

## Breakout Session B: Opportunities for IOLTA Programs Without Rate Comparability

2:45 p.m. – 4:15 p.m. – Breakout Session

Feb. 12, 2009



### Session Leader:

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## Breakout Session B: Opportunities for Programs Without Rate Comparability in Place

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### Topics:

- 1) Negotiate with banks to pay higher rates
- 2) Plan & implement rate comparability
- 3) Establish a voluntary benchmark rate
- 4) Convert to mandatory IOLTA
- 5) Manage the ebbs and flows of IOLTA revenue

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## **Opportunities for Gearing Up –**

### **1. Negotiate w/ banks to pay higher rates**

- ◆ **Negotiation seeks to:**
  - Increase IOLTA revenues
  - Strengthen relationships & build partnerships
  - Provide something in return, usually by promoting the banks in creative ways

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## **Opportunities for Gearing Up –**

### **1. Negotiate w/ banks to pay higher rates**

- ◆ **Methods include:**
  - **General solicitation letters**, followed by telephone calls
  - **Face-to-face meetings:**
    - ◆ Using Board members, lawyers or other key contacts as negotiators
    - ◆ It's harder for banks to say "no" in person
  - **A specific rate request, based upon:**
    - ◆ What other "leadership" banks are paying or
    - ◆ What rate comparability would require, if it were in place or could be...
    - ◆ A flat-rate request or a rate that floats, for ex., with the Federal Funds Rate

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## **Opportunities for Gearing Up –** **1. Negotiate w/ banks to pay higher rates**

- ◆ **Methods include (cont.)...**
  - **An offer or incentive:**
    - ◆ Inclusion on Honor Roll
    - ◆ Invitation to annual gala for recognition
    - ◆ Marketing & promotion such as TX “Prime Partner”
      - Highly attractive to some banks competing to keep, attract lawyer/law firm customers
      - Builds bank’s reputation as good corp. citizen
      - Builds familiarity & partnerships
- ◆ **Programs reporting some success in past year:**
  - Arizona, Georgia, Idaho, Minn., N. Carolina, Nebraska, Nevada, NY, S. Carolina, Washington

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## **Opportunities for Gearing Up –** **2. Plan & implement rate comparability**

- ◆ **IOLTA interest rate comparability seeks:**
  - **Fairness** in IOLTA & non-IOLTA rates (& fees)
  - **Increased IOLTA revenues:**
    - ◆ 2-5 times previous levels
  - **Authority** to determine if banks are complying & eligible to participate in IOLTA
  - **Additional info** on balances, rate, fees, etc.

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## **Opportunities for Gearing Up –** **2. Plan & implement rate comparability**

- ◆ **Methods include:**
  - **1. Feasibility study** – Does it make sense for your program?
    - ◆ **How much revenue gain is likely?**
      - Timing matters:
        - ◆ Implementation not advisable when rate environment is so low, but...
        - ◆ Now is a great time to plan campaign
    - ◆ **2. Gauging support** – Is there support among board, state bar, court, or with legislature & governor (if applicable)?

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## **Opportunities for Gearing Up –** **2. Plan & implement rate comparability**

- ◆ **Methods include:**
  - **3. Development of IOLTA rule revisions**
    - ◆ **Team approach:**
      - Ex Dir, Board, Ct Liaison, Office of Lawyer Reg.
      - ABA Technical Assistance Committee
      - Outside help, as desired
      - Once submitted, public comment could include feedback or negotiations w/ bankers assoc.
    - ◆ **It takes time to get rule/statute changed:**
      - May take a few months up to a year or more
      - The crisis provides a rationale for your “case”
        - ◆ When other rates rise, history shows that IOLTA rates will not w/o comparability

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## ***Opportunities for Gearing Up – 2. Plan & implement rate comparability***

- ◆ **Methods include:**
  - **4. Notification to banks** (new rule), attorneys (no action required)
  - **5. Implementation mailing:**
    - ◆ Request for bank's rate & fee info and plan, if known at that time
  - **6. Verify compliance, bank-by-bank:**
    - ◆ Review responses
    - ◆ Use independent rate & fee data
    - ◆ Other tools, forms, & data mgt required
    - ◆ May require addtl staff support or outside help

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## ***Opportunities for Gearing Up – 3. Establish a voluntary benchmark rate***

- ◆ **Use of benchmark rate (a.k.a. safe harbor rate) seeks to:**
  - **Align banks with the fairness principle** underlying rate comparability – "Pay us at least as much as you pay your non-IOLTA customers."
  - **Simplify administration for banks & IOLTA** by defining a single rate that complies with the rule (expressed as a % of the Federal Funds Target Rate)

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## **Opportunities for Gearing Up –**

### **3. Establish a voluntary benchmark rate**

- ◆ Can be used by programs without rate comparability as a basis for negotiation w/ banks:
  - ◆ **South Carolina & Virginia** are examples
  - ◆ **New York & California** are examples of programs that tried this with some success
    - And used the experience as evidence that comparability indeed was necessary to achieve for true fairness

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## **Opportunities for Gearing Up –**

### **3. Establish a voluntary benchmark rate**

- ◆ **Method for establishing:**
  - 1. **Analyze bank remittance data** of 5-10 biggest banks (holding majority of IOLTA balances) to determine net yield for each
  - 2. **Obtain independent rate & fee info** to determine what banks pay non-IOLTA customers & apply this info to remittance data to determine “comparable” net yield
    - ◆ Step 2 minus Step 1 (above) = Likely revenue gain
  - 3. **Set benchmark rate** at level that closely approximates comparability for biggest banks & express as % of the Federal Funds Target Rate

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## **Opportunities for Gearing Up –**

### **3. Establish a voluntary benchmark rate**

- ◆ **Special focus for “comparability” programs: Revising the benchmark rate...**
  - At least 17 “comparability” states have a benchmark rate & virtually all are considering a revision
- ◆ **Perceived problem:**
  - Fed Rate is at historically low level & a range (0.00% - 0.25%), raising uncertainty about how to apply the benchmark
  - Very low yield:
    - ◆ Ex.: 0.25% X 70% benchmark = 0.175%

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## **Opportunities for Gearing Up –**

### **3. Establish a voluntary benchmark rate**

- ◆ **Perceived solution:**
  - Set a “floor” rate:
    - ◆ Examples: Maryland, Massachusetts, Missouri & Texas (see “Benchmark Rates” handout)
    - ◆ Risk/reward:
      - Reward – Might gain additional revenue
      - Risk – Banks might opt out of benchmark & pay even less now (& in future)
    - ◆ Raises questions about whether a strong reserve policy might be a better approach

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## **Opportunities for Gearing Up – 4. Convert to mandatory IOLTA**

- ◆ **Relevance:**
  - 38 states have mandatory IOLTA
  - 12 opt out
  - 2 voluntary
- ◆ **Seeks to:**
  - Require that all lawyers participate in IOLTA
  - Increase IOLTA revenues
  - Bolster rate comparability, which would be devalued w/o mandatory IOLTA

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## **Opportunities for Gearing Up – 4. Convert to mandatory IOLTA**

- ◆ **Estimate impact:**
  - ◆ **Determine # of attorneys in state**
  - ◆ **Estimate potential # of IOLTA accounts after conversion**
    - ABA Survey, 2006 – 15 states converted from Opt-out to Mandatory
    - Provides basis for estimating the number of IOLTA accounts
  - ◆ **Estimate total IOLTA Principal balances:**
    - Based on current avg. IOLTA principal balance in state multiplied by potential # of IOLTA accounts
      - ◆ Then multiply by IOLTA net yield to estimate revenue

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## **Opportunities for Gearing Up – 4. Convert to mandatory IOLTA**

- ◆ **Consider phased approach:**
  - 1. **Implement conversion to mandatory**
    - ◆ Plan outreach efforts & develop materials
    - ◆ Disseminate notification & certification materials
    - ◆ Follow up & educational outreach
      - w/ lawyers, the bar, CLE programs, banks, etc.
  - 2. **Implement rate comparability (if applicable)**
    - ◆ Rely on bank relationships developed during conversion to mandatory to aid in implementation of comparability

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## **Opportunities for Gearing Up – 5. Manage the ebbs & flows of IOLTA**

- ◆ **The Challenge:**
  - The “Boom & bust” cycle of IOLTA revenues & grant-making
    - ◆ Carries huge costs to legal aid programs, access to justice
- ◆ **Strategic opportunities:**
  - Grant Reserves
  - Multi-year grants
  - New revenue streams..
    - ◆ Cy pres awards
    - ◆ Filing-fee surcharge
    - ◆ Interest on title company trust accounts

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## **Opportunities for Gearing Up – 5. Manage the ebbs & flows of IOLTA**

- ◆ **Reserves** –Example from Louisiana IOLTA:
  - Reserve policy since 1999-2000
  - Sets aside 15% of net remittances quarterly
  - In 2003-04 downturn, suspended reserve policy
    - ◆ used all available funds for admin and grants
  - Now suspended policy again as of 4th quarter 2008
    - ◆ NOT tapping the reserves; just the quarterly input of funds to the reserves
    - ◆ Intent is reserve's principal not to decrease, although investment income can be drawn down
    - ◆ Any suspension of 15% allocation to reserves must be made up later, when feasible
    - ◆ \$3.5M of \$5M reserve is IOLTA funding

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## **Opportunities for Gearing Up – 5. Manage the ebbs & flows of IOLTA**

- ◆ **New revenue streams:**
  - Be open to opportunities that present themselves
  - Consider filing-fee surcharge as potential, stable source
  - Cy pres
    - ◆ 17 programs reported considering cy pres initiative
    - ◆ Legal aid grantees often a good fit for cy pres awards
    - ◆ Education campaign and/or change in rule or law
    - ◆ Plan now for how you would use such an award
    - ◆ South Carolina example:
      - \$650K cy pres award in 2007
      - Funded a LRAP & a grantee's facility

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## ***Opportunities for Gearing Up – 5. Manage the ebbs & flows of IOLTA***

- ◆ **New revenue streams:**
  - **Interest on title company trust accounts**
    - ◆ TX pursuing legislation
      - at least 6 states considering it
    - ◆ Ohio has a law, which applies to lawyers & non-lawyers alike; Washington State is similar
    - ◆ Florida & Connecticut differ in that lawyers often handle real estate, but law in those states does not apply to title cos.

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