0/A 11-7-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,671

IN RE: PROPOSED AMENDMENT
TO RULE 5-1.1(d) OF THE RULES
REGULATING THE FLORIDA BAR
CONCERNING THE MATTER OF
INTEREST ON TRUST ACCOUNTS

_____/

REPLY OF TERRENCE WILLIAM ACKERT TO RESPONSE OF THE FLORIDA BAR TO THE PETITION OF THE FLORIDA BAR FOUNDATION

COMES NOW, TERRENCE WILLIAM ACKERT, Florida Bar and Florida Bar Foundation member, and replies to the Response of The Florida Bar to the Petition of the Florida Bar Foundation seeking amendment to the Rules regulating the Florida Bar regarding the Comprehensive Interest on Trust Account Program, and would show:

1. That the Court's Clerk's Office has indicated that the rules regarding formal briefing need not be strictly adhered to in the matter sub judice; thus, your Respondent pleads accordingly.

2. That Respondent has previously appeared by pleading and oral argument, before this Court in a related matter filed by some of the same Petitioners who allegedly authorized the filing of the current Petition, (respecting mandatory pro bono including a form of mandatory IOTA as an alternative) as Counsel of Record for the Seminole County Bar Association, in 1981.

3. That Respondent believes there are five questions of grave, long-term significance posed by the Bar's response to the (and the) Florida Bar Foundation (FBF) Petition:

> A. Should the Bar have a clear and specific, and enforceable, rule (rather than a statement of policy) prohibiting attorney manipulation of trust funds for personal benefit?
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> B. Is it constitutionally permissible for this Court to amend the Rules regulating the Florida Bar (RRFB) to require mandatory observation of the comprehensive IOTA program proposed sub judice by the FBF?
>
> C. Is it constitutionally permissible for this Court to amend the RRFB to impose an "opt-out" IOTA program as proposed sub judice by the Bar?
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> D. On strictly a policy level, is the adoption of the said comprehensive IOTA program justified?
>
> E. On strictly a policy level, is the adoption of the said opt-out program justified?

Your Respondent, who currently serves by appointment through this Court as Vice-Chair of a Grievance Committee, who has served four times as Vice-Chair or Chair of the Bar's Delivery of Legal Services Committee, has twice been accorded the President's Pro Bono Award before this Court, and who has raised many thousands of dollars for FBF both as an IOTA attorney and a recruiter, respectfully urges upon the Court the following considerations respecting these critical questions.

4, THE QUESTION OF RULE PROHIBITING MANIPULATION OF TRUST FUNDS: There seems little need for argument upon this point. This Court has the clear constitutional authority to regulate attorneys (without reference to interest on client moneys), and the equally clear policy making authority to impose rules which serve to protect the public served by attorneys, especially where necessary to prevent

attorney-client conflict. Surprisingly, the American Bar Association (ABA) approved, Florida Bar adopted Rules effective 1/1/87 are less clear on the matter of attorney manipulation of trust funds for personal benefit than were previous rules. There appears to be no direct prohibition respecting such practices as attorneys personally receiving interest from investment into interest bearing accounts of client moneys, or attorneys negotiating preferential loan or other banking benefits from "shopping around" client moneys. There is no legitimate defense to be advanced on behalf of practices permitting attorneys to convert moneys which remain the property of clients (ergo, "trust" moneys) to their own personal use and benefit; such practices deprive clients of a property right, promote misuse of a trust relationship crucial to our very system of justice, create a sordid image of selfish attorneys more interested in their own agenda than the client's, and inevitably foster a climate on conflict wherein clients seek redress against their counsel for unjust enrichment and breach of fiduciary duty.

5. THE QUESTION OF THE CONSTITUTIONALITY OF COMPREHENSIVE IOTA: Your Respondent adopts ad verbatim the briefs earlier filed on this point by Professor Joe Little of the Holland Law Center, University of Florida Law School, and Harvey M. Alper, Esq., of Altamonte Springs, Florida. If the Florida Department of Real Estate (an executive agency) imposed by rule a comprehensive IOTA type program on Realtor Trust Accounts, would it be any less than comprehensive IOTA a tax and a deprivation of the client's property interest by State Action? If a Clerk of the Circuit Court seeks to keep for his own use interest on Registry funds deposited under Court Order, is it any less than a tax and

a deprivation of client property? The old saw of the English Justice responding to a question regarding the meaning of a written contract, that if he were informed how the parties performed, he would be able to decide what the contract required may be instructive logic as to the question of whether the interest generated by IOTA is property. Further, a decision by this Court that "property" is not property not only ignores reality, but has grave and thoroughly frightening consequences, regardless of the benevolent purposes to which the "property" might be put; a similar sense of sincere concern (directed towards the disruption of public education) led to Mr. Hawkins' case. The system currently in place carefully permits the current benevolent goals of the FBF to be met, and counsel to participate, while still permitting the client to direct otherwise (but indirectly enough to avoid Internal Revenue Service complications apparently greatly feared by FBF). It should be maintained.

6. THE QUESTION OF THE CONSTITUTIONALITY OF "OPT-OUT" IOTA: An "opt-out" proposal is potentially no less constitutionally odious than comprehensive IOTA, espectially if it contains a provision that unless an attorney handling client moneys "opts out," the attorney is "in." The client remains without control. What may resolve the problem would be requirement that counsel inform the client in written form of the attorney's intention to IOTA-deposit the funds unless contrary written instructions are received within a specific time (with the client reserving the right to direct removal of the funds at any time by written instrument). Respondent is not conversant with how such a program might be treated by IRS; the IRS tail cannot waive, however,

the constitutional dog. The IRS is a create of the national legislature; if the Bar, or the FBF, desires alterations of the rules under which IRS operates , the Bar and/or FBF must approach Congress directly, not expect this Court to do violence to basic constitutional precepts to avoid doing so.

7. THE QUESTION OF THE WISDOM IN A POLICY SENSE OF COMPREHENSIVE IOTA: The FBF proposal does not have the support of the Bar Board of Governors, nor surely the rank and file and not a single poll or other test of sentiment argues otherwise; at best, the entire program of FBF is supported by about 20% of the Bar. Is the public any more or less favorable? This question remains unanswered, but controversial, if the response of the Bar Membership is any measurement. The matter is not primarily a popularity contest, however. There are other at least equally pressing policy questions, such as:

A. The FBF is sort of a semi-official Bar charitable institution, yet it operates completely independently of the Bar. This Court has been heard recently on the "one-man, one-vote" issue in Bar elections; does not the same wisdom apply in Foundation offices?

B. The FBF has discussed seeking actual control and power over attorneys, such as auditing trust accounts to insure compliance with IOTA rules and declaring what sums constitute "nominal funds" and therefore are subject to IOTA deposit. While no rules have been passed regarding these issues, they suggest a sort of "regulation by proxy" which violates the constitutionally mandated system of Bar regulation now in place, and an attempt at dog waiving by the tail.

C. The FBF is subject to various pressures regarding its charitable use of funds on a regular basis. Could the funds have been used in 1954 to support Florida A & M Law School? Could the funds be exclusively directed to replace lost federal funds for only federally supported programs (as has actually been proposed)?

D. The public perception of attorneys is not necessarily enhanced by a system wherein the public's money is used to

support Bar goals, or where a selected segment of the public compelled by the necessity of seeking counsel is forced to provide a solution to a societal problem.

E. Will individual Bar members be able to challenge FBF use by method similar to the Rules imposed by this Court on dues money usage by the Bar?

F. Who will enforce comprehensive IOTA and how? It would be Pollyannaish to expect total compliance without sanction. Will enforcement violate privacy rights or attorney-client privilege notions?

G. Will attorneys simply abandon trust account operation for lesser funds as a final means of avoiding burdensome procedures which simply serve to increase spiraling legal costs and fees?

H. Is the alternative (proposed by FBF) to IOTA accounts (that is, accounting to the client for interest on smaller sums of client funds in trust) fiscally responsible, or merely an artifice and device to compel IOTA participation?

8. THE QUESTION OF THE WISDOM IN A POLICY SENSE OF "OPT-OUT" IOTA: A plan which allows the client notice of intended IOTA participation, the right to direct non-participation at any time, and the right to secure interest from funds in trust at any time, and at the same time which specifically and directly prohibits attorneys from manipulating client funds and maintains control over attorney participation in the Bar, shares few if any of the policy complications which comprehensive IOTA produces and as noted above in paragraph 7. Such a program, in fact, would appear to be remarkably similar to the existing program.

9. CONCLUSION:

A: The responsive proposal of the Florida Bar should be granted, but only so long as the "opt-out" program provides for initial written notice of provision for client rejection before deposit of funds

and that the client may direct removal at any time, for the plain and simple reason that it deserves constitutional mandates while permitting the Bar to carry on the fine and charitable work of the Foundation.

B. By proceeding with its current plan, the FBF has ignored the cumulative wisdom of the Bar and placed this Court in the apparent position of conflict (the Court benefiting from FBF money and members serving on the FBF Board) and created the sordid image of the Bar claiming to serve a chairitable interest financed entirely by clients. It is therefore respectfully suggested that the IOTA program must be removed from the aegis of the FBF and placed under the direct control and management of the Florida Bar and its Board of Governors, and that the pending FBF Petition be denied.

C. Finally, your Respondent respectfully suggests that the Court direct the Bar to report an appropriate Rule clearly proscribing attorney manipulation of trust funds.

RESPECTFULLY SUBMITTED at Orlando, Orange County, Florida, this 26th day of October, 1988.

Terrence William Ackert, Esq.
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Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Roderick N. Petrey, Esquire, The Florida Bar Foundation, 3400 One Biscayne Boulevard, Miami, Florida 33131, Jack Harkness, Executive Director, The Florida Bar, The Florida

Bar Center, Tallahassee, Florida 32399-2300, Harvey M. Alper, Esquire, 112 West Citrus Street, Altamonte Springs, Florida 32714, and Brian Sanders, Esquire, P.O. Box 2529, Ft. Walton Beach, Florida 32549, this 20th day of October, 1988.

Terrence William Ackert, Esq.