funds from private donors. We may lobby on the same side as legal services entities on any given policy issue but because we do not provide legal aid, we are restricted from accessing IOLTA funds. This seems to set a standard that by virtue of providing legal services, one organization is more worthy of public funding for its lobbying. This is an unequal playing field.

As a parent, I often remind my children, "Just because you *can* do something, does not mean you *should*." The majority report justifies its conclusion with "cans": Lobbying is legal work, it is consistent with federal law and IOLTA's purpose, the Legislature finds it useful, Maine is not an outlier, and the agencies need the money. None of those, in my reading of the report, justify overriding the real free speech, separation of powers, appearance of a conflict of interest, and level playing field issues raised in the hearing this morning and in the minority reports.

If all lobbying efforts are privately funded, then there can be no question of the Judiciary, through its distribution of IOLTA funds, privileging one policy position or one lobbyist over another. The Judiciary should prioritize access to the courts and legal advice over all other potential IOTLA uses; in that way, there can be no question as to the promotion of certain policy or political advocacy organizations over others.

There should be a bright line for the use of these funds. Active Retired Justice Robert W. Clifford's report sets such a line, prohibiting IOLTA funds from being expended to provide direct or indirect support for political or ideological activities, including:

(A) supporting or opposing candidates for elective office;
(B) supporting or opposing ballot initiatives or referenda;
(C) lobbying in support of or in opposition to pending or proposed legislation;
(D) seeking public support through the media, including social media, to support or oppose legislation, ballot initiatives or referenda, or candidates for elective office; or
(E) voter registration, voter education, voter signature gathering, or get-out-the-vote actions.

This is the right policy position for the use of IOLTA funds in Maine.

Sincerely,

Julie Dumont Rabinowitz
Director of Policy and Communication