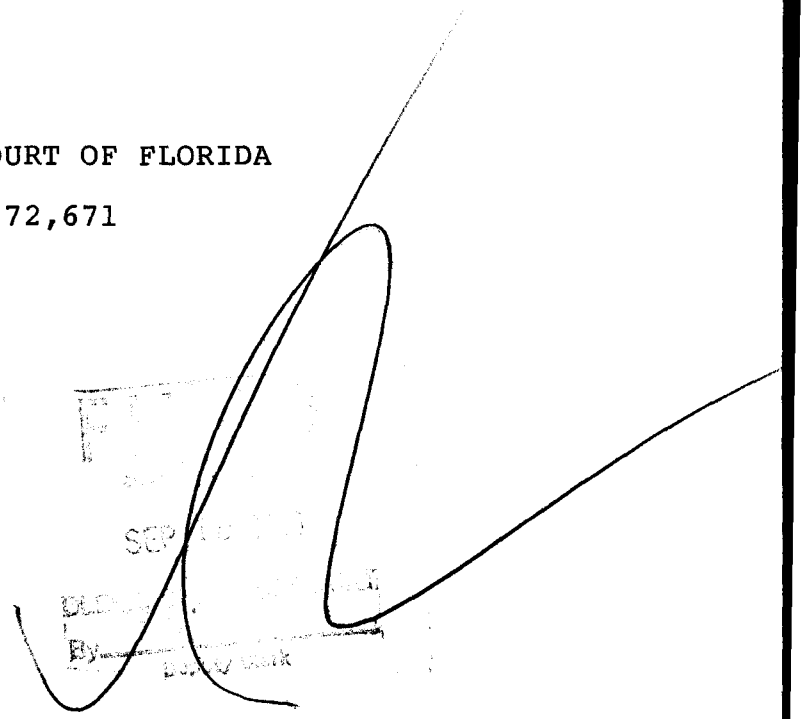
IN THE SUPREME COURT OF FLORIDA

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

_____/



COMMENT OF HARVEY M. ALPER, ESQUIRE,
IN OPPOSITION TO THE PETITION TO AMEND IOTA PROGRAM
FROM "VOLUNTARY" TO "COMPREHENSIVE" (COMPULSORY)

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INTRODUCTION

Respondent, Harvey M. Alper files this "Comment" in lieu of a formal brief or memorandum having been advised by Sarah Gainey of the Clerk's Office, Supreme Court of Florida, that "formal briefs" are not required in this matter. Nonetheless, Respondent, who has previously briefed this matter to the Supreme Court and argued concerning same when the matter was last before the Court in Case No. 62,889, will nonetheless endeavor to present a cohesive argument based upon principles of law rather than emotion or political philosophy.

POINTS ADVANCED

POINT 1 - THE UTILIZATION OF CLIENT FUNDS FOR ANY NON-CLIENT PURPOSE, ABSENT CLIENT CONSENT, IS VIOLATIVE OF THE 5TH AND 14TH AMENDMENT TO THE FEDERAL CONSTITUTION, THE COMPANION PROVISIONS OF THE FLORIDA CONSTITUTION AND CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

POINT 2 - THE PETITION MUST FAIL BECAUSE IT DEPRIVES THE OWNERS OF FUNDS OF THE RIGHT TO DECIDE WHAT FRUITS, IF ANY, SUCH FUNDS SHALL YIELD AND, IF SUCH FRUIT IS YIELDED, THE PROGRAM FURTHER DEPRIVES THE OWNERS OF THE RIGHT TO DETERMINE WHO SHALL HAVE THE BENEFIT THEREOF.

POINT 3 - THE JUDICIAL SYSTEM MAY NOT BE USED TO LEVY A TAX.

POINT 4 - THE CREATION OF THE PROGRAM PROPOSED BY PETITIONERS WILL NOT CREATE THE DESIRABLE IMAGE OF THE BAR WHICH THEY SEEK.

POINT 5 - OPPOSITION TO THE IOTA PROGRAM AMENDMENT NOW PROPOSED IS NOT AXIOMATICALLY TO BE EQUATED WITH POLITICAL CONSERVATISM, REACTIONARY POLITICS, OR OPPOSITION TO THE ENHANCEMENT OF THE LOT OF THE POOR.

POINT 6 - THIS COURT SHOULD DECLINE TO FURTHER CONSIDER THE IOTA PROGRAM IN THAT IT HAS CREATED A IRREMEDIABLE CONFLICT OF INTEREST IN ITS OPERATION.

STATEMENT OF FACTS

This Court now has before it a Petition to Amend the Rules Regulating The Florida Bar, Rule 5-1.1(d), for the apparent purpose of causing all "nominal or short-term funds" held by lawyers in their trust accounts to be invested at interest, either for the benefit of The Florida Bar Foundation or, hypothetically, for the benefit of the client placing such funds with the attorney. Said Petition has been filed, purportedly, on behalf of the required number of Petitioners who are members of The Florida Bar. If adopted, the Rule would, in effect, require that attorneys invest all trust funds held by them either in separate interest-bearing trust accounts for the benefit of each particular client, or in a pooled interest-bearing trust account for the benefit of all participating clients or, alternatively, in a pooled interest-bearing trust account, with regard to which no accounting would be required of the lawyer, with the interest earned, "less reasonable services charges in connection with this account" to be "forwarded to The Florida Bar Foundation." No provision is made in the Rule proposed for clients who do not want interest to be earned on their money.

SUMMARY OF ARGUMENT

Respondent argues that the program proposed by Petitioners, no matter how laudable their motives, is improper and unconstitutional. It is also improperly presented to this Court.

The program proposed is unconstitutional in that it constitutes a taking of property without just compensation or due process of law. Interest on client money, if earned, is property of the client.

Further, the program is unconstitutional for the additional reason that it constitutes the exaction of a tax upon client funds entered by judicial fiat. This Court does not have the power to tax.

The program is additionally improper and likely unconstitutional, as proposed, because it creates a facial conflict of interest in this Court. As the undersigned Respondent argued to this Court in a previous Motion to Strike this Petition, the Petition creates various conflicts of interest and related ethical issues which require that this Court not consider it.

Further, the Petition, even if deemed constitutional, must fail in that it would require that private monies be taken by virtue of public (governmental) action and then be paid to a private corporation (The Florida Bar Foundation) for such uses and purposes as that private corporation may see fit. The egregiousness of the situation thus created will be argued further in this Comment. However, it should be noted here that

the fund created by virtue of this Court's previous actions in creating a voluntary IOTA program has served to literally create a fund to now pay for the massive effort before this Court, financed with IOTA funds, which would further enhance the ends of Petitioners. In many instances IOTA has served to improve the individual Petitioners' corporate finances and consequent personal employment opportunities with such corporate entities.

Finally, Respondent argues that this matter has been before the Court many times. See, for example, Matter of Interest on Trust Accounts, a Petition of The Florida Bar to Amend the Code of Professional Responsibility and the Rules Governing the Practice of Law, 372 So.2d 67 (Fla. 1979) and In The Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981). In those cases this Court fashioned a program which meets and effectively answers to all possible constitutional objections. That program leaves it with the lawyer and the client to determine what, if anything, will be done with the client trust funds. It thus saves the existing program from all constitutional objections. The program now proposed does not since it creates an involuntary situation relative to the use, retention and investment of what in the final analysis is client money.

As a consequence of the foregoing, Respondent argues that The Florida Bar and The Florida Bar Foundation have woefully failed to consider the logical public reaction to the program as proposed. They state that the program will enhance the image of

lawyers in that it will show lawyers are working to improve the legal system and the lot of the poor. In fact, the program will serve to demonstrate that lawyers are using client money to fund a program which, in many instances, will be working on opposition to specific client interests. And lawyers, having thus utilized client money for the enhancement of the image of their profession, will then claim that the Bar (and not the clients whose money is being used) are the "heroes of the hour." The public will not accept this purchase of good public relations by the Bar with client funds.

ARGUMENT

POINT 1. THE UTILIZATION OF CLIENT FUNDS FOR ANY NON-CLIENT PURPOSE, ABSENT CLIENT CONSENT, IS VIOLATIVE OF THE 5TH AND 14TH AMENDMENTS TO THE FEDERAL CONSTITUTION, THE COMPANION PROVISIONS OF THE FLORIDA CONSTITUTION, AND CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Approximately ten (10) years ago the undersigned counsel stood before this Court and argued the case of Beckwith v. Webb's Fabulous Pharmacies, Inc., 374 So.2d 951 (Fla. 1979). In that case this Court, in what was essentially a unanimous decision, found that interest earned on a sum of money deposited with the Clerk of the Court was not the property of the owner of the principal but could be the property of the Clerk, because the operative statute directed that the principal fund be invested at interest. This Court thus stated that, "in this sense, the statute takes only what it creates . . . There is no unconstitutional taking because interest earned on the clerk of the court's registry account is not private property." Beckwith at 953.

That decision by this Supreme Court was later reversed when the undersigned counsel took a direct appeal to the Supreme Court of the United States. In its decision, the Supreme Court of the

United States, citing the 5th Amendment to the Constitution of the United States, declared that "The principal sum deposited . . . plainly was private property and was not the property of Seminole County." Noting that the property held was for the "ultimate benefit" of those who owned the principal in the fund, the Court held that "the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest." The Court went on to adopt and approve what it described as "the usual and general rule that any interest on a fund follows the principal and is ultimately to be allocated to those who are ultimately to be the owners of that principal." Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155 at 162, 66 L Ed 2d 358, 101 S Ct 446 (1980). In so doing the United States Supreme Court cited the very authorities which had theretofore been cited to this Court, but not favorably considered by it. Those authorities are James Talcott, Inc., v. Allahabad Bank, Ltd., 444 F2d 451, 463 (CA5), cert denied sub nom City Trade & Industries Ltd. v. Allahabad Bank, Ltd., 404 US 940, 30 L Ed 2d 253, 92 S Ct 280 (1971); Murphy v. Travelers Ins. Co., 534 F.2d 1155, 1165 (CA5, 1976); In re: Brooks and Woodington, Inc., 505 F 2d 794, 799 (CA 7, 1974); McMillan v. Robeson County, 262 NC 413 at 417, 137 SE2d 105 at 108 (S Ct NC 1964); Sellers v. Harris County, 483 SW2d, at 243; Southern Oregon Co. v. Gage, 100 Ore 424, 433, 197 P 276, 279 (1921); Board of Law Library Trustees v. Lowery, 67 Cal App 2d

480, 154 P2d 719 (1946); Kiernan v. Cleland, 47 Idaho 200, 273 P 938 (1929). See Webb's, supra. at 160-162.

It is noteworthy that in reversing this Court the Supreme Court of the United States commented, "Indeed '[t]he Fifth Amendment guarantee . . . was designated to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' Armstrong v. United States, 364 US 40, 49, 4 L Ed 2d 1554, 80 S Ct 1563 (1960)." See, Webb's at 163.

That a Court may not re-characterize property for the purpose of taking same, was also dealt with, with finality, in the Webb's decision. Thus, the unanimous decision opines at 164, "Neither the Florida Legislature by statute, NOR THE FLORIDA COURTS BY JUDICIAL DECREE, may accomplish the result . . . simply by recharacterizing the principal as 'public money' because it is held temporarily . . . THE EARNINGS OF A FUND ARE INCIDENTS OF OWNERSHIP OF THE FUND ITSELF AND ARE PROPERTY JUST AS THE FUND ITSELF IS PROPERTY." (Emphasis added).

To make the decision absolutely clear, Justice Blackmun, in the opinion he wrote for the Court, stated his holding twice when he then wrote, "To put it another way: a State by ipse dixit, may not transform private property into public property without compensation . . . this is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power." Webb's at 164.

This Respondent does not question that the uses and purposes for which the expropriated interest on client money would now mandatorily be put are ultimately for the public good. But that is not the issue. The issue here is property. The issue is private property. The issue is an unlawful, unconstitutional, unconscionable taking of private property without due process of law and without the consent, joinder, permission or consultation with the owner of the funds taken.

In effect, Petitioners argue that the ends justify the means. They tell this Court that there is a need for legal services in this State which is going unmet. Respondent does not take issue that there is such a need. But Respondent argues that if such need is to be met it must be met by legislative appropriation rather than judicial expropriation.

POINT 2. THE PETITION MUST FAIL BECAUSE IT DEPRIVES THE OWNERS OF FUNDS OF THE RIGHT TO DECIDE WHAT FRUITS, IF ANY, SUCH FUNDS SHALL YIELD AND, IF SUCH FRUIT IS YIELDED, THE PROGRAM FURTHER DEPRIVES THE OWNERS OF THE RIGHT TO DETERMINE WHO SHALL HAVE THE BENEFIT THEREOF.

The Rule proposed by Petitioners is truly a sham. As has been stated above, this matter has been before this Supreme Court repeatedly. And this Supreme Court has fashioned a system which has worked; this is a system of voluntary participation in an interest on trust accounts program. This Court has left it to attorneys and their clients to determine whether or not funds left in attorneys' trust accounts are to be placed at interest, and if thus placed, whether or not the interest is to be paid to The Florida Bar Foundation.

Respondent believes that attorneys have an ethical obligation, if investing client funds at interest for the benefit of The Florida Bar Foundation, to obtain client consent thereto. But whether or not attorneys participating in IOTA meet this ethical obligation, and whether or not attorneys who fail to meet this ethical obligation are subject to a claim by their clients for misuse of interest generated, the mechanism provided by this Supreme Court has allowed persons (who in good conscience do not agree with a mandatory IOTA program or with the purposes of The Florida Bar Foundation) to gracefully and constitutionally

exercise inherent property rights and free will and to thus decline to participate in the IOTA program. It is this free will and this discretion which Petitioners would now remove from The Florida Bar and the public which it serves. And in thus removing this discretion judicial action will have been taken to tax all trust account interest earned.

The mandatory program will thus be invalid for two reasons:

A. This Court does not have the power to tax.

B. No tax may be levied by government for the benefit of a private corporation and it is unquestionable that The Florida Bar Foundation is a private corporation. See, In the Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981).

In fact, Petitioners in their chip, chip, chipping away at the decision of this Court initially creating the voluntary IOTA program have devised a ruse carefully calculated to "avoid" the constitutional problems hereinabove described by making participation in the IOTA program "voluntary" when in fact they would force all lawyers holding client funds in trust to invest that money for the benefit of The Florida Bar Foundation.

First, Petitioners have created a very simple mechanism for the investment of client trust funds which would result in all interest earned on these funds being paid to the benefit of The Florida Bar Foundation. Next, without regard to client wishes, they have stated that money which is not thus invested must be

invested in some other interest bearing account whether the client wants interest on his principal or not. Thus, they would make this Court command clients of private counsel to cause such client's money to be invested at interest whether the client desired such investment or not. And it is the client's money which is being invested, not the money of this Court, not the money of the people of the State of Florida, and not the money of the attorney who holds that principal in sacred trust.

Thus, the alternatives to investing money for the benefit of The Florida Bar Foundation are meaningless. That is so because one of the alternatives is not that the money may simply be held in a non-interest bearing account. Rather, the proponents of the modifications to Rule 5-1.1(d) want lawyers who do not invest money for the benefit of The Florida Bar Foundation to either invest the money in a separate interest bearing account for the benefit for a particular client (who may not want interest) or, to place the same in a "pooled interest-bearing trust account" with separate sub-accountings for the benefit of each participating client. The Florida Bar Foundation and the proponents of this Rule change well know two things with regard to these latter proposals:

A. First, most attorneys do not have the technological ability to pool funds and then account separately as to small amounts of interest earned on funds held for short periods in nominal amounts. Further, even where the

technology exists, the administrative expense of operation is monstrous.

B. Second, it is absolutely absurd to suggest the such monies should be held in separate interest bearing accounts. This is unwieldy and expensive beyond description.

Thus, the proponents of the modified Rule have in effect jerry rigged a system whereby attorneys and clients will, in the vast majority of cases, be unwittingly and unwillingly forced into giving a contribution, an exaction, to The Florida Bar Foundation. They would have no other practical alternative.

Notably, there are good reasons that a client might not want money invested at interest and might not want the money invested for the benefit of The Florida Bar Foundation either. And it is those reasons that go to the property issue now before this Court.

By way of example, a landlord might not want his trust deposit used to finance work of a Legal Services entity which works in opposition to landlord's rights. A political conservative or death penalty proponent might not want his trust monies used to finance a program dedicated to representing inmates on death row. And these same people might not want their money invested at interest for their personal "benefit" for good cause, including the nuisance of having to include a nominal amount of interest earned by them on their taxes, including the loss of confidentiality in the lawyer-client relationship occasioned by

the reporting requirement that interest has been paid (as for example, a husband consulting an attorney about the possibility of a divorce and then receiving a 1099 form at his home, opened and read by his wife, advising that he received ten cents interest on his deposit in that attorney's trust account) and in situations involving criminal defendants who do not wish anyone to know what money, if any, they have placed with their attorneys.

While the undersigned is not a criminal lawyer, he was powerfully convinced at a recent meeting of The Florida Bar's Special Committee on Comprehensive IOTA (Tampa Airport Marriott, September 7, 1988) in a statement by Attorney Jeff Weiner of Miami that criminal attorneys face incredible ethical and practical problems if they are placed in the situation where they must choose between violating their client's express desire to confidentiality as to the confidential placement of trust money, or the utilization of such money for the ultimate benefit of an organization to which a particular criminal client may be opposed. In an ultimate sense, the IOTA program jeopardizes the confidential relationship of lawyers and client by involving third parties therein.

And what is the response of the proponents of this Rule change to these problems? Their answer is that the money must be invested at interest, whether or not the client so chooses, and that if the client seeks confidentiality with regard to his funds the logical solution is to place them into the pooled fund for the benefit of The Florida Bar Foundation, thereby forcing an exaction of interest (property) which the client does not wish to give.

POINT 3. THE JUDICIAL SYSTEM MAY NOT BE USED TO LEVY A TAX.

Respondent believes that it is mere metaphysical sophistry to argue that interest on trust money is not property. Thus, using as a point of beginning the fact that under Webb's and under principles of simple logic it must be accepted that the interest is property, Respondent further argues that this Court (and no Court) has the power to take such property.

Before citing authority for this principle, Respondent would, however, urge onto the Court a few points in support of the argument that interest is property. Metaphysical arguments to the contrary make no sense. If interest is not property then an attorney could, today, take the interest earned on his client's trust account and place it in his own pocket without committing any impropriety. This would be so because the interest could not be construed to be the property of the client or anyone else. Similarly, if interest is not property then The Florida Bar Foundation and proponents of amendment to the Rule now before the Court are after absolutely nothing.

It strains logic to the breaking point to say that the interest isn't property because in fact the interest in the aggregate is many millions of dollars.

Respondent is cognizant of the fact that The Florida Bar

Foundation cites the case of Cone v. The State Bar of Florida, 819 F.2d 1002, cert. denied, 108 S.Ct. 268, 98 L.Ed.2d 225 (1987) as authority for the position that interest may be taken and is not property.

Respondent would suggest several things with regard to Cone. First, to be perfectly forthright, Respondent believes that the decision in Cone was wrong. But more to the point, Cone did not deal with a compulsory taking. In Cone the attorney made the decision as to whether or not the money would be invested at interest and the client was not foreclosed from suing the attorney for return of the interest earned as having been misappropriated by the attorney to The Florida Bar Foundation. In fact, that issue was not dealt with. Only the recipient of the trust interest was called to task in Cone --- and the recipient was found to be innocent, without consideration of the ethical dilemma the attorney who delivered the client's money to the Foundation may have faced.

As has been suggested by Hugo Black, Jr., at The Florida Bar hearings mentioned above, attorneys under the present scheme have liability to their clients if they cause the clients' money to be paid to The Florida Bar Foundation in violation of the clients' wishes. Thus, the present scheme is salvabeable if the clients sign an informed consent as to the investment and donation of their funds to The Florida Bar Foundation.

But, again, this does not go directly to the question of

impropriety of taxes levied by judicial fiat. That taxes may not be levied by judicial fiat is almost axiomatic. However, Respondent notes that this Court has held repeatedly, as in the case of Farabee v. Board of Trustee, 254 So.2d 1 (Fla. 1971) that the judicial power may not be utilized to levy a tax, no matter how laudable the purposes for which the money is to be put. Further, the entry of the Courts into the province of the Legislature (that is to say the exaction of taxes by the Courts) is violative of the constitutional separation of powers found in the Florida Constitution and incumbent upon this State through the Federal Constitution, see Ex Parte Coffelt, 228 P.2d 199 (Crim.Ct.App. Okla., 1951). Such action also violates the 10th Amendment of the United States Constitution.

POINT 4. THE CREATION OF THE PROGRAM PROPOSED BY PETITIONERS WILL NOT CREATE THE DESIRABLE IMAGE OF THE BAR WHICH THEY SEEK.

Petitioners are people of good heart and, for the most part, laudable motives. Unquestionably, they seek to help the poor and the down trodden of our society, although, regrettably, the programs which they seek to enhance do little or nothing to meet the needs of those who most require legal services, the working poor, the lower middle class, and persons who experience catastrophic legal problems without any anticipation thereof or consequent provision having been made for their disposition.

No one, this Respondent believes, would take issue with the foregoing.

But in the final analysis it is clear that Petitioners believe all persons confronted with civil legal problems are entitled to representation at public expense. And while this Respondent personally subscribes to that theory, and is dumb-struck by the fact that our society provides convicted criminals with legal representation while persons who have never committed a single wrong have their lives ruined through the civil process in that they have no ability to retain representation, Respondent and Petitioners must defer to the Legislature for the solution to this problem.

It is not for the Courts to appropriate money for defense of

civil actions at public expense or the maintenance of civil suit by attorneys in the public's employ. It is for the Legislature to do so. And if this Court believes that the poor are entitled to representation in civil matters then it should so hold. The Legislature must then make provision for the funding of a necessary program. This is not the responsibility of The Florida Bar Foundation, The Florida Bar or the Bar's paying clients.

The irony of the program urged upon this Court by Petitioners is that they argue the image of the Bar will be enhanced through the Bar's participation in compulsory IOTA. They say the Bar will be able to represent to the public that it is doing a great public good.

Respondent, however, suggests that nothing is further from the truth. Lawyers themselves make no contribution by taking the interest earned on their clients' money and giving it to public service entities, whether they be The Florida Bar Foundation, the Ford Foundation, the Meninger Foundation or some other worthy recipient. It is the clients in such circumstances who are contributing to the public good. For, after all, what has the lawyer given up when he gives The Florida Bar Foundation interest on his client's money? What has the lawyer contributed to the public good when he gives The Florida Bar Foundation his client's interest, his client's money? What has The Florida Bar contributed in the invocation of an interest on trust accounts program which takes client money, not lawyer money, and con-

tributes it to those perceived to be in need by one solitary private non-profit corporation?

What credit can the Bar honestly claim for contributing to the public good when all it gives is that which belongs to the public? Is a scintilla of lawyer money involved in this grant? Is a scintilla of lawyer time, freely given for public purposes, involved in this program?

In fact, are Petitioners themselves now before this Court for eleemosynary purposes or do most of them work for the very recipients of these monies, and thus directly and indirectly benefit from any expansion of a compulsary IOTA program?

This Court should note that most, if not all, of the Petitioners are being paid for their aggressive effort to enhance the IOTA program. They are in the salary of the very organizations which will receive even more money if compulsory IOTA is implemented and it is the public's money, the existing IOTA money, and public tax money received by their employers, which is making it possible for them to come before this Supreme Court to argue an enhancement of this program. Most of the Petitioners haven't even paid postage in connection with this cause. IOTA has directly and indirectly footed the bill.

Respondent notes that while Petitioners opine that private counsel have much to gain from the continued maintenance of the existing program, and while Petitioners argue that the banking industry is a special beneficiary of the status quo, this

Respondent represents no bank and knows of no other Respondent before the Court who does so or who is being paid either directly or indirectly to oppose the IOTA Petition; this while the proponents, in large measure, are being paid by the IOTA program to advance its very ends.

In any event, apologists for the legal profession do our profession no good in suggesting that IOTA will enhance the image of the Bar.

These very apologists, by being apoligetic, are destructive of the Bar's image. Our's is a noble profession, a profession which has served to maintain the freedom and dignity of our people throughout our nation's history. We need not apologize for the fact that because we are on the cutting edge of social change there are those who question our motives and contributions. What other profession almost universally expects its members to serve the poor without compensation? What other profession is known for its contributions and attentiveness to those who are not able to care for their own problems? In this respect the Bar stands tall historically and currently. We may be proud; we need not be apologetic.

POINT 5. OPPOSITION TO THE IOTA PROGRAM AMENDMENT NOW PROPOSED IS NOT AXIOMATICALLY TO BE EQUATED WITH POLITICAL CONSERVATISM, REACTIONARY POLITICS, OR OPPOSITION TO THE ENHANCEMENT OF THE LOT OF THE POOR.

This Respondent has for many years worked to advance the lot of the needy through the enhancement of a legal aid program in this State. In fact, this Respondent holds The Florida Bar Presidents' Pro Bono Service Award granted March 16, 1983. And, for approximately ten years, he served on the Board of Directors of his local Legal Aid Society. Even now, he voluntarily participates in that Legal Aid Society's program although he is not required to do so since he is not a member of his local voluntary Bar association.

Respondent makes these points for a reason: while he does not wish to present to this Court a curriculum vitae showing that his opinions are wise, learned, or necessarily representative of any particular group, he wishes to demonstrate to this Court that persons who believe in legal services for the poor may nonetheless, in good faith, oppose compulsory IOTA.

This Respondent resents the implication and the express argument advanced by proponents of the Amendment to the existing Rule governing IOTA who suggest that only persons who oppose legal aid oppose their suggested changes to the Rule.

While it is true that many who oppose legal aid do oppose

these changes to the Rule, they are not alone and, further, they, too, are entitled to have their legitimate opinions considered by this Court which, in the final analysis, has placed itself in a political quagmire by becoming involved directly and indirectly in the administration of a private corporation, to wit, The Florida Bar Foundation. For, in the final analysis, The Florida Bar Foundation is cause oriented. And for the most part the causes in question are representative of a particular political philosophy and not a political balance.

POINT 6. THIS COURT SHOULD DECLINE TO FURTHER CONSIDER THE IOTA PROGRAM IN THAT IT HAS CREATED AN IRREMEDIABLE CONFLICT OF INTEREST IN ITS OPERATION.

Respondent has previously filed a Motion to Strike Petition which said Motion was denied by this Court on August 10, 1988. Said Motion to Strike the Petition urged upon the Court that since its inception, The Florida Bar Foundation, which is a private corporation and not a body politic answerable to the people of this State, has had as directors the Chief Justice of this Supreme Court (then and now sitting) and two other judicial officers, appointed annually by the Chief Justice, usually including at least one other Supreme Court Justice.

Thus, this Respondent argued that at least three sitting members of this Court have served or now serve as directors of The Florida Bar Foundation which is the chief and only beneficiary, in an institutional sense, of the proposed amendment to the Rule. Such an arrangement has thus resulted in a situation where sitting Justices of this Court are being asked to consider a matter which will benefit a corporation in which they have a very direct, albeit not personal financial interest. It is regrettable that this situation was not anticipated in the creation of The Florida Bar Foundation, and it is incontrovertible that this situation having been allowed to exist the Justices of this Court should not now act to further enhance the financial standing of The Florida Bar Foundation, a corporation

in which they have an interest.

That The Florida Bar Foundation indirectly advocates political ends cannot be denied. This is a further embarrassment to this Court. The Foundation funds numerous organizations which are viewed as "activist" and political including the American Civil Liberties Union (for whom the undersigned has rendered pro bono services). [See Exhibit A "Florida Interest On Trusts (IOTA Program) Grants as of September 6, 1988]. Moreover, as also substantiated by Exhibit A, The Florida Bar Foundation helps to fund this very Supreme Court, thus further exacerbating the conflict of interest problem here complained of.

Further, the Petition should be denied in that Petitioners have amongst their numbers a former Justice or Justices of this Court who considered the related and predecessor Petition(s) which were before this Court when they sat here --- and who have thus participated in its current presentation to this Court notwithstanding Rule 4-1.12 of the Rules regulating The Florida Bar which provides that, "(A) lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge . . . "

Further, the Petition should be denied because it is not in proper form, having not been signed by the purported Petitioners, and having amongst those named as Petitioners a person or persons who are not members of The Florida Bar.

CONCLUSION

It is not axiomatic that good motives make for good programs. But it is autocratic to think that we lawyers (and judges) can impose upon clients an exaction aimed at creating a program or programs which some of us believe is for the enhancement of the commonweal. That is a Legislative function which, as suggested by Professor Joseph Little in his Brief, may be discharged in a variety of ways, none of which are for this Court to impose upon the people of Florida and the lawyers who represent them.

The hue and cry which has gone up in this State amongst the legal profession concerning the proposed Amendment to Rule 5-1.1(d) is but the tip of an iceberg of public opinion, an avalanche of which will descend upon this Court and the Bar in the event the proposed Amendment is adopted and clients are forced to have their money invested at interest, for their "benefit," against their will or, alternatively, donated to programs which they may oppose.

That The Florida Bar Foundation is peculiarly qualified to be the beneficiary of client largess is not established. Numerous other organizations exist whom clients may wish to make the beneficiaries of interest, earned on their money, and no mechanism is suggested for an arrangement which would yield such a result under the present proposal.

Further, the proposal assumes that clients will want their money invested at interest, while they and their counsel may have

good reason, no matter how idiosyncratic, to wish otherwise. In matters of private property an individual's wishes and idiosyncrasies are for the individual to decide. That property is not being put to the public's good use or the individual's own benefit does not justify its taking by the commonweal, at least not in our society at this time in history.

That one man may choose to own a beach front condominium which is used by him solely on the weekend, while another man lives in squalor and poverty, does not permit the State to take the rich man's home so that the poor man may have a place to live. That such an investment by the rich man may not be a wise one does not permit the State to decide how the wealthy man's funds will be invested. If people choose to leave their money lying fallow, not earning interest, or elect to use their property in some other way which some may not think wise, is not for the State to contradict.

To say that the millions of dollars of interest which are now at issue before this Court does not constitute property is an absurdity hardly worth the breath it takes to contradict. Simply put, if there is no property interest here then The Florida Bar Foundation is seeking nothing whatever. But all concerned well know that, as is true in the vast grovelands of this State where each orange is property of the owner of the grove and helps to constitute the property as a whole, so it is true that each penny of interest earned constitutes the entirety of client property.

Any taking of this property, be it a single penny or a single orange, is unlawful unless just compensation is paid.

To permit deminimus arguments as to such issues is to invite the creation of a whole new concept of property neither justified, needed or permitted under the laws of our land . . . it is an argument that property exists and may be taken by degree.

This Court should be wary of the constitutional commandment that "no private property shall be taken except for public purpose and with full compensation therefore paid to each owner (Article 10, Section 6(a), Florida Constitution. See also, United States Constitution). No person shall be deprived of life, liberty or property without due process of law (Article 1, Section 9, Florida Constitution. See also, United States Constitution).

In a time when the sanctity of private property is taken as a given, and rarely questioned, this Court is called upon to make a landmark decision concerning which it erred in Webbs and concerning which it now has the rare and unique opportunity to both cure its previous error and lead the nation in considering future proposals of like and similar kind.

In truth, this Supreme Court has already done so by creating the constitutionally acceptable IOTA program which we now enjoy in this State. Thus, it has fashioned a mechanism which allows those who wish to participate in the goals of The Florida Bar

Foundation to do so without being coerced into such participation against their collective will, and in a manner contrary to law; similarly, it has left it with clients and their counsel to determine whether or not the client wishes to personally enjoy the benefit of interest on trust monies, there being no prohibition upon such arrangements and the mechanism to do so being in full force and effect.

Lastly, it must be said that the issue now before the Court is one so basic and so stirring that if this Court invokes a mandatory system requiring the investment of money at interest and requiring that in certain circumstances such interest be paid to The Florida Bar Foundation, it will cause persons of good conscience and good will who differ to seek relief and protection under the Federal constitution.

This is regrettable, may well serve to destroy any IOTA program, and would otherwise be unnecessary if the existing system were left in place, and promoted amongst the Bar and the public by those who support it.

For the foregoing reasons advanced in this Comment, the Petition to Amend should be denied; further, Petitioners should be advised that this Court does not want to revisit this issue every few years.

Respectfully submitted,

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Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true 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, and to Jack Harkness, Executive Director, The Florida Bar, The Florida Bar Center, Tallahassee, Florida, this 14th day of September, 1988.

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