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Iolta's Last Obstacle: *Washington Legal Found v. Massachusetts Bar Found.*'s Faulty Analysis of Attorneys' First Amendment Rights

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IOLTA'S* LAST OBSTACLE: *WASHINGTON LEGAL FOUND. V. MASSACHUSETTS BAR FOUND.*'S** FAULTY ANALYSIS OF ATTORNEYS' FIRST AMENDMENT RIGHTS

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INTRODUCTION

Thomas Jefferson once stated that "[t]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[1] These words ring just as true today. When the State compels individuals to support organizations which are contrary to their political or ideological views, it violates their constitutional rights.[2] Thus, due to the element of compulsion, mandatory Interest on Lawyers Trust Accounts programs (IOLTA) -- which require attorneys to use their clients' money to support various organizations[3] -- directly violate

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* In Massachusetts, the program is called IOLTA, Interest on Lawyers' Trust Accounts. Although other jurisdictions refer to this program as IOLA (Interest on Lawyers' Accounts) or IOTA (Interest on Trust Accounts), this Comment will use the Massachusetts terminology throughout.

** 993 F.2d 962 (1st Cir. 1993).

*** BLS Class of 1995. The author expresses gratitude for the assistance in the preparation of this Comment to BLS Professors Carol Ziegler and Jeffrey W. Stempel and to Note and Comment Editor Jordana Silverstein.

[1] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 n.31 (1977) (quoting I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948)).

[2] *See Washington Legal Found.*, 993 F.2d 962.

[3] IOLTA is a program through which client funds are placed in interest bearing accounts for the benefit of a state bar foundation to provide legal services to the needy persons of the community. Kenneth Paul Kreider, Note, *Florida's IOLTA Program Does Not "Take" Client Property for Public Use:*

attorneys' First Amendment rights. *Washington Legal Found. v. Massachusetts Bar Found.*[4] is the most recent case which examines the constitutionality of IOLTA programs. In *Washington Legal Found.*, attorneys and clients challenged the constitutionality of Massachusetts' mandatory IOLTA program.[5] The First Circuit held that Massachusetts' program did not compel "financial support" of IOLTA recipient organizations in violation of attorneys' First Amendment rights of freedom of speech and association.[6]

In reaching this conclusion, however, the First Circuit used faulty reasoning and failed to address serious concerns involving attorneys' First Amendment rights. This Comment will draw parallels to mandatory bar membership, labor union and government spending cases where members were compelled to contribute dues and/or taxes to support political and ideological activities. By comparing these cases to the case at issue, this Comment will show how attorneys' First Amendment rights and the right to hold employment regardless of political beliefs are fundamental rights. Through this analysis, this Comment will show that compulsory IOLTA programs that support activities against attorneys' political and ideological beliefs violate these fundamental rights.

I. HISTORY OF IOLTA

The purpose of IOLTA accounts is to give money to a worthwhile organization rather than to give an interest-free loan to a bank.[7] Before the implementation of IOLTA programs, the interest on clients' money, which was either nominal or held for a

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Cone v. State Bar of Florida, 57 U. CIN. L. REV. 369 (1988).

[4] 993 F.2d 962.

[5] *Id.* at 969-70; MASS. S.J.C. RULE 3:07, CODE OF PROF. RESP., DR 9-102(C) (1993).

[6] *Id.* at 967.

[7] Betsy Borden Johnson, Comment, *"With Liberty and Justice For All" IOLTA in Texas - The Texas Equal Access to Justice System*, 37 BAYLOR L. REV. 725, 725 (1985).

short period of time by an attorney, would be left with the bank.[8] In response to the decrease in public service funding over the past decade and the initiation of Negotiable Orders of Withdrawal (NOW) accounts,[9] courts, legislatures, and attorneys proposed IOLTA programs.[10] In jurisdictions which permit IOLTA programs, attorneys are required to segregate clients' funds into "trust accounts" unless they use the funds to reimburse previously rendered services or pay fees.[11] Subsequently, the bank must disburse the accrued interest from these funds to non-profit organizations specifically set up to receive the revenue.[12]

Although several foreign jurisdictions have used the interest on lawyers' trust accounts for public service projects since the 1960s, it was not until 1981 that a jurisdiction within the United States actually implemented an IOLTA plan.[13] In 1971, the organized bar of Florida initiated a study on the possible uses of interest in

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[8] *Id. See also* N.Y. JUD. §497 (1993). In New York, an attorney must deposit "qualified funds" in an IOLA account in a banking institution of his or her choice. "'Qualified funds' are moneys received by an attorney in a fiduciary capacity from a client or beneficial owner and which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner." N.Y. JUD. §497(2).

[9] *See In re* Interest on Trust Accounts, 356 So. 2d 799, 802 (Fla. 1978). NOW accounts apportion interest at a slightly lower rate than ordinary savings accounts and are comparable to checking accounts. *Id.*

[10] *Id.*

[11] *Id.* at 801. If clients' funds are not in clearly separate accounts from their attorneys, the attorneys may encounter ethical problems relating to commingling of funds. *Id.*

Note that all states, except for Indiana, now have some form of IOLTA program. *See In re* Public Law No. 154-1990, 561 N.E.2d 791 (Ind. 1990).

[12] Johnson, *supra* note 7, at 727.

[13] *Id.* at 730-31. Since the 1960's, IOLTA programs created in Australia, Canada, and parts of Africa channelled client trust funds into various law-related public purposes. *Id.*

clients' trust funds for public programs designed to improve the administration of justice.[14] After five years of research, Florida's Bar petitioned the Florida Supreme Court to approve a voluntary IOLTA program.[15] Then, in 1981, the Florida Supreme Court adopted the first IOLTA plan in the nation.[16] Florida's IOLTA concept spread rapidly because of the drastic need in the 1980s to improve America's legal system for the indigent.[17] Following its lead, 49 states and the District of Columbia have now ratified IOLTA programs, recognizing them as constitutionally and ethically permissible.[18]

Indiana stands alone in consistently refusing to accept IOLTA programs.[19] The Indiana Supreme Court has prohibited IOLTA programs on the ground that the programs are unconstitutional and

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[14] *See* Kreider, *supra* note 3, at 372-74. The Florida Bar Association encountered many obstacles when proposing an IOLTA program that the Florida Supreme Court would adopt. The Internal Revenue Service was concerned that an IOLTA program could become a breeding ground for yet unborn tax avoidance schemes. Attorneys complained that the IOLTA plan was unwise because the Bar Foundation would be the sole recipient of any earnings which are generated by the plan. The court was concerned that attorneys might violate the "taking" provisions of the federal Constitution when placing client funds in IOLTA accounts. Furthermore, the bar members vehemently objected to the possible conversion of the IOLTA program from a voluntary to a mandatory account. During all of the negotiations for proposing an acceptable IOLTA program, the Florida Supreme Court failed to address either clients' or attorneys' possible First Amendment claims which could flow from the introduction of an IOLTA account.

[15] Johnson, *supra* note 7, at 731.

[16] *Id.* at 731. *See In re* Interest on Trust Accounts, 402 So. 2d 389, 390 (Fla. 1981).

[17] Johnson, *supra* note 7, at 726.

[18] *See* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962, 968 (1st Cir. 1993).

[19] *See In re* Public Law No. 154-1990, 561 N.E.2d 791 (Ind. 1990); *In re* Indiana State Bar Ass'n's Petition to Authorize a Program Governing Interest on Lawyers' Trust Accounts, 550 N.E.2d 311 (Ind. 1990).

unethical.[20] Rejecting the Indiana bar's petition, the Indiana Supreme Court has maintained that the IOLTA program violates rules for discipline of attorneys and rules of professional conduct.[21] The court was especially concerned that the IOLTA program would be a vehicle for attorneys to commingle clients' funds, a problem already plaguing the Indiana legal community and the source of the greatest number of attorney disciplinary proceedings in the state.[22] In particular, the court focused on the lack of any requirement for disclosure to clients by participating attorneys.[23] Additionally, the Indiana Supreme Court feared that IOLTA accounts might induce attorneys to believe that they could satisfy their *pro bono* obligations when, in fact, they would simply be transferring wealth.[24]

While many states have modeled their IOLTA programs after Florida's, they have differed on whether their programs should be

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[20] *See In re* Indiana State Bar Ass'n's Petition, 550 N.E.2d at 313-16; *In re* Public Law No. 154-1990, 561 N.E.2d at 793-94.

However, note that the Committee on Ethics and Professional Responsibility has found nothing in the Model Code of Professional Responsibility that "prohibits a lawyer from participating in state-authorized programs . . . which use interest earned on bank accounts in which are deposited clients' funds, nominal in amount or to be held for short periods of time, providing for the interest to be paid to certain tax-exempt organizations." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 348 (1982).

[21] *In re* Indiana State Bar Ass'n's Petition, 440 N.E.2d at 313-316.

[22] *Id.* at 312.

[23] *Id.*

[24] *Id.* at 313. In contrast, the Indiana Supreme Court in *In re* Public Law No. 154-1990, 561 N.E.2d at 793-94, struck down the proposed IOLTA program because its immunity clause shielded attorneys from disciplinary action for participation in the statutory trust program. The court stated that, without the immunity clause, the remaining provisions of the Act could have no practical legal effect.

mandatory, voluntary or "opt-out."[25] In a voluntary program, participating attorneys open IOLTA accounts with their financial institutions and then inform the local bar foundation that the account has been established.[26] A non-participating attorney in a voluntary IOLTA program, however, may impute short-term and nominal amounts to non-interest bearing accounts.[27] In contrast, with an "opt-out" procedure, lawyers must exclude themselves during an annual opt-out period if they do not want to participate in the IOLTA program.[28] Finally, in a mandatory program, the state requires that all lawyers' trust funds earn interest either for the client or for the specified IOLTA organizations to which contributions are made.[29]

II. IOLTA TODAY: *WASHINGTON LEGAL FOUND. V. MASSACHUSETTS LEGAL FOUND.*[30]

In *Washington Legal Found.*,[31] attorneys and clients claimed that Massachusetts' mandatory IOLTA program violated their

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[25] As of September 15, 1991, 29 programs were voluntary, 12 were mandatory and 9 were "opt-out." Rachael Scovill Worthington, Comment, *IOTA - Overcoming Its Current Obstacles*, 18 STETSON L. REV. 415, 419-20 (1989); W. VA. CODE § 1.15(d)-(f) (1993) (voluntary program established by the court on November 29, 1989, effective January 1, 1990; changed to mandatory program by the court, on July 25, 1991, effective September 15, 1991).

[26] Worthington, *supra* note 25, at 419.

[27] *Id.*

[28] *Id.* at 420.

[29] *Id.* at 421.

[30] 993 F.2d 962 (1st Cir. 1993).

[31] *Id.*

constitutional rights.[32] The program that was at issue required

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[32] *Id.* at 969-970; MASS. S.J.C. RULE 3:07, CODE OF PROF. RESP., DR 9-102(C).

Massachusetts' IOLTA program is based on Rule 3:07 of the Massachusetts Supreme Court which states:

> Each lawyer who holds client funds shall deposit such funds, as appropriate, in one of two types of interest-bearing accounts: either a pooled account ("IOLTA account") for all client funds which in the judgment of the lawyer are nominal in amount, or are to be held for a short period of time, or an individual account with the interest payable as directed by the client for all other client funds; provided, however, that an account in the name of an attorney in a lending bank used exclusively for depositing and disbursing funds in connection with the bank's loan transactions ("conveyancing accounts") shall not be required but is permitted to be established as an IOLTA account. All IOLTA accounts shall be established in compliance with the following provisions:
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> (1) The IOLTA account shall be established with any bank, savings and loan association, or credit union authorized by Federal or State law to do business in Massachusetts and insured by the Federal Deposit Insurance Corporation or similar State insurance programs for State-chartered institutions. Funds in the IOLTA account shall be subject to withdrawal upon request and without delay . . .
> (4) This court shall appoint members of a permanent IOLTA Committee to fixed terms on a staggered basis. The representatives appointed to the committee shall oversee the operation of a comprehensive IOLTA program, including:
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> > (a) the receipt of all IOLTA funds and their disbursement, net of actual expenses, to the designated charitable entities, as follows: sixty-seven percent (67%) to the Massachusetts Legal Assistance Corporation and the remaining thirty-three percent (33%) to other designated charitable entities in such proportions as the Judicial Court may order . . .
>
> (5) The Massachusetts Legal Assistance Corporation and other designated charitable entities shall receive IOLTA funds from the IOLTA Committee and distribute such funds for approved purposes. The Massachusetts Legal Assistance Corporation may use IOLTA funds to further its corporate purpose and other designated charitable entities may use IOLTA funds either for (1) improving the administration of

lawyers or law firms to direct the banks holding their IOLTA accounts to disburse accrued interest to the IOLTA Committee.[33] After the IOLTA Committee receives the money, it must then disburse 67 percent of all IOLTA funds to Massachusetts Legal Assistance and the remaining 33 percent to "other designated charities."[34] Because Massachusetts' statute is compulsory, its IOLTA program has eliminated any choice attorneys have in designating the recipient of the interest that has accrued on their clients' accounts.[35]

Although the interest earned in an IOLTA account is the designated charity's property and not the attorney's,[36] the attorney does have standing to direct the interest.[37] The First Circuit applied *Whitmore v. Arkansas*' straightforward Article III approach to determine whether the attorney, in *Washington Legal Found.*, had standing.[38] Under *Whitmore*, litigants must first demonstrate that they have suffered an "injury in fact" to establish an Article III case or controversy.[39] Second, litigants must allege facts which

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justice or (2) delivering civil legal services to those who cannot afford them.

[33] MASS. S.J.C. RULE 3:07, CODE OF PROF. RESP., DR 9-102(C).

[34] *Id.*

[35] *See Washington Legal Found.*, 993 F.2d at 968.

[36] *See* Kreider, *supra* note 3, at 374.

[37] *Washington Legal Found.*, 993 F.2d at 971-72. *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541-542 (1986) (holding that standing requirements are most strictly enforced in cases where constitutional questions are presented).

[38] Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); *Washington Legal Found.*, 993 F.2d at 971-72.

[39] *Whitmore*, 495 U.S. at 155 (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975); O'Shea v. Littleton, 414 U.S. 488, 494 (1974), *vacated*, Spomer v. Littleton, 414 U.S. 514 (1974); Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983)). The Supreme Court has defined an "injury in fact" as an injury to one's

show that "the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'"[40] In *Washington Legal Found.*, the First Circuit held that attorneys have standing because the IOLTA Rule forces them to choose whether to practice law.[41] Since attorneys may be unable to practice law unless they follow this Rule, the First Circuit found that the attorney sufficiently alleged an "injury in fact" traceable to the IOLTA Rule which could be remedied by the relief requested.[42] Further, using the same approach, it found that the client also had standing.[43] Thus, it found that the attorney adequately proved that he had standing.

After holding that both the client and attorney have standing, the First Circuit applied a Fifth Amendment analysis.[44] By applying this test, the court found that clients do not have a constitutionally protected property right to exclude others from the beneficial use of their funds while those funds are deposited in

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self that is "distinct and palpable," as opposed to "abstract," and the alleged harm must be "actual or imminent," not "conjectural" or "hypothetical." *Id.*

[40] *Whitmore*, 495 U.S. at 155(quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41 (1976) and Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982)).

[41] 993 F.2d at 972.

[42] *Id.*

[43] *Id.* The First Circuit found that the client had standing to challenge the IOLTA Rule because she had stated an actual injury to herself which was traceable to the IOLTA Rule and could be remedied by the relief sought. Due to her business' use of lawyers, the client alleged standing to challenge the Rule on the ground that she had indirectly placed her funds in IOLTA accounts. She further claimed that the IOLTA Rule violated her First Amendment rights of free speech and association.

[44] *Id.* at 976.

IOLTA accounts.[45] In reaching its decision, the court found that the IOLTA program leaves the deposited funds untouched, the funds are always available to the clients, and the interest earned on IOLTA accounts is not the clients' property.[46] In short, clients do not have a constitutionally protected Fifth Amendment right because the mandatory IOLTA program does not occupy or invade their property.[47]

In determining whether the plaintiffs' First Amendment rights were abridged, the First Circuit articulated a two-part strict scrutiny test.[48] Under the first prong of this test, the court examined whether the IOLTA Rule burdens protected speech by "forcing expression through compelled support of organizations espousing ideologies or engaging in political activities."[49] If the court determined that free speech was burdened, it would next inquire whether the IOLTA Rule "serves compelling state interests through means narrowly tailored and germane to the state's interests."[50] In this case, the court came to a halt after the first step because it found that the plaintiffs did not adequately allege that the IOLTA Rule compels a connection between themselves and the recipient

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[45] *Id. See also* Cone v. State Bar of Fla., 819 F.2d 1002 (11th Cir.), *cert. denied*, 484 U.S. 917 (1987) (holding that clients do not have a property interest in the proceeds from an IOLTA account because they do not have a "legitimate expectation of interest").

For a further discussion on how courts have found that clients do not have a constitutionally protected property right in interest placed in IOLTA accounts, see *Cone*, 819 F.2d 1002; Kreider, *supra* note 3; Philip F. Downey, *"Attorneys' Trust Accounts: The Bar's Role in the Preservation of Client Property*, 49 OHIO ST. L.J. 275 (1988).

[46] *Washington Legal Found.*, 993 F.2d at 976.

[47] *Id.*

[48] *Id.* at 977.

[49] *Id.*

[50] *Id.*

organizations.[51]

III. IOLTA RULE BURDENS PROTECTED SPEECH

The First Circuit erred when it determined that Massachusetts' mandatory IOLTA Rule did not burden protected speech.[52] Because it specifically stated that Massachusetts' IOLTA Rule is compulsory for attorneys and that First Amendment rights may be burdened when individuals are compelled to support an organization engaging in activities contrary to their beliefs, the First Circuit should have found that the attorney's rights were violated by the IOLTA Rule.[53] Moreover, the First Circuit inadequately followed the Supreme Court's rulings in analogous cases involving First Amendment violations in areas such as union support,[54] bar membership[55] and the government's spending power.[56] The First Circuit adopted the Supreme Court's holding that, when constitutional issues are involved, employees shall not be required to finance activities against their beliefs as a condition of employment unless the contributions are used to regulate the legal profession.[57] However, while acknowledging that attorneys' current employment may be terminated in compulsory IOLTA jurisdictions when attorneys are forced to finance organizations with opposing viewpoints, the First Circuit ignored the Supreme Court's determi-

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[51] *Id.* at 979.

[52] *Id.*

[53] *Id.* at 976-78.

[54] *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. Brotherhood of Ry. Airline & S.S. Clerks, 466 U.S. 435 (1984).

[55] *See, e.g.*, Keller v. State Bar of Calif., 496 U.S. 1 (1990); Lathrop v. Donohue, 367 U.S. 820 (1961).

[56] *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968).

[57] *See Keller*, 496 U.S. 1; *Abood*, 431 U.S. 209; *Flast*, 392 U.S. 83.

nation that the opportunity to practice law is a "fundamental right".[58] The First Circuit also neglected to articulate circumstances in which the payment for dues to improve the quality of legal services would be political in nature or where the improvement of legal services would be dubious.[59] Furthermore, the First Circuit failed to address the government spending power cases which stress the importance of taxpayers' rights under the Establishment Clause.[60]

A. *Support of Organizations as a Condition of Employment*

After announcing that the IOLTA Rule is compulsory for attorneys, the First Circuit asserted that compelled support of an organization engaging in expressive activities *may* burden First Amendment rights.[61] The court then failed to show that the compulsory IOLTA plan did *not* violate attorneys' First Amendment rights.[62] Had the First Circuit relied on the union support cases which held that employees may not be compelled to engage in political and ideological activities to which they are opposed as a condition of their employment, it would have reached a different conclusion.[63] Instead, the First Circuit would have found that attorneys may not be compelled by IOLTA programs to participate in activities against their personal beliefs in order to practice law,

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[58] Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985); *see* Washington Legal Found. v. Massachusetts Bar Found., 993 F.2d 962 (1993).

[59] *See Washington Legal Found.*, 993 F.2d at 976.

[60] *See Flast*, 392 U.S. 83.

[61] *Washington Legal Found.*, at 976-78 (emphasis added).

[62] *Id.* (emphasis added).

[63] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. Brotherhood of Ry. Airline & S.S. Clerks, 466 U.S. 435 (1984).

a fundamental right.[64]

A union and an employer may demand that all employees become union members. However, a union may not require those employees to contribute to union activities "beyond those germane to collective bargaining, contract administration and grievance adjustment."[65] The Supreme Court held in *Abood v. Detroit Bd. of Education*[66] that employers may not require individuals to relinquish rights guaranteed to them by the First Amendment as a condition of employment. In that case, various governmental employees challenged a Michigan statute authorizing all governmental employees, even those who were not union members, to pay for union dues as a condition of employment.[67] The Court concluded that the Constitution requires that expenditures financed from dues must be paid by employees who do not object to advancing the proposed ideas and who are not coerced into doing so by the threat of loss of governmental employment.[68]

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[64] Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985) (recognizing that the opportunity to practice law is a "fundamental right").

See also Arrow v. Dow, 544 F. Supp. 458, 460-461 (D. N.M. 1982) ("The First Amendment does not distinguish between lawyers and other occupations. Unless there is an important governmental interest requiring otherwise, lawyers are entitled to the same protections from the compelled support of ideas that are afforded labor union members.").

[65] Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990); Communications Workers v. Beek, 487 U.S. 735 (1988).

[66] 431 U.S. at 231, 235-36; *see also Ellis*, 466 U.S. 435, 442, 455 (Clerical employees objected to the use of their compelled dues for specified union activities against the national union. The Court held that dissenting employees are protected under the First Amendment from the union's use of their funds. In exacting a remedy, the court found that a rebate scheme by which the union reimbursed objecting employees for their share of union expenditures was inadequate to protect the dissenting employees' rights. Given several acceptable alternatives, the Court emphasized that the union could not, even temporarily, be allowed to commit dissenters' funds to improper uses.).

[67] 431 U.S. at 211-213.

[68] *Id.* at 231. The Supreme Court in *Abood* made it clear that its holding applies equally to employees in the private sector.

As in *Abood*, the attorney plaintiff in *Washington Legal Found.* alleged that he had to comply with the IOLTA program to maintain his livelihood, despite his belief that the IOLTA Rule compelled him to support political and ideological views which he disavowed.[69] In response, the First Circuit found that the burden placed on him was more than an inconvenience, although something less than forcing him to lose his employment.[70] This determination conflicts with the court's acknowledgement that attorneys cannot engage in the full practice of law without holding client funds, an event which mandates compliance with the IOLTA Rule.[71] Thus, despite its contradictory conclusion, the court indirectly confirms the fact that the IOLTA Rule burdens attorneys' fundamental right to practice law[72] by maintaining that attorneys cannot practice law without complying with the IOLTA Rule.[73]

B. Expenditures Not Used To Regulate Legal Profession Or Improve Legal Services

In addition to its determination that employees cannot be compelled to relinquish First Amendment rights as a condition of employment, the Supreme Court has held that compelled financial support of bar associations, that engage in political or ideological activities, implicates First Amendment rights when those funds are used to subsidize ideological or political activities.[74] In the

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[69] 993 F.2d 962, 978 (1st Cir. 1993).

[70] *Id.*

[71] *Id.*

[72] *See*, Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985).

[73] *Washington Legal Found.*, 993 F.2d at 978.

[74] Keller v. State Bar of Calif., 496 U.S. 1, 13 (1990).

integrated bar[75] cases, the Court qualified its position by stating that expenditures only violate attorneys' First Amendment rights when the expenditures are not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of legal services available to the people of the state.'"[76] The Supreme Court noted that the standard for determining what actually regulates the legal profession or improves the quality of legal services would often be unclear.[77]

Until the case of *Keller v. State Bar of Calif.*,[78] the Supreme Court had not made a definitive determination as to which activities could be subsidized by the revenue produced by compulsory bar membership dues. There, the State Bar of California used compulsory bar dues to finance political and ideological activities to which some of the members were opposed.[79] Some of the particular activities challenged by the members were described in the complaint as follows:

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[75] *Id.* at 1. An "integrated bar" is "an association of attorneys in which membership and dues are required as a condition of practicing law--created under state law to regulate the State's legal profession."

[76] *Keller*, 496 U.S. at 13 (quoting Lathrop v. Donohue, 367 U.S. 820, 843 (1961)).

[77] *Id.* at 15.

[78] *Keller*, 496 U.S. 1; *see also Lathrop*, 367 U.S. at 843 (1961). In *Lathrop*, a Wisconsin lawyer challenged the state bar association's use of dues to influence legislation on issues with which he did not agree. The lawyer sued for a refund of dues paid to the Wisconsin State Bar that were required as a condition of practicing law in Wisconsin.

Due to a segmented opinion, *Lathrop* does not provide a clear holding to guide constitutional questions. A plurality of four members of the Supreme Court (Brennan, J., Warren, Ch. J., Clark, J. and Stewart, J.) found that the requirement was not unconstitutional on its face and that the question was not ripe because the court could not see what the funds were being used to support. In its reasoning, however, the plurality developed the guiding standard in these types of questions that the challenged expenditures must be necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State." *Id.*

[79] *Keller*, 496 U.S. at 4, 6.

(1) Lobbying for or against state legislation providing that laws designating that the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance;

(2) Filing amicus curiae briefs in cases involving a requirement that attorney-public officials disclose names of clients; and

(3) The adoption of resolutions by the Conference of Delegates opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer and busing.[80]

Examining the various activities that the compulsory dues supported, the Supreme Court found that the use of compulsory dues violated members' First Amendment right of free speech when the expenditures were not "reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services."[81]

While the *Keller* Court formulated an inquiry for determining when the use of compulsory dues may infringe upon First Amendment rights, it was unable to articulate under what circumstances the test would be satisfied.[82] The Supreme Court noted that:

[p]recisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not

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[80] *Id.* at 6, n.2.

[81] *Id.* at 14.

[82] *Id.* at 15-16.

always be easy to discern.[83]

In attempting to determine parameters for this inquiry, the Court directed that compulsory dues may not endorse "a gun control or nuclear weapons freeze initiative" but may be used for "disciplining members of the Bar or proposing ethical codes for the profession."[84]

Although the Supreme Court acknowledged that organizations may incur additional inconveniences or burdens when ensuring that compulsory dues are used only for permissible purposes, it concluded that these burdens or inconveniences are "hardly sufficient to justify contravention of the constitutional mandate."[85] The Supreme Court found these inconveniences were particularly insignificant because associations are already constitutionally required, when collecting fees, to "include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[86] By requiring associations to account for the uses of their fees, the Supreme Court recognizes that contributors have a right to support only those activities in which they believe. Unfortunately, courts often have been vague in determining the circumstances in which contributors are entitled to First Amendment protection.

Various lower courts have attempted to clarify the standard for determining exactly when an integrated bar, through compulsory dues, supports activities that violate attorneys' First Amendment

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[83] *Id.* at 15.

[84] *Id.* at 16.

[85] *Id.* at 16-17.

[86] Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986) (finding that the union procedure which established "proportionate share" payments used to meet expenses of the collective bargaining process and contract administration were unconstitutional because they "failed to provide adequate justification for the advance reduction of dues" and they "failed to offer a reasonably prompt decisions by an impartial decision maker").

rights.[87] The Montana Supreme Court held that the state integrated bar could not use funds derived from compulsory dues for lobbying purposes unless it refunded dissenting members an aliquot portion of their compulsory dues.[88] Furthermore, a District Court agreed with the Montana Supreme Court and added that the use of bar dues to finance lobbying for or against proposed items of state legislation in order to promote the administration of justice did not serve important governmental interests and would not justify infringing upon bar members' First Amendment rights.[89]

Because many "legal" issues are inherently "political," and the "exact line this standard draws is still quite fuzzy,"[90] courts will be continuously bombarded with questions concerning the constitutional permissibility of a wide range of political and ideological programs.[91] Although providing financial support for attorney disciplinary proceedings and continuing legal education are clearly permissible examples of regulating the legal profession, the Massachusetts IOLTA program has numerous activities which could be considered activities with "political or ideological coloration" not related to the advancement of the State Bar

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[87] *See* Arrow v. Dow, 544 F. Supp. 458 (D. N.M. 1982); Reynolds v. State Bar of Mont., 660 P.2d 581 (Mont. 1983) (Shea, J., concurring).

[88] *Reynolds*, 660 P.2d 581.

[89] *Arrow*, 544 F. Supp. 458.

[90] David F. Addicks, *Renovating the Bar After Keller v. State Bar of California: A Proposal for Strict Limits on Compulsory Fee Expenditure*, 25 U.S.F. L. REV. 681, 701, 709 (1991).

[91] Edwin J. Lukas, Note, *Constitutional Law -- First Amendment -- Compulsory State Bar Associations May Use Mandatory Dues Payments For Political or Ideological Programs When Such Expenditures Are Necessarily or Reasonably Incurred For The Purpose Of Regulating The Profession Or Improving The Quality Of Legal Services. Keller v. State Bar of California*, 68 U. DET. L. REV. 297, 304 (1991).

goals.[92] Due to their political undertones, these activities would not pass the Supreme Court's vague First Amendment test. For example, although attorneys may believe in limiting the number of foreigners allowed to immigrate into the United States, last year $525,795.00 was given to the Southeastern Massachusetts Legal Assistance Corporation which helps finance the Cambodian Outreach program conducting special outreach to newly arrived clients from Cambodia.[93] Also, because the topic of AIDS and gay rights is very controversial, some attorneys may be opposed to contributing $53,000.00 to the Gay and Lesbian Advocates and Defenders, which supports pro bono legal services combating HIV discrimination, with IOLTA funds.[94] Even if attorneys' views on these issues may not be popular, the First Amendment allows individuals to assert their beliefs and choose to support -- or not to support -- whatever they wish. When attorneys are not given an opportunity to refuse to financially support a particular organization, the bar association compels the objector to embrace a repugnant political ideology and therefore, violate their First

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[92] *See* 1992-1993 Grants and Grantee Profiles distributed by the Massachusetts IOLTA Committee [hereinafter *Grantee Profiles*].

For example, $25,000.00 was given to Social Justice for Women which seeks to find alternative sentencing options for low-income women. *Id.* at 16. This funding may violate attorneys' First Amendment rights if they believe that low-income women who commit crimes should not be treated differently than more affluent women or equally poor men. Similarly, attorneys may not agree with giving $18,500.00 to the Alliance for Young Families, *Id.* at 17., which provides legal support to pregnant teens because they feel that helping pregnant teens encourages teen pregnancies. Furthermore, the IOLTA Committee grants vast amounts of money to various housing projects which support tenant rights. *Id.* at 7, 10. If attorneys represent landlords, this may pose a conflict of interest.

[93] *Id.* at 8. Additionally, attorneys may not agree with the religious or immigration aspects of $39,000.00 given to Boston Catholic Charities to assist Haitian immigrants to file for political asylum through the Haitian Asylum Project. *Id.* at 14.

[94] *Id.* at 18. Similarly, the IOLTA Committee gave $264,277.00 to the Cambridge and Somerville Legal Services to help finance the AIDS Disability Benefits Project. *Id.* at 11.

Amendment rights.[95] In sum, what may be a "cause" for one attorney may be an "abhorrence" to another.

C. *Support of Religious Organizations*

Although tax dollars are often used to support organizations whose views are contrary to certain taxpayers' beliefs, the Supreme Court has limited Congress' taxing and spending power when the Establishment Clause of the First Amendment is violated.[96] Yet, when the First Circuit examined Massachusetts' particular IOLTA program, it overlooked the importance that constitutional freedoms place on an organization's spending power by failing to note the emphasis placed on First Amendment rights by the taxing and spending power cases. Even if all First Amendment freedoms are not treated equally, the First Circuit should have, at the very least, disallowed the IOLTA Committee supporting religious organizations.[97]

In granting standing to taxpayers only when First Amendment rights are infringed upon,[98] the Supreme Court stressed that the Constitution limits the support of organizations by public agencies. In *Flast v. Cohen*, the Supreme Court found that the Establishment Clause "operates as a specific constitutional limitation upon Congress' exercise of the taxing and spending power conferred by Article I, Section 8."[99] In fact, the Court noted that our history

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[95] Jeffrey R. Parker, *First Amendment Proscriptions on the Integrated Bar: Lathrop v. Donohue Re-Examined*, 22 ARIZ. L. REV. 939, 964 (1980).

[96] *See, e.g.*, Flast v. Cohen, 392 U.S. at 83, 102-06 (1968); Lamont v. Woods, 948 F.2d 825, 835 (2d Cir. 1991).

[97] In 1992-1993, the Massachusetts IOLTA Committee supported the Jewish Family Service of Worcester, Boston Catholic Charities and the Catholic Charitable Bureau of Boston. Grantee Profiles, *supra* note 92, at 14, 17, 18.

[98] *Flast*, 392 U.S. at 87.

[99] *Id.* at 104. After the Supreme Court found that the taxpayers in *Flast* had standing to challenge Congress' expenditures when they are in derogation of constitutional provisions, it remanded the decision on the merits of the taxpayers'

"vividly illustrates" that the drafters of the Establishment Clause specifically feared that "the taxing and spending power would be used to favor one religion over another or to support religion in general."[100] The Court relied on this history when it held that a taxpayer has standing to claim that Congress' taxing and spending violates the constitutional provisions that limit its taxing and spending power.[101] Because the Supreme Court followed the dictates of the First Amendment, the holding in *Flast* has been followed by numerous lower courts.[102]

If the First Circuit had followed *Flast* when it examined the

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claim to the lower courts. The taxpayers, however, chose not to pursue their case on the merits. In response to an "apparently unsympathetic court," the taxpayers decided to wait for a "more favorable climate" than that which existed in 1968. Rosanne R. Pisem, *The Second Circuit and the Establishment Clause: Shoring Up A Crumbling Wall*, 51 BROOK. L. REV. 642, 656-657, n.62 (1985).

[100] *Flast*, 392 U.S. at 103.

[101] *Id.* at 105-06.

[102] *Id.* Lower courts have consistently allowed taxpayers to bring suit when rights under the Establishment Clause are implicated. *See, e.g.*, Protestants and Other Ams. United for Separation of Church and State v. Watson, 407 F.2d 1264, 1265 (D.C. Cir. 1968) (holding that taxpayers have standing when challenging the Postmaster General's expenditures incurred in issuing a commemorative Christmas stamp that is allegedly religious in nature); Lamont v. Woods, 948 F.2d 825, 830 (2d Cir. 1991) (holding that taxpayers have standing to challenge the Office of American Schools and Hospitals Abroad for alleged violation of Establishment Clause through appropriation and expenditure of public funds for construction, maintenance, and operation of religious school abroad).

Additionally, lower courts have uniformly prohibited taxpayers from bringing suit when First Amendment Establishment Clause rights are not involved. *See, e.g.*, Taub v. Commonwealth of Ky., 842 F.2d 912, 918-919(6th Cir. 1988), *cert. denied*, 488 U.S. 870 (1988) (holding that the taxpayer lacked standing when challenging Kentucky statutes involving the Commonwealth's dealings with an auto manufacturer because the taxpayer presented a generalized, not direct injury, from these dealings); Troutman v. Shriver, 417 F.2d 171, 175(5th Cir. 1969), *cert. denied*, 397 U.S. 923 (1970) (dismissing case for lack of standing when taxpayer challenged constitutionality of alleged acts regarding establishment of legal aid service programs because there is no legislative intent to protect appellants' competitive interest).

organizations that the attorney is compelled to support, it would have given due weight to the universal importance that courts have given First Amendment concerns when the question of compelled support of organizations is involved. By ignoring the violation of attorneys' rights when they are compelled to support organizations with religious affiliations, the First Circuit disregarded the Establishment Clause of the First Amendment and the cases that limit the government's spending power when the Establishment Clause is involved.[103] Specifically, the First Circuit should have prohibited the Massachusetts IOLTA Committee from contributing $15,518.00 in 1992-1993 to Jewish Family Service of Worcester, $39,000 to Boston Catholic Charities, and $40,000 to Catholic Charitable Bureau of Boston[104] because this support is in violation of the letter and spirit surrounding the Establishment Clause.[105]

IV. COMPELLING STATE INTEREST AT ISSUE IN IOLTA RULE CAN BE ACHIEVED THROUGH LESS RESTRICTIVE MEANS

When the First Circuit developed its two-part inquiry in *Washington Legal Found.*, it failed to address the second part of the test because it found that the plaintiffs did not succeed on the first part.[106] However, the second question should have been addressed because the First Circuit erred in its determination that the IOLTA Rule does not burden protected speech. A proper application of the strict scrutiny test would have revealed that the IOLTA Rule does not serve compelling state interests necessary to overcome governmental objectives.

The Supreme Court has promulgated a "balancing test" for

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[103] *Washington Legal Found.*, 993 F.2d 962.

[104] Grantee Profiles, *supra* note 92, at 14, 17, 18.

[105] *See* Flast v. Cohen, 392 U.S. at 103.

[106] 993 F.2d at 980.

determining infringements upon First Amendment freedoms.[107] In this test, courts determine whether infringements on the right to associate for expressive purposes may be justified by regulations adopted to serve compelling state interests that cannot be achieved through means significantly less restrictive of associational freedoms.[108] The government has the burden of meeting the threshold requirement that the state interest in the regulation infringing upon the First Amendment right is one of vital importance.[109]

Because IOLTA goals can be achieved through less restrictive

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[107] *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

[108] *Id.* In *Roberts*, the Supreme Court developed its formula for determining when First Amendment rights are infringed upon. *Id.* In that case, the United States Jaycees challenged the application of a Minnesota statute forbidding discrimination on the basis of sex in "places of public accommodation." *Id.* at 609. The Supreme Court reasoned that the application of the Act to compel the Jaycees to accept female members may have violated either their freedom of intimate association or their freedom of expressive association. *Id.* at 618. However, it held that the effect that the statute had on the Jaycees' freedom of association was justified by Minnesota's interest in eliminating discrimination against its female citizens. *Id.* at 627.

[109] Elrod v. Burns, 427 U.S. 347, 362 (1976). The Michigan Supreme Court in *Falk v. State Bar of Mich.*, 305 N.W.2d 201 (Mich.), *cert. denied*, 469 U.S. 925 (1981), attempted to follow the opinions discussed above. Although it was unable to secure a clear majority, the court held that an integrated state bar could only compulsorily exact dues, and require the association to support duties and functions of the state bar that served a compelling state interest and which could not be accomplished by means less intrusive upon individual attorneys' First Amendment rights. *Id.* at 202. (Coleman, C.J., Moody, J., Levin, J., Kavanagh, J., Williams, J., Fitzgerald, J. and Ryan, J., concurring).

Similarly, the District Court in *Carroll v. Blinken*, 768 F. Supp. 1030, (S.D.N.Y. 1990), *aff'd in part, rev'd in part*, 957 F.2d 991 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 300 (1992) found that a student's First Amendment rights were not violated when a portion of his mandatory dues were used to support a public interest research group. *Id.* at 1036. In reaching its conclusion, the court noted that the university funded over 100 student organizations to create a diverse forum for public discussion for training undergraduates to become concerned public citizens. *Id.* at 1034. The District Court held that individuals do not have the constitutional right to control their contributions when universities spend money to "expand public debate on a content-neutral basis." *Id.*

means by using voluntary and "opt-out" programs,[110] these alternative programs should be used to protect attorneys' First Amendment rights. Many attorneys have been opposed to the courts' and legislatures' suggestions of changing voluntary IOLTA programs to mandatory ones.[111] Although mandatory IOLTA accounts earn more than both voluntary and "opt-out" programs,[112] the additional money which may be earned does not excuse the serious impingements on attorneys' First Amendment rights. Mere financial considerations or administrative efficiency does *not* justify an abridgement of First Amendment rights.[113] Voluntary and "opt-out" programs still give public service organizations the money they need, but these types of programs do not require attorneys to invest money into organizations which are contrary to their political and ideological philosophies or jeopardize their jobs. Furthermore, if IOLTA programs are voluntary, courts will not be constantly required to monitor the program's activities to ensure they are truly regulating the legal profession.[114]

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[110] *See* Patricia Heim, *Voluntary Bar vs. Mandatory Bar: The Debate Heats Up*, 64 WIS. LAW. 10, 12 (Feb. 1991).

[111] *In re* Interest on Trust Accounts, 402 So. 2d at 389. When the Florida Bar Foundation, Inc. considered changing its program from a voluntary IOLTA to a mandatory IOLTA, it solicited comments from all interested parties. It received an "outpouring of mail and filings, predominately hostile to the proposed changes." *Id.* at 391. It heard from attorneys, law firms, bar associations, bar committees, law schools, the Florida Bankers' Association and various public interest law organizations. *Id.* The Foundation's proposal that the IOLTA program should be converted from a voluntary to a mandatory program elicited a fervor among bar members. *Id.* From all of these responses and various court cases, the Supreme Court of Florida decided to adopt a voluntary program rather than a mandatory program. *Id.*

[112] Don J. DeBenedictis, *IOLTA Earnings Down*, 78 A.B.A. J. 16, 16 (Oct. 1992). The author of this article stated that each step up (from voluntary to opt-out to mandatory) increases the number of trust accounts. *Id.*

[113] Spencer v. Herdesty, 571 F. Supp. 444, 452 (S.D. Ohio 1983) (emphasis added).

[114] *See* Heim, *supra* note 110, at 63.

In the alternative, if legislatures and courts insist upon a mandatory approach, IOLTA goals can also be achieved by allowing attorneys to choose which programs they will support or designating the money from IOLTA to support programs that unequivocally regulate the legal profession. Even if a state refuses to accept voluntary or "opt-out" programs because it will lose revenue, it should give attorneys discretion in selecting which programs to support in a mandatory IOLTA system. If attorneys are given a comprehensive checklist of programs, they will not be compelled to support organizations which represent political or ideological ideas contrary to their own. Moreover, public service organizations will still be able to receive the interest from all attorney trust accounts. Even if legislatures find administrative inconveniences with this approach, the Supreme Court would likely allow it because "the Constitution recognizes higher values than speed and efficiency."[115]

CONCLUSION

Because the Supreme Court has never examined an IOLTA plan, the controversy over the permissibility of IOLTA accounts still looms large.[116] When determining the constitutionality of IOLTA programs, attorneys must, therefore, look to the lower courts and analogous Supreme Court cases for guidance.[117] Unfortunately, with respect to compulsory IOLTA plans, courts have neglected to properly address the concomitant First Amend-

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[115] Frontiero v. Richardson, 411 U.S. 677, 690 (1973) (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)).

[116] The Supreme Court has denied certiorari on *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir.), *cert. denied,* 487 U.S. 917 (1987) and Carroll v. State Bar, 213 Cal. Rptr. 305 (Cal. 1984), *cert. denied,* 474 U.S. 848 (1985).

Paul Marcotte, *Big Interest in Small Change,* 73 A.B.A. J. 70, 70 (July 1987). The Florida bar's general counsel stated that, "[t]he missing piece in the whole equation is whether these programs will be reviewed one day by the Supreme Court."

[117] *See, e.g., In re* Interest on Trust Accounts, 356 So. 2d 799, 806-07 (Fla. 1978); Abood, 431 U.S. at 235, n.31.

ment violations.

In *Washington Legal Found.*,[118] the First Circuit ignored significant issues surrounding the attorneys' First Amendment claims.[119] The First Circuit held that the IOLTA Rule does not burden attorneys' protected speech, but declined to examine whether Massachusetts had a compelling state interest in restricting the attorneys' First Amendment rights.[120] Since the State has the burden of showing that compelled contribution is necessary to serve overriding governmental objectives,[121] it is unlikely that the State would have prevailed on the second part of the court's inquiry: whether compelling state interests could be achieved through less restrictive means.

Because the goals of IOLTA programs are worthwhile, the programs should not be eliminated outright. Clearly there is a need to provide legal services to the disadvantaged. However, IOLTA programs should be modified to obtain a balance between the States' interest in providing public legal services with attorneys' First Amendment rights. Either by adopting voluntary or "opt-out" programs or allowing attorneys to choose the organizations they wish to support, states can accommodate the needs of both the government and the attorneys. As the Supreme Court emphasized in *Keller*,[122] additional inconveniences or burdens to ensure that compulsory dues are used only for purposes designated by attorneys are inconsequential compared to the need to protect individuals' First Amendment rights.[123]

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[118] 993 F.2d 962 (1st Cir. 1993).

[119] *Id.*

Id. at 980.

[121] Elrod v. Burns, 427 U.S. 347, 362 (1976).

[122] Keller v. State Bar of Calif., 496 U.S. 1 (1990).

[123] *Id.* at 16.