

PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: THOMAS R. PHILLIPS, ET AL., Petitioners v.
WASHINGTON LEGAL FOUNDATION, ET AL.

CASE NO: No. 96-1578 c-3

PLACE: Washington, D.C.

DATE: Tuesday, January 13, 1998

PAGES: 1-56

REVISED

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

APR 29 1998

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'98 APR 29 A10:38

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 THOMAS R. PHILLIPS, ET AL., :

4 Petitioners :

5 v. : No. 96-1578

6 WASHINGTON LEGAL FOUNDATION, :

7 ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, January 13, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:11 a.m.

14 APPEARANCES:

15 DARRELL E. JORDAN, ESQ., Dallas, Texas; on behalf of
16 the Petitioners.

17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioners.

21 RICHARD A. SAMP, ESQ., Washington, D.C.; on behalf of the
22 Respondents.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
DARRELL E. JORDAN, ESQ.	
On behalf of the Petitioners	3
ORAL ARGUMENT OF	
EDWIN S. KNEEDLER, ESQ.	
On behalf of the United States, as amicus curiae,	
supporting the Petitioners	19
ORAL ARGUMENT OF	
RICHARD A. SAMP, ESQ.	
On behalf of the Respondents	30

1 P R O C E E D I N G S

2 (10:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-1578, Thomas R. Phillips, et al. v.
5 Washington Legal Foundation.

6 Mr. Jordan.

7 ORAL ARGUMENT OF DARRELL E. JORDAN

8 ON BEHALF OF THE PETITIONERS

9 MR. JORDAN: Mr. Chief Justice and may it please
10 the Court:

11 The Texas IOLTA program is an extension of the
12 ethical rules that have always been applicable to lawyers
13 in connection with their maintenance of client funds.
14 Lawyers have always been required to manage client funds
15 as fiduciaries. The rules required this before IOLTA
16 programs were adopted, they require it today under IOLTA,
17 and they would require it tomorrow if IOLTA programs went
18 away.

19 QUESTION: But they're required to manage it as
20 fiduciaries for the benefit of the clients, are they not?

21 MR. JORDAN: That's correct, Your Honor, Mr.
22 Chief Justice.

23 Clients received no interest income on their
24 nominal and short-term deposits before IOLTA. During
25 IOLTA, they don't receive any interest income on their

1 nominal and short-term deposits, and if --

2 QUESTION: Well, Mr. Jordan, by way of
3 background, the IOLTA funds account also include deposits
4 from corporations, do they not?

5 MR. JORDAN: That's correct, Justice O'Connor.

6 QUESTION: And as to the corporate moneys that
7 are deposited as opposed to the share that's the result of
8 deposits by individuals, is there a correspondingly larger
9 amount of interest earned? I mean, is there interest
10 being earned in the accounts for the corporate funds that
11 exceed the cost of maintenance of the funds?

12 MR. JORDAN: Justice O'Connor, we are not able
13 to track what percentage of the IOLTA interest income that
14 gets to the foundation comes from corporate or partnership
15 deposits.

16 QUESTION: Do you know what percentage of the
17 deposits are from corporate as opposed to individuals?

18 MR. JORDAN: I only have my opinion, and that
19 would be, Justice O'Connor, that probably about 60 percent
20 or so do come from corporate or partnership --

21 QUESTION: I was curious because the amounts of
22 individuals that -- of interest earned that wouldn't
23 exceed the cost of establishment and maintenance of the
24 fund nevertheless seem to be generating substantial
25 amounts of money for these programs, and so it seemed to

1 me very likely there were corporate deposits that were
2 generating substantially more interest, and that's why so
3 much was being earned.

4 MR. JORDAN: One of the reasons, Your Honor,
5 that IOLTA is able to earn interest for the foundation
6 when it cannot for individual clients whose money is
7 deposited, whose short-term and nominal funds are
8 deposited in IOLTA accounts, is that it takes advantage of
9 the changes in the banking law that occurred in 1980 where
10 corporate and partnership accounts can be pooled with
11 individual funds in an IOLTA account, and then, based on
12 the tax ruling, there's no taxable transaction, the
13 efficiency of the economy of scale where one pooled
14 account and the recipient can be attributed to one
15 foundation, all of this generates --

16 QUESTION: Are corporations making these
17 deposits, or anyone, for that matter, given an option
18 about whether to have their moneys go into an IOLTA
19 account or not, or is it required that they go into an
20 IOLTA account?

21 MR. JORDAN: Justice O'Connor, the IOLTA program
22 is mandatory for the lawyer.

23 QUESTION: Right.

24 MR. JORDAN: It's part of the disciplinary
25 rules. If --

1 QUESTION: How about for the client?

2 MR. JORDAN: But if there's any way a client's
3 deposit can earn net interest for that client, whether
4 it's a corporate client, whether it's an individual
5 client, the lawyer's ethical responsibility is to do that.

6 QUESTION: Well --

7 QUESTION: But I thought for the corporate
8 client they were prohibited from receiving the interest
9 from the NOW account.

10 MR. JORDAN: Your Honor, they would not be able
11 to have those funds placed in a NOW account, a demand
12 account.

13 QUESTION: Right. Now, could the corporation
14 doing business say, okay, I'm going to get legal services,
15 but you put my deposit with an account that's not a NOW
16 account and I'll take the interest, thank you.

17 MR. JORDAN: Under our rules, Your Honor, that
18 may be permissible.

19 QUESTION: May?

20 MR. JORDAN: If the --

21 QUESTION: Is or is not, or you don't know?

22 MR. JORDAN: Well, I know that it is, and the
23 rule that the fund must be returned to the client on
24 demand is satisfied as long as the account is placed in a
25 bank. It could be a time -- but as long as the client

1 understands that, our rules permit it.

2 QUESTION: Mr. Jordan, one of your earlier
3 statements makes me think that very likely times have
4 changed since I practiced law long ago, but my -- I'm
5 familiar with a firm trust account, whereby a number of
6 clients' moneys would be placed in the same account. I
7 don't ever recall a situation where you opened up a
8 separate account for each client whose money you had in
9 trust. The firm put all of the money in the trust
10 account.

11 So it seems to me it's not entirely accurate to
12 say that these moneys could never have earned interest.
13 You treat it as if every single separate trust deposit
14 would be a separate account. That was never true when I
15 practiced.

16 MR. JORDAN: Mr. Chief Justice, before IOLTA, of
17 course, the deposits from clients were put into a
18 noninterest-bearing demand account, for the most part.
19 With the advent of IOLTA, if the amount of the client
20 deposit was small enough, or was going to be held for a
21 short enough period of time, they went into the IOLTA
22 account. IOLTA doesn't apply to any amounts of money that
23 are going to be able to earn net interest for the client,
24 so --

25 QUESTION: Well, how about if the amounts were

1 pooled?

2 MR. JORDAN: IOLTA enables, Mr. Chief Justice,
3 the client funds of many clients to be pooled.

4 QUESTION: And why shouldn't that interest go to
5 the clients?

6 MR. JORDAN: Because the client, Mr. Chief
7 Justice, had no reasonable expectation to receive interest
8 income, net interest income on small or short-term
9 deposits before IOLTA, during IOLTA, and if IOLTA were to
10 go away, that benefit would be retained by the banks. It
11 would not change one thing for the client.

12 QUESTION: You mean that if a firm pooled its
13 trust accounts and put them all in one account, called a
14 trust account, the bank would not have to pay interest on
15 it?

16 MR. JORDAN: Mr. Chief Justice --

17 QUESTION: Do you mean that?

18 MR. JORDAN: A lawyer or a law firm is able now,
19 Mr. Chief Justice, to pool eligible client funds, and if
20 there can be any way that that account can yield a net
21 benefit to the client, that's what the lawyer is supposed
22 to do. That's the fiduciary responsibility of a lawyer to
23 his or her client.

24 It's only the funds that are incapable, whether
25 using technology, subaccounting, pooling, or whatever,

1 that cannot yield a net benefit to a client, that go into
2 IOLTA.

3 QUESTION: So IOLTA accounts wouldn't cover a
4 situation where the firm, say, has 20 trust deposits, and
5 no one of those could earn interest worthwhile separately,
6 but 20 of them pooled could? IOLTA does or does not cover
7 that?

8 MR. JORDAN: It does cover those. If a
9 separate --

10 QUESTION: I thought you just said it didn't.

11 MR. JORDAN: Mr. Chief Justice, I must have
12 misunderstood your question, then, because what I'm saying
13 is that when the lawyer receives the funds from the
14 client, he or she makes an independent determination about
15 whether they're able to be placed in an account that would
16 benefit the client, using any means that are legal,
17 subaccounting, pooling, whatever. If they determine, in
18 good faith, that those funds cannot be placed so as to
19 benefit the client, then they go into the IOLTA account,
20 and if the --

21 QUESTION: Well, take my hypothesis. The firm
22 has 20 separate trust deposits. Pooling them would result
23 in interest that was useful to the various clients. Is
24 there -- does the lawyer have any option in a situation
25 like that, under your rules?

1 MR. JORDAN: No, Mr. Chief Justice. If the
2 lawyer, in good faith, determines that there is no way
3 that that client fund can earn net interest, interest over
4 the cost of attributing it, then the money goes into an
5 IOLTA account. That is required under our rules.

6 QUESTION: I'm not sure you've answered the
7 Chief Justice's question, if I might interrupt. I think
8 his hypothesis is that no one of them could separately
9 earn interest, but that pooled in the lawyer's office,
10 they could earn such interest. What is done in that
11 situation?

12 In other words, we would -- I had the same
13 practice years ago. We would have one trust account in
14 which we would deposit money. It was the property of
15 several different clients. We wouldn't treat them each
16 separately, but you have a separate trust account which
17 was a pooled account and could earn interest, and what
18 does the lawyer do in that situation? Under your rules,
19 what must he do?

20 MR. JORDAN: Looked at independently --

21 QUESTION: Well, what do you mean independently?

22 QUESTION: But I'm saying --

23 MR. JORDAN: These funds usually come in at
24 different times.

25 QUESTION: I look at it independently. I say,

1 yes, but if I put it with 19 other clients' accounts it
2 will earn money. Am I looking at it independently or not?

3 MR. JORDAN: If you could, Justice Stevens, put
4 them with 19 other-eligible accounts into a pooled account
5 in the name of the law firm --

6 QUESTION: Right.

7 MR. JORDAN: -- and if that process enables you
8 to earn a net interest benefit for the client, then you
9 are able to do that.

10 QUESTION: Why isn't that always going to be the
11 case if you have more than one client? You have a bunch
12 of clients who deposit money, you put all their money in
13 the trust account.

14 MR. JORDAN: Because --

15 QUESTION: It would always earn interest.

16 MR. JORDAN: Justice Stevens, it's only the
17 amounts from clients that are unable to be placed in an
18 account that would yield a net benefit to a client --
19 you -- it's the net --

20 QUESTION: It's the net benefit that you're
21 emphasizing.

22 MR. JORDAN: It's the net benefit.

23 QUESTION: If I understand you correctly, what
24 you're saying is that if, after subtracting either the law
25 firm's or the bank's accounting cost, so much as one penny

1 could be earned for the client, it does not go into IOLTA
2 and, in fact, it will be invested in a way that will get
3 the penny to the client.

4 MR. JORDAN: That's correct.

5 QUESTION: But in these pooled funds, even
6 though the pooled funds earn interest, the cost of
7 accounting for that interest separately to the client
8 would be greater than the interest that would be
9 attributable to the client. Is that correct?

10 MR. JORDAN: That is correct, Justice Souter,
11 and one other thing that I think is important --

12 QUESTION: Except for the corporate deposits.

13 MR. JORDAN: Except for the corporate deposits.

14 QUESTION: Now, let's not forget that, because
15 they can be very substantial, but there's some provision
16 in the law for NOW accounts that says you can't pay
17 anything to a corporation.

18 MR. JORDAN: Justice O'Connor, one of the things
19 that makes IOLTA possible, of course, is the IRS ruling
20 that allows there to be no taxable transaction.

21 If, in Justice Souter's question, you were
22 attributing and tracking the interest to be paid to each
23 client, then the bank, whether it's a sub account or
24 whatever, would have to have a taxpayer ID number, the
25 bank would have to send a 1099, the law firm would

1 either -- then have to figure out who gets what amount of
2 interest, and there's an awful lot of additional
3 administrative accounting expense that must be taken into
4 account.

5 But the fact remains, if a lawyer can find a
6 legal way to create a benefit for a client using those
7 funds, then they're supposed to do it. But as a practical
8 matter --

9 QUESTION: Why does it say -- it says,
10 considered without regard to funds of other clients.
11 That's what's causing the confusion, I think, because if
12 you think of three clients, A, B, and C, and they each
13 give you \$100,000 to hold for a day, all right, and you'd
14 think, well, there's no way at all that I can open up --

15 MR. JORDAN: Justice Breyer --

16 QUESTION: -- three accounts, but if I have a
17 regular account here and I put all \$300,000 in this
18 account of the firm, maybe then it would earn interest,
19 and then the words here, it says, such funds could not
20 reasonably expected to earn interest, but it says,
21 considered without regard to other funds. That's what's
22 mixing me up.

23 MR. JORDAN: Justice Breyer, in a situation
24 where there are many lawyers in a firm, as Chief Justice
25 Rehnquist posed, you have to make -- the lawyer has to

1 make that decision about whether the client funds are --

2 QUESTION: Do you consider it without regard to
3 other funds or not?

4 MR. JORDAN: Yes, you do. Yes, you do.

5 QUESTION: So that means, in the example that's
6 being given -- I'm sorry to give this, but its -- everyone
7 has, and I think it's not totally clear yet, that what we
8 have is a circumstance where there are three clients.
9 They each give you some money, if you have to open up
10 three accounts it's just not going to be worthwhile
11 because the administrative expenses are too great.

12 But the banker comes to you and says, give me
13 all three together. There is no IOLTA fund in the State
14 I'm talking about. He gives me all three together, and I
15 will generate interest for you that exceeds administrative
16 costs.

17 Now, in that circumstance, do you put that money
18 in that fund, which is private, or do you give it to
19 IOLTA?

20 MR. JORDAN: If, Justice Breyer, there's any way
21 that, using the banking accounts that are available to you
22 as a lawyer, you can create a net benefit to a client,
23 then you're supposed to do it.

24 QUESTION: So you -- my answer is --

25 MR. JORDAN: Your answer is yes.

1 QUESTION: -- you do consider --

2 QUESTION: Then what's -- what --

3 MR. JORDAN: You look at it -- you look at it
4 independently, and --

5 QUESTION: What's the meaning of considered
6 without regard to others?

7 MR. JORDAN: Because, Mr. Chief Justice, the
8 fact is that you have to look at the amount of money that
9 comes from a client and the approximate length, in your
10 good faith judgment, that it's going to be held in your
11 account, without -- you won't know, as a lawyer, what else
12 is in that trust account.

13 If you're in a firm, for instance, that it --
14 that has several lawyers, each of whom handle, during the
15 course of their practice, client funds, you may not know,
16 and usually it's an accounting person that's going to
17 decide and give you guidance about whether or not there's
18 some opportunity there that can benefit a client, so --
19 but as a lawyer, you're the one under the court's -- the
20 supreme court of Texas is, anyways, supervision, and told
21 to determine whether in good faith you think it can be
22 earned some benefit for a client, so that's the reason.
23 The practical approach --

24 QUESTION: It doesn't mean, then, that in
25 Justice Breyer's hypothesis, you would consider only

1 whether one of the \$100,000 deposits could earn --

2 MR. JORDAN: No. Mr. Chief Justice, generally
3 speaking, if you had \$100,000 client fund there's probably
4 some way you're going to be able to place it in a way that
5 benefits a client.

6 You -- these amounts are usually smaller.
7 They're usually held for only as long as it takes a check
8 to clear. If you take into account, let's say a \$50,000
9 settlement in a tort case, and let's assume that in your
10 State the maximum rate in a NOW account is 2-1/2 percent.

11 2-1/2 percent, \$50,000, earns about \$2.05 a day.
12 If it's going to be held for the 5 days that it takes the
13 check to clear, that's \$10 and, what, 25 cents. There's
14 no practical way that you can create an account and
15 capture that net interest benefit for the client.

16 QUESTION: Okay, but in --

17 QUESTION: Mr. Jordan, there was a reference in
18 the American Bar Association brief -- it's page 9,
19 footnote 10 -- that says that there is a mechanism in
20 Texas to reimburse a client if it turns out that the funds
21 could have generated interest and instead --

22 MR. JORDAN: Yes, Justice Ginsburg. If the --
23 at the foundation they believe that somebody has erred,
24 there's precedent for calling the lawyer and saying what
25 are the facts here, and at least four times there have

1 been reimbursements made through the bank.

2 QUESTION: How does that mechanism work, because
3 it's just a very quick footnote. It doesn't --

4 MR. JORDAN: The person at the foundation
5 realizes that this is an abnormal amount of interest that
6 has come from an account that historically has not
7 generated that kind of activity. They call the lawyer,
8 find out what the facts are with regard to the account, if
9 the mistake has been made in good faith, well then the
10 interest is returned to the bank, and the transaction
11 between the bank and the lawyer is straightened out.
12 That's what we do.

13 In Texas, Justice Ginsburg, we've got about
14 60,000 lawyers. 30,000 of those say they have occasion
15 during their practices to handle client funds, and they
16 answered our compliance request affirmatively. Of those
17 30,000, there are about 16,000 active IOLTA accounts.

18 We get about \$5-1/2 million a year, which means
19 that each active IOLTA account of the 16,000 generates
20 less than \$1 a day. It's a little bit of money coming in
21 from a lot of accounts that makes this whole program
22 possible.

23 QUESTION: Mr. Jordan, let me ask you something
24 before your time is up. The court below found there's a
25 property interest, a cognizable property interest here.

1 It didn't go on and determine whether there had been a
2 taking, is that right?

3 MR. JORDAN: Yes, Justice O'Connor. That's --
4 they incorrectly, we feel, determined that a --

5 QUESTION: Okay.

6 MR. JORDAN: -- property interest was there. We
7 don't agree with them.

8 QUESTION: Well, I guess it's possible that
9 there might be a property interest, but nonetheless it
10 might turn out at the end of the day there's no taking.
11 No damages, no loss, no taking.

12 MR. JORDAN: Yes, Your Honor. We don't believe
13 there's a property interest that these respondents have
14 raised. If this Court disagrees with us, we still believe
15 that it's a regulatory taking and there's -- on something
16 that's worth nothing, the just compensation is nothing,
17 and therefore we're back to where we were.

18 QUESTION: Are you familiar with any case in
19 which there is a regulation but the State is enriched as a
20 result?

21 MR. JORDAN: No, Justice Kennedy, I'm not.

22 QUESTION: There are a lot.

23 MR. JORDAN: But I believe that the principal
24 tenets of the IOLTA programs in Texas and across the
25 country are entirely consistent with this Court's

1 jurisprudence in the Lucas case, where we're talking about
2 economic reality, not abstract economic theory, where
3 we're talking about the historic understandings of our
4 citizens regarding their rights and reasonable investment-
5 backed expectations. That's what clients before IOLTA did
6 not have with regard to any interest opportunities --

7 QUESTION: Did you ever overpay your income tax?
8 You know, you have to pay so much a quarter? You ever pay
9 more than, the first quarter than you actually owed
10 proportionately? Did they give you a refund check back at
11 the end of the year? I haven't gotten mine.

12 (Laughter.)

13 MR. JORDAN: No, Your Honor.

14 Thank you very much.

15 QUESTION: Thank you, Mr. Jordan.

16 Mr. Kneedler, we'll hear from you.

17 ORAL ARGUMENT OF EDWIN S. KNEEDLER

18 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE PETITIONERS

20 QUESTION: Mr. Kneedler, is there any
21 requirement that you overpay your installments of income
22 tax?

23 (Laughter.)

24 MR. KNEEDLER: No, there's not, but there's also
25 no requirement, State-imposed requirement that a client

1 turn over money to the lawyer. That is a matter of
2 private contractual --

3 QUESTION: What about federally imposed
4 requirements? Can the Federal and the State Governments
5 collude to establish a system in which it is impossible
6 for a private individual to earn any interest by reason of
7 the way the banking laws are written, and then the State
8 come in and say, well, since you can't make any interest
9 privately, we're going to take your -- we're going to take
10 the interest that's earned and use it in this governmental
11 scheme. Doesn't something strike you wrong about that?

12 MR. KNEEDLER: I don't --

13 QUESTION: I mean, this whole thing works only
14 because -- because corporate money can't receive
15 interest --

16 MR. KNEEDLER: Well --

17 QUESTION: -- in immediate payment accounts,
18 right?

19 MR. KNEEDLER: Right.

20 QUESTION: That rule is adopted, but if you
21 allow those corporate funds to be used for something else,
22 some good thing that the State wants to do, then it's
23 okay.

24 MR. KNEEDLER: Well, I think the basic point
25 here is that the -- whether the Federal Constitution

1 requires the State of Texas to conclude that the interest
2 generated by an IOLTA account, which State law declares to
3 be the property of the Texas Equal Access to Justice
4 Foundation, instead to be the property of the individual
5 client, and it's important to remember that the question
6 of whether a property right arises takes place in a -- in
7 two heavily regulated areas. One is the practice of law,
8 and the other is the banking industry, which this Court
9 has recognized is perhaps the most -- the classic example
10 of a heavily federally regulated area.

11 QUESTION: Well, but it's been -- this isn't any
12 regulation of banks. It's a regulation of clients.

13 MR. KNEEDLER: No, but whether -- the question
14 of whether a client has a legitimate or a reasonable
15 investment-back expectation in earning net interest
16 necessarily arises against the background of the
17 banking --

18 QUESTION: Well --

19 MR. KNEEDLER: -- banking regulations and
20 economic reality.

21 QUESTION: Well, you could have said the same
22 thing in Webb's Fabulous Pharmacies, that the person had
23 no expectation under State law because there was a State
24 rule that said you didn't get it.

25 MR. KNEEDLER: Well --

1 QUESTION: But that didn't control the result in
2 that case.

3 MR. KNEEDLER: No, but there are several
4 important distinctions between this case and Webb's, if I
5 may highlight them, because I do think they're -- they
6 illustrate what's so different about this case.

7 First of all, in Webb's the premise of the
8 Court's opinion was that the interest earned was not tied
9 to reimbursing the State for its costs. In other words,
10 the premise was that there was net interest earned. There
11 was a separate exaction by the State calculated on a
12 percentage of the amount deposited to reimburse the State
13 for its costs, so that was a case where there was net
14 interest.

15 Here, the fundamental precept of IOLTA is that
16 the individual client's accounts would not be able to earn
17 net interest.

18 QUESTION: Well, would this be a different case,
19 do you think, if each person giving a lawyer money that
20 might go into an IOLTA account were given a choice and
21 asked to decide whether to agree with the IOLTA scheme or
22 not?

23 MR. KNEEDLER: The difficulty with that option,
24 Justice O'Connor, is that one of the important
25 considerations in the IRS' approval of this and the

1 revenue ruling 81-209 that we cite in our brief was that
2 the client did not have control, because if the client has
3 control as to -- over whether the lawyer will deposit the
4 money in the IOLTA account, then the income generated by
5 that account, which goes to a charitable contribution,
6 might be an assignment of income by the individual
7 taxpayer, individual client, because the client would be
8 exercising control over the disposition, so --

9 QUESTION: Oh, but you said a moment ago, and I
10 thought correctly, that the client does, in fact, have
11 that option. In answering Justice Scalia's question you
12 said the client doesn't have to leave any money in a
13 lawyer's trust account.

14 MR. KNEEDLER: Right. Now, I --

15 QUESTION: Oh, as opposed to assigning it to
16 a --

17 MR. KNEEDLER: Right. There are two separate --
18 the client doesn't have to give money to the lawyer.
19 That's a matter of private contractual --

20 QUESTION: So under the IRS there's no problem
21 in the client having a choice as to whether or not to take
22 the money back as opposed to leaving it in in a way that
23 will earn interest for this charitable organization. That
24 doesn't offend the IRS reg.

25 MR. KNEEDLER: Right. Right.

1 QUESTION: Okay.

2 MR. KNEEDLER: It's the fact of whether the --
3 and after all, it's -- again, looking at the overall --

4 QUESTION: The client doesn't have the option if
5 the lawyer is not willing to proceed without some funds.

6 MR. KNEEDLER: But -- but --

7 QUESTION: I mean, this is a rather unrealistic
8 option, isn't it?

9 MR. KNEEDLER: But that's not a --

10 QUESTION: You've got to find a lawyer who's
11 willing to go ahead without any deposit.

12 MR. KNEEDLER: That's not a State-imposed
13 requirement. That's a matter of private contractual
14 relationship, and it's -- I think it would be the rare
15 client who would have the sort of substantial objection
16 that the client has in this case.

17 QUESTION: Well, but this, as I understand it,
18 was a retainer, which ordinarily wouldn't go into any
19 lawyer's trust account. You get a retainer to -- for your
20 own income.

21 MR. KNEEDLER: For the lawyer's own income, but
22 it is protection for the lawyer's income, and the retainer
23 is regarded as the client's property.

24 QUESTION: Well, since when? I mean, I never
25 regard a retainer as a client's property.

1 MR. KNEEDLER: Once the matter is over with --

2 (Laughter.)

3 MR. KNEEDLER: It's security for the lawyer, but
4 once the matter is over with the money is returned to the
5 client --

6 QUESTION: Well --

7 MR. KNEEDLER: -- if the client is separately
8 billed. If the lawyer draws down on the retainer, then
9 obviously when the --

10 QUESTION: Well --

11 MR. KNEEDLER: -- when the money is paid out
12 that belongs to the --

13 QUESTION: Well, agreements may differ.

14 MR. KNEEDLER: Right.

15 QUESTION: But I think it's a mistake to think
16 that you would generally categorize what someone calls a
17 retainer as something that belongs in a trust account.

18 MR. KNEEDLER: Right. I think that's right, but
19 it's important -- this is not real property, as in Lucas.
20 This is personal property, and as the Court said in the
21 Lucas case, that questions of property arise looking at
22 background principles of State and Federal law, and here
23 it couldn't be clearer, looking at the background of State
24 law, that the client has no established entitlement to the
25 interest generated by the IOLTA account.

1 QUESTION: How can we reach this question? This
2 is just -- there is some property. I have \$1,000. You're
3 my lawyer. I give it to you. The State of Texas is
4 taking my \$1,000 and using it to make money for other
5 people.

6 I can imagine somebody arguing that they don't
7 have the power to use my money to make money for somebody
8 else, but somehow that isn't being argued. That is to
9 say, we're in this question of a property interest, and --
10 so how in your opinion would we reach that question,
11 whether Texas does or does not have the power to take my
12 money and use it to generate some money for another
13 person.

14 MR. KNEEDLER: Well, let me answer it this way.
15 Typically, when a person deposits money in a bank -- I
16 realize this -- the client is not directly depositing it
17 in the bank, the lawyer is. But when a person deposits
18 money in a bank, what the depositor gets in return is,
19 it's really a debt owed by the bank. When you write a
20 check the bank has promised to pay you to allow you to
21 withdraw funds.

22 But once the funds are deposited in the bank,
23 the bank uses them. The bank earns money on them. So at
24 a time when there were no -- there was no interest on
25 demand deposits, and that's still true for corporations,

1 it's not as if no one is benefiting from that money. The
2 bank --

3 QUESTION: They're doing it with my money.
4 Suppose, Mr. Kneedler, I have a piece of land that has no
5 economic value. It simply is not rentable, it's not
6 usable for anything. Does that mean the Government can
7 come in and take it?

8 MR. KNEEDLER: No. I -- that's because I think
9 real property -- real property is different. There's no
10 question that you --

11 QUESTION: Real property is different? I
12 just -- it doesn't seem to me the Government has the right
13 to take something away from me just because it says, hey,
14 it's no use to you.

15 MR. KNEEDLER: The question here is --

16 QUESTION: And that's what's going on here.

17 MR. KNEEDLER: The question is just the
18 interest, and it -- the history of our country shows that
19 there is no constitutional entitlement to earn interest.
20 The background of our banking laws --

21 QUESTION: But Mr. Kneedler, I thought the
22 answer was simpler than that. I thought the answer was
23 the one you mentioned earlier. The client is not being
24 forced to devote his property to someone else's benefit.
25 The client can say, give me the retainer back. I won't

1 give you the money. Pay me the closing costs in cash
2 immediately.

3 He may have trouble finding a lawyer who wants
4 to do that, but that's not a requirement of the State.
5 Isn't that the reason --

6 MR. KNEEDLER: Right. That --

7 QUESTION: -- that we don't have in this case
8 the question, how can you make me, in effect, devote my
9 property to someone else's benefit?

10 MR. KNEEDLER: That is a sufficient reason, but
11 I did want to answer Justice Breyer's question, because in
12 the banking situation someone else is clearly earning
13 money on the deposit.

14 If what Texas did was, instead of setting up
15 this program in the way that it did, required every bank
16 to pay 2 percent, or the equivalent demand deposit amount
17 to the State for all -- measured by the amount of IOLTA
18 accounts in the bank without setting up a separate
19 account, but simply all clients' funds in the bank of a
20 certain minimal amount, the bank has to pay an exaction
21 measured by that --

22 QUESTION: Well, I guess --

23 MR. KNEEDLER: -- there would be no question
24 that the clients' property --

25 QUESTION: Mr. Kneedler, though, in the case of

1 a corporation it's the Federal Government that's saying a
2 corporation can't have any interest earned on its money.

3 MR. KNEEDLER: Right, and petitioners concede at
4 page 35 of their brief that there is no constitutional
5 entitlement that interest is -- interest is only allowed
6 when provided for by statute or agreement of the parties.

7 QUESTION: Well, suppose we have a client who
8 does have a huge trust deposit, and the State of Texas
9 says, you know, this IOLTA's working pretty well. We're
10 going to take the interest from everybody. We're going to
11 take the interest on the million dollar trust account, and
12 we're going to use it for State programs. That's a
13 taking, isn't it?

14 MR. KNEEDLER: Well, the -- that's a very
15 different situation.

16 QUESTION: Is that a taking?

17 MR. KNEEDLER: I'm -- I think -- I'm not certain
18 that it would be. It depends -- it depends --

19 QUESTION: What about --

20 QUESTION: Why is isn't it a taking?

21 QUESTION: -- Webb's Fabulous Pharmacies?

22 MR. KNEEDLER: In Webb's -- it would depend upon
23 whether there was any reasonable relation between the
24 exaction and the interest, but here the background rule is
25 that the money could not earn any interest for the client

1 to begin with, and therefore putting it into the account,
2 from one noninterest-bearing account to another from the
3 perspective of the client does not affect the client's --

4 QUESTION: Thank you, Mr. Kneedler.

5 MR. KNEEDLER: Thank you.

6 QUESTION: Mr. Samp, we'll hear from you.

7 ORAL ARGUMENT OF RICHARD A. SAMP

8 ON BEHALF OF THE RESPONDENTS

9 MR. SAMP: Mr. Chief Justice, and may it please
10 the Court:

11 Respondents wish at the outset to take issue
12 with some of the confusing language in the question
13 presented by the petitioners. Petitioners contend that it
14 is a fundamental precept of the IOLTA program that only
15 those funds which could not on their own generate what
16 they call net interest go to an account which generates
17 IOLTA. That simply is not the rule in the State of Texas.
18 There are many --

19 QUESTION: Isn't that the premise on which the
20 court of appeals decided the case?

21 MR. SAMP: The court of appeals said, even if
22 that is the case, that is correct.

23 QUESTION: They assume that, and we're asked to
24 pass on whether their decision was correct on that
25 assumption, and that's why the question was phrased the

1 way it was. We've rephrased the question, as I remember
2 it.

3 MR. SAMP: That is correct, and we believe that
4 the Court should uphold the Fifth Circuit's decision. We
5 believe that an alternative basis for upholding the
6 decision is that the fundamental precept as stated by the
7 petitioners is simply wrong.

8 QUESTION: We don't have a factual record
9 developed to support that, do we?

10 MR. SAMP: We do not have a factual record, and
11 that was why --

12 QUESTION: Then I don't know why we would decide
13 the case on that assumption.

14 I mean, you may have a different -- you may have
15 a very different case to bring, and anything based upon
16 the premise of this case might be quite irrelevant to the
17 one that you are now telling us exists, but I don't see
18 how we can decide your other case on a --

19 MR. SAMP: The --

20 QUESTION: -- factual premise that we don't have
21 before us.

22 MR. SAMP: The court of appeals reversed the
23 grant of summary judgment to the petitioners. We believe
24 that that was the correct decision under any of the two
25 theories that we are here.

1 The court of appeals said that it was not proper
2 to grant summary judgment, and if we are correct that
3 there was a factual dispute in the district court as to
4 whether or not this fundamental precept really exists,
5 then that would be a correct reason for reversing the
6 grant of summary judgment.

7 QUESTION: It might be a correct reason for
8 *digging this case, too.

9 QUESTION: Well, so you're saying -- you're
10 arguing for affirmance on an alternate ground as well as
11 on the ground that the court of appeals took?

12 MR. SAMP: That is correct, and certainly that
13 would be an option to *dig the case, if Your Honor so
14 chose. We do believe, however, as we pointed out in our
15 response to the cert petition, that the issue on which the
16 Fifth Circuit ruled was directly in conflict with that of
17 two other circuits, and so long as the Court is -- has
18 agreed to hear the case, we think it ought to decide that
19 issue.

20 QUESTION: Mr. Samp --

21 QUESTION: And also, isn't it clear that if you
22 lose on the question that is presented, you can still make
23 that argument in the court of appeals?

24 MR. SAMP: That is correct, yes.

25 QUESTION: You're still protected in that

1 regard.

2 QUESTION: In this case, which is not a class
3 action, there's a vague reference to what is at stake
4 for -- is it Mr. Summers?

5 MR. SAMP: Yes.

6 QUESTION: I believe the complaint says a small
7 amount of his money has been in an IOLTA account since May
8 1993.

9 MR. SAMP: That is correct.

10 QUESTION: We know there's no economic stake for
11 the lawyer or for the organization. What is the
12 pocketbook interest for Mr. Summer? What is the small
13 amount?

14 MR. SAMP: The small amount is \$1,000 that has
15 been in this account since 1993. The financial stake of
16 his lawyer is that his lawyer holds the legal title to
17 these trust funds. The beneficial or equitable title is
18 held by Mr. Summers, so they both have a financial
19 interest in these particular funds.

20 And under this Court's decision in Webb's
21 Fabulous Pharmacy, the Court said very explicitly the
22 earnings of the fund are incidents of ownership of the
23 fund itself and are property, just as the fund itself is
24 property.

25 QUESTION: But can we argue the case on the

1 assumption that no net interest can be attributed to this
2 client? Can we argue the case on that assumption?

3 MR. SAMP: If you so choose. There is an
4 alternate basis for upholding the --

5 QUESTION: On that assumption, why should you
6 still prevail?

7 MR. SAMP: Because it has been the common law
8 rule for 250 years that if, in fact, interest is
9 generated, that interest belongs to the client.

10 QUESTION: Well, if that's so, why -- this is
11 exactly the problem I'm having. It's very easy for me to
12 see arguments both ways if we look at the property as the
13 deposit, because then the issue becomes, can the
14 Government take this piece of property and use it to earn
15 money for another person?

16 Now, we know the Government can take real
17 property and can insist you put up an antipollution thing.
18 And they do it just to earn money for a downstream
19 business, say a tourist business. They perhaps could
20 force my water over a dam, which would generate
21 electricity that would go to another person, and maybe
22 even they take my advance payment on my taxes and they use
23 that payment to make money for the Government, and they
24 never pay me anything.

25 In any of those cases it seems to me the issue

1 is the correct use, constitutional or not, of the property
2 I own, not the electricity, not the money that's earned in
3 the tourist attraction, and not the money that the
4 Government happens to use my money to get for itself.

5 MR. SAMP: Justice --

6 QUESTION: So on any of those analogies, the
7 answer is there is no property interest in what's used,
8 what's gained, but the question is whether we can use the
9 basic fund for that purpose.

10 Now, I put that quite squarely because I want to
11 hear your response to the point, why is there a property
12 interest in that electricity that my water is used to
13 make, or the interest here?

14 MR. SAMP: Justice Breyer, the Court in its
15 Webb's Fabulous Pharmacy case saw these two issues that
16 you're presenting as really the flip side of each other,
17 that really the reason that interest follows principal is
18 because in effect the use of the principal is what
19 generates the interest, and therefore the Government's
20 temporary taking or use of the original principal is the
21 same thing as the taking of the interest.

22 Now, in some of the examples you have given,
23 there are many things that distinguish them. For example,
24 in the case of the Government taking a tax, it has always
25 been thought that a properly constituted tax that does not

1 violate either equal protection or due process does not
2 constitute a taking. The same would be true of any sort
3 of user fee. The -- I'm not sure I understand the case of
4 the water. Generally, the water --

5 QUESTION: They take my water and they say, run
6 it over the TVA dam, and as a result it makes electricity
7 which otherwise couldn't be produced. The Government
8 takes that electricity, sells it, keeps the money. It's
9 just like the interest here. They take your money and
10 they use it to make some other thing that's worth
11 something.

12 MR. SAMP: In all respect, the navigable -- the
13 water in navigable streams has never been thought to be
14 private property. The riverbeds can be private property
15 but not the water, so I'm not sure that any of those
16 analogies prove your point.

17 QUESTION: It seems to me this case is something
18 like an escheat. All States escheat bank accounts after
19 different periods of time, some 7 years. Can a property
20 owner come and say, well, you know, you really should give
21 me 10 years. In 10 years I would have got this. This is
22 really mine? The State uses it for escheats and uses it
23 for -- it takes the money and uses it for any purpose it
24 wants.

25 MR. SAMP: In the case of abandoned property,

1 that is correct, and the rules of escheat --

2 QUESTION: Well, isn't this something like
3 abandoned property, because under the assumption -- and I
4 know you have an alternate base, but under the assumption
5 that we -- on which we're considering the case, you simply
6 cannot trace and pay the interest, so it seems to me very
7 much like an escheat.

8 MR. SAMP: Well, let me distinguish what --
9 within the question presented from what all the facts of
10 this case are.

11 The petitioners say that you cannot earn
12 interest. Yes, you can earn interest. Interest is what a
13 willing borrower is willing to pay for the use of money.
14 Interest is generated.

15 QUESTION: I thought that we made it very clear
16 that interest is earned, but that it's not net interest in
17 the sense that the administrative cost of tracing it and
18 paying it to the client will exceed the interest itself.
19 I thought that's the basis we're arguing the case on.

20 MR. SAMP: And let me add, Justice Kennedy, that
21 the underlying premise of IOLTA is that there will be
22 these costs, yet those costs will exist in any event.

23 If I operate a trust account, I am going to have
24 certain bank charges. I am going to have certain overhead
25 costs in my office, including the cost of entering the

1 names on a daily basis into the account. I am going to
2 have the cost of reconciling the account at the end of the
3 month. Those costs will exist no matter whether I put my
4 funds into an account that earns interest for IOLTA or
5 earns interest for my client.

6 QUESTION: No, but the -- when IOLTA talks about
7 the offset it's talking about offsets beyond that. It's
8 talking about offsets necessary, not only to account for
9 the funds, but to account for them separately to each
10 source, to file the appropriate tax information for each
11 source, to pay the interest out to each source, and so on,
12 and those, in fact, are separate costs which are not
13 incurred in a pooled fund.

14 So sure, you're right, no matter how you hold it
15 there's going to be some accounting cost, but the premise
16 of IOLTA is, there are going to be more accounting and
17 reporting costs if you're going to account for them
18 separately to the client and, in fact, when you do so
19 that's going to wipe out any benefit to the client. There
20 will be a net of zero or less.

21 MR. SAMP: Justice Souter, I'd like to call your
22 attention both to Rule 6 --

23 QUESTION: No, but isn't that the premise?

24 MR. SAMP: No, that is not. The premise is that
25 if the net interest to the client is less than zero, that

1 the money does not go at all to the client. The --
2 however, a net interest of less than zero will almost
3 always be a, still a net benefit for the client.

4 If you look at IOLTA Rule 6, if you look at page
5 43 of our brief in which we lay out in footnote 16 all of
6 the overhead cost that the State of Texas tells lawyers
7 should be taken into account before the -- it is
8 determined whether there can be net interest, you will see
9 that only one out of seven items mentioned is the cost of
10 producing a 1099 form. The cost of computing interest
11 separately --

12 QUESTION: What is the Texas State law about
13 interest following principal? Is it the law in the State
14 of Texas that net interest follows principal, only the
15 net?

16 MR. SAMP: The --

17 QUESTION: The Sellers case sort of sounds like
18 that.

19 MR. SAMP: The Sellers case indicates that if a
20 fund of interest is generated, the person responsible for
21 generating the interest is entitled to take a reasonable
22 fee for their expenses before paying on the interest.

23 QUESTION: I mean, if Texas law is to the effect
24 that only net interest goes with the property, and if we
25 take this case on the assumption that there isn't any net

1 interest, then where does that leave us?

2 MR. SAMP: Texas law does not say only net
3 interest. Texas law says a reasonable fee can be
4 deducted. It says nothing about other costs that someone
5 other than the State might be incurring, so that, for
6 example, in this particular case there will be costs that
7 the attorney incurs for overhead, for setting up of the
8 account, for all of these other things, yet the State of
9 Texas does nothing to generate any of those funds.

10 This is not a case where somehow the State has
11 pooled money. This is pooling by the lawyer that, as
12 Chief Justice Rehnquist indicated before, has always been
13 going on.

14 QUESTION: Mr. Samp, can I -- coming back to
15 Justice Kennedy's escheat example, I was thinking that
16 that differs from this in that the owner of a bank account
17 that would be escheated has voluntarily let it go. He's
18 abandoned it, in effect.

19 But then, maybe that's not true, because the
20 contention has been made here that these people have an
21 option, too, that they don't have to let the lawyer hold
22 onto their money.

23 What is your response to that argument?

24 MR. SAMP: There is nothing voluntary about the
25 IOLTA program. First of all, it says explicitly in the

1 IOLTA rules that the attorney is not required to tell the
2 clients about the existence of the IOLTA program. Indeed,
3 virtually no clients know that their money is going in
4 here, so they really don't have that option.

5 In the case of Mr. Summers, he was never told
6 that his funds were going into an IOLTA account. When he
7 finally did learn, his case was already 18 months down the
8 road, so that to say that there was any sort of realistic
9 option at that point to --

10 QUESTION: Well, I thought that the statements
11 made here say that it was just ordinarily funds kept for a
12 very short time while a check cleared. His funds were
13 kept for 18 months?

14 MR. SAMP: They are still in the fund. He was
15 sued in a civil action in 1993 -- or, excuse me, 1992.
16 The -- he was -- this was a retainer of a different sort
17 than the one you were describing. This was not an advance
18 payment. Rather, this was \$1,000 that was put into a
19 trust account. It was to be used to ensure payment of
20 regular bills. So long as regular bills were paid, and
21 they have been in all the years since then, then the money
22 remains in the trust account.

23 QUESTION: Does the State require him to pay the
24 \$1,000 to the lawyer? That's a matter of his contract
25 between him and the lawyer. I don't see how that's

1 attributable to the State.

2 MR. SAMP: The State has stated that any money
3 in a trust account must go --

4 QUESTION: Yes, but the State doesn't say that
5 this \$1,000 has got to be paid to the lawyer and put in --
6 to be put in a trust account. The State doesn't tell him
7 he's got to pay the lawyer \$1,000.

8 MR. SAMP: Similarly, in the Webb's Fabulous
9 Pharmacy case, there was no requirement that anybody make
10 a claim against the --

11 QUESTION: No, but there was a difference in
12 Webb's, and the difference was in effect that there was a
13 background of practice in dealing with money, and given
14 that background of practice with dealing with money, it
15 was the standard, the norm that the interest went to the
16 person whose principal was earning it.

17 There isn't that kind of a background of
18 practice here. Maybe we should say that there should be a
19 legal requirement that the two be treated the same, but we
20 are certainly going to go beyond Webb's if we hold your
21 way.

22 MR. SAMP: In all due respect, in Webb's there
23 was no such history. The history in Webb was that in
24 general, when money had been put into the court registry,
25 it sat there and no interest was earned. At some point --

1 QUESTION: But there was a general background
2 principle that sums of money capable of earning interest
3 at commercial rates in substantial amounts, as a general
4 rule, went to the -- as a general rule under those
5 circumstances the interest went to the person who owned
6 the principal. That was the background.

7 MR. SAMP: The background in Florida is
8 precisely the same in Texas, and that is a general rule
9 that interest follows principal. I have not seen anything
10 in the --

11 QUESTION: No, but there is a --

12 MR. SAMP: -- background principle that adds the
13 caveats that you have suggested.

14 QUESTION: But the question, I think, is whether
15 we should say that the, I guess consistently different
16 background treatment in commercial and legal practice here
17 is not entitled to some constitutional significance, and
18 we can't make that determination simply by saying this is
19 like Webb's, because the question in this case is whether
20 it is like Webb's. Do you agree at least with that?

21 MR. SAMP: Webb's did not directly address the
22 issue here. The general background principles in Webb's
23 apply equally here, and I think perhaps an effective way
24 of looking at this is to look at it really perhaps in the
25 way that Justice Breyer was suggesting before, which is

1 that we have the right to exclude others from the use of
2 our property. Presumably --

3 QUESTION: Mr. Samp, I'd like to ask you -- your
4 time is running out. I take it that on the theory you're
5 presenting, this would go for what the Justice's brief
6 brought up. That is, the prisoners who want to buy things
7 at the commissary have to put a deposit, and they don't
8 get any interest on it, but the interest is used to
9 make -- do things to administer the prison, so I take it,
10 if you prevail here, the same would follow for the
11 prisoners.

12 MR. SAMP: Precisely, and in fact that is the
13 unanimous view of the court of appeals right now, is that
14 prison accounts, when they are set up and they actually
15 earn interest, the prison is entitled to take a reasonable
16 administrative fee off of the top, but any interest that
17 remains is the property of the clients, and they --
18 generally courts of appeals have said that prisons may not
19 take that money and use them as they see fit for the
20 general benefit of the prison.

21 QUESTION: Is there any -- please.

22 QUESTION: No, go --

23 QUESTION: Let me ask you a question if they're
24 hesitating, then.

25 (Laughter.)

1 QUESTION: Do you think Texas could pass a
2 statute repealing the rule that interest follows principal
3 at least in a limited category of cases, including
4 deposits by clients with their lawyers?

5 MR. SAMP: Well, that's what they have done in
6 this case.

7 QUESTION: Do you think they --

8 MR. SAMP: They have announced a rule repealing
9 it, and the question is --

10 QUESTION: The question is, as a matter of
11 State -- if they did it as a matter of State statutory
12 law, say, you say they -- the Constitution would permit or
13 prohibit that?

14 MR. SAMP: They have done that, and it prohibits
15 it, because this Court said in Webb's --

16 QUESTION: But they do it by defining property
17 in a way that doesn't include this category of interest.

18 MR. SAMP: Yes, and this Court in Webb's said
19 that when you simply announce by ipse dixit that some
20 piece of property that used to be protected by State law
21 no longer is, that that is precisely what the Takings
22 Clause was intended to prevent.

23 Now, the State is permitted to redefine
24 property, but it may not do so in a way that defines one
25 category of property totally different from similarly

1 situated property and, for example, in our brief we point
2 out that the State of Texas itself right now is litigating
3 in the Ninth Circuit the right to have its trust funds,
4 any interest earned on those trust funds, have the
5 interest go to the State of Texas even though in that
6 particular case Texas had no right in the first instance
7 to insist that interest be generated.

8 So that if Texas is going to be taking -- making
9 that argument, right now in court in that case, it should
10 not be allowed to change property law for similarly
11 situated property --

12 QUESTION: Let me ask you this. If it were not
13 for the Webb's case -- you rely very heavily and very
14 properly on it -- would you have any authority for your
15 position, your response to my question, except Webb's?

16 MR. SAMP: Yes. In the Lucas case, this Court
17 generally talked about the ability of the State to change
18 property law and nuisance law, and what the Court said was
19 that if you are going to declare something a nuisance,
20 that really has to be consistent with background
21 principles of property and nuisance law. You can't just
22 simply, by ipse dixit, declare that something is a
23 nuisance and therefore say that no compensation is due
24 when you pass a regulation stopping a particular activity.

25 QUESTION: Well, is --

1 QUESTION: Mr. Samp, can I ask you, is this case
2 necessarily over, have you gotten over the hill if we
3 agree with you on this aspect of the case?

4 As I understand it, the only thing before us is
5 whether your client has a property interest in the
6 interest.

7 MR. SAMP: That's correct.

8 QUESTION: It's conceivable that he has a
9 property interest but that there hasn't been a taking.

10 MR. SAMP: That is correct.

11 QUESTION: Because since he could not harvest
12 that property interest, so to speak, it was worthless to
13 him, the holding below on remand could be there's been no
14 taking of that property interest.

15 MR. SAMP: While we would argue against that
16 result, that is a possible result after a favorable
17 decision to us today.

18 QUESTION: Okay, but you acknowledge that they
19 are two separate questions, and all we're talking about
20 here is whether there is a property interest.

21 MR. SAMP: That is correct.

22 QUESTION: Do you think they are necessarily two
23 separate questions for us here?

24 It's one thing, I suppose, to ask abstractly
25 whether there is a property right in the interest, but it

1 seems to me equally legitimate to ask the question, should
2 we recognize a property right in the interest for Fifth
3 Amendment purposes if, in fact, the result on the premise
4 of the case would be that there was no just compensation
5 due at the end of the road because the client, in --
6 because -- yes, the client in fact had lost nothing that
7 the client would otherwise have had?

8 In other words, wouldn't it be legitimate for us
9 to consider what will happen at stage -- or what ought to
10 happen at stage 2 in deciding whether in the first
11 instance to recognize a property right at stage 1?

12 MR. SAMP: I think it would be a preferable
13 course for the Court to have a full record as to whether
14 or not there was a loss to the client prior to making that
15 determination.

16 The initial decision the court of -- the
17 district court will have to face is whether or not the per
18 se taking rules apply and then, if they do not, then the
19 question is, each of the various factors that the Court
20 has enunciated for whether a taking exists, and those
21 sorts of questions perhaps could best be decided on a
22 fuller record.

23 QUESTION: The court of appeals made no effort
24 to decide the second question, did it?

25 MR. SAMP: That is correct, yes.

1 QUESTION: It expressly reserved it, as I
2 recall.

3 QUESTION: Yes.

4 MR. SAMP: That's correct, and they also, while
5 they reinstated our First Amendment claim, they really
6 had -- had virtually no discussion of the First Amendment
7 issue, so that regardless of how the Court rules today on
8 the Fifth Amendment issue, we would hope that that issue
9 would be -- would still be open on remand.

10 QUESTION: There's a lot of law that concerns
11 contracts and trusts, and misuse of trusts, and I take it
12 it's common law in most States that if a trustee misuses
13 your money and makes money out of it he's going to have to
14 pay that to you, and that seems to help you.

15 MR. SAMP: That is correct.

16 QUESTION: All right. But what's worrying me
17 here is that we're talking about, not your loss, but the
18 misperforming trustee's gain, let's say, assuming
19 everything in your favor, the misperforming trustee's gain
20 over and above your loss, and I'm -- have you found
21 anything -- I'm nervous about, or would worry about the
22 consequences of constitutionalizing that amount, of
23 suddenly we invade trust law and contract law by saying
24 there is a property interest in -- let's take a
25 misperforming trustee, who makes some money out of your

1 money in an amount greater than you could have ever made.

2 And now, what happens, once we say there's a
3 constitutional interest in that? Is there suddenly going
4 to be an implication for bankruptcy proceedings, or for
5 State laws that decide for some reason not to give that
6 extra amount back to the person who put the money into the
7 trust? What happens in a -- I'm -- I can't quite foresee,
8 the terrible word, ERISA cases.

9 (Laughter.)

10 QUESTION: I can't quite foresee that, and I'd
11 like to get your reaction.

12 MR. SAMP: I am not sure that a decision in our
13 favor in this case would constitutionalize the entire law
14 of trusts. A trustee, for example, could be found to have
15 failed to properly invest the money, but that would not be
16 a subject for the Takings Clause.

17 However, it has long been the case that if a
18 trustee earns interest, that even though he had no
19 obligation to do so in the first place, it has been
20 considered that the Takings Clause requires that interest
21 to be paid over, and --

22 QUESTION: Not the Takings Clause, just normal
23 property law.

24 MR. SAMP: Yes. In the --

25 QUESTION: My worry was just the opposite of

1 Justice Breyer's. I worry that if we hold that there is
2 no property interest here, that where this kind of a plan
3 did not exist, the lawyer himself would be able to merge
4 all clients' funds that could not individually make a
5 profit and keep whatever interest comes. I'm sure that
6 that's not what the common law would normally provide,
7 that that interest would be considered the property of the
8 individual clients who ponied up the money.

9 MR. SAMP: I --

10 QUESTION: But if there's no property interest,
11 there would be no basis for such a rule, I assume.

12 MR. SAMP: I agree with you completely, and it
13 seems to me that --

14 QUESTION: But Mr. Samp, I thought that the --
15 once I -- tell me if this is a wrong fix on the case, that
16 it was a question between who was going to get this money,
17 the Texas fund or the bank, that in no event was it going
18 to enrich the lawyer or the client, so there were two
19 choices. If IOLTA is no good, the bank gets the money.
20 If IOLTA's okay, the fund gets the money, but not the
21 lawyer and not the client in any event. I thought that
22 was the basic premise of this whole thing.

23 MR. SAMP: Perhaps that was a premise back in
24 1976, at a time when interest could not effectively be
25 earned on accounts. However, there is a difference

1 between a bank having free use of money and a bank paying
2 interest and then deciding who gets that money.

3 Interest is an actual payment of money for the
4 use of funds. That has been this Court's definition --

5 QUESTION: But that's --

6 QUESTION: Well, assume that's still the premise
7 of this case..

8 QUESTION: Yes.

9 QUESTION: Assume that's still the premise of
10 this case. As Justice Ginsburg outlined it, why does the
11 client have a reasonable investment-backed expectation of
12 interest when we stipulate that he could never get that
13 interest?

14 MR. SAMP: I don't believe he has an investment-
15 backed expectation, and that goes to the issue of whether
16 there is a taking. He has not invested anything here. He
17 does have a very legitimate expectation that any interest
18 that is earned will be his, and that's why this should be
19 considered to be his property.

20 But once that issue is reached, then, of course,
21 we have to consider whether the per se taking rule
22 applies. If not, then the issue of whether or not there
23 is a reasonable investment-backed expectation would be one
24 of a number of factors that would be taken into account in
25 determining whether there is a taking, but I don't believe

1 that we need to show that there was any kind of reasonable
2 investment-backed expectation in order to prevail on the
3 issue today, which is whether or not this is property in
4 the first place.

5 QUESTION: Well, why wouldn't your case be
6 basically the same even if there were no IOLTA and the
7 banks were simply getting the benefit of the deposit?

8 It's true, the banks would not be going through
9 the formality of paying itself interest, but you would
10 have, it seems to me, exactly the same property claim that
11 you've got here.

12 MR. SAMP: The banking industry has always been
13 subject to regulation, and if they are prohibited from
14 paying interest, we don't claim that we would have any
15 sort of claim. However, banks are ready, willing, and
16 able to pay interest. They compete actively for the money
17 of depositors. They want to have this money in order to
18 be able to lend it out to others.

19 QUESTION: So interest follows principal only if
20 there is a background practice of paying interest.

21 MR. SAMP: Any interest that is paid follows
22 principal. That is the rule. If it is not paid, then
23 there is no right to accrued interest for the use of one's
24 money, and we don't claim that that's any kind of
25 constitutional right.

1 Going back to your question, Justice Scalia, it
2 seems to me that it's very easy to foresee many examples
3 where the Government, for example, might come in and say
4 that you're not gardening in your backyard, why don't we
5 come in and grow a vegetable garden there.

6 And I'd say, well, I want to exclude you, and
7 they say, well, it would cost you too much to buy the
8 fertilizer for the backyard, so you can't do it
9 profitably, but we buy our fertilizer in bulk, so we can
10 do it more profitably, let us use it since you're not
11 doing it otherwise, and it would seem to me that a
12 decision that this is not property would --

13 QUESTION: No, no.

14 QUESTION: No.

15 QUESTION: That's a misuse of the yard.

16 QUESTION: That's right.

17 QUESTION: That's what I think is the question
18 in the case. Can they or can they not use the \$1,000 in
19 this way?

20 MR. SAMP: And I --

21 QUESTION: I mean, whether the vegetables if
22 they do use it, who they happen to belong to, I mean, I
23 don't know. I guess that's a question of State
24 restitution law. If it was a misused garden, I don't know
25 that the Constitution says who the vegetables have to

1 belong to, but the Constitution might say whether you can
2 use the garden that way.

3 MR. SAMP: The -- it's not the Constitution, it
4 is common law and State law that has always said that the
5 earnings of a fund, the earnings of property are the
6 property of those who own the fund that generate it. Just
7 as, because I own the garden, I own the vegetables that
8 are produced from it, so, too, because I own the fund, I
9 own the interest that is generated by my fund.

10 QUESTION: Yes, but because you can tell the
11 Government to get out of your yard you're in the same
12 position, it seems to me, that you're in here, when you
13 can say to the lawyer, give me the \$1,000. The Government
14 isn't stopping you from doing that.

15 MR. SAMP: The Government hasn't even -- the
16 Government has said to the lawyers, you don't even have to
17 tell me, so I don't even know that you're in my backyard.
18 I've gone off on vacation, and I come back, and all of a
19 sudden --

20 (Laughter.)

21 MR. SAMP: -- the yard is occupied.

22 Thank you very much.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Samp.
24 The case is submitted.

25 (Whereupon, at 11:11 a.m., the case in the

1 above-entitled matter was submitted.)

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

THOMAS R. PHILLIPS, ET AL., Petitioners v.
WASHINGTON LEGAL FOUNDATION, ET AL.
CASE NO: No. 96-1578

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna M. Fedico-----

(REPORTER)