O|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

_____/

RESPONSE OF HARVEY M. ALPER
TO THE REPLY OF THE FLORIDA BAR FOUNDATION
AND PETITIONERS TO THE WRITTEN RESPONSES
OF INTERESTED PERSONS

COMES NOW Harvey M. Alper, and in response to the "Reply of The Florida Bar Foundation and Petitioners to the Written Responses of Interested Persons" which was filed with this Court on or about September 12, 1988, says:

1. The Court should disregard the "Reply of The Florida Bar Foundation and Petitioners to the Written Responses of Interested Persons," hereinafter called the "Reply" because said Reply was not served upon any of the persons who responded to the Petition.

2. The "Reply" is further infirm and should not be given consideration by the Court because The Florida Bar Foundation therein has proposed a further amendment to Rule 5-1.1(d)(1) which would provided that "the Foundation should have the ability to excuse an attorney from participation in the IOTA program when the Foundation is satisfied that the interest earned by the attorney's trust account will not suffice to cover the service charges assessed by the bank. To accomplish this, we suggest the addition of a new section, numbered 5-1.1(d)(4)(d)."

3. This new proposal set forth in the Reply constitutes a suggestion to further and newly modify the Rules Regulating The Florida Bar and is one which has not been made known to the members of the Bar either by the mechanism by publication through The Florida Bar News, or through any other avenue. This failure to advise members of the Bar as to this new proposal makes it infirm.

4. The proposal in the Reply to further modify the Rules Regulating The Florida Bar is additionally infirm in that The Florida Bar Foundation has proposed in its latest suggested rule a landmark step which would, for the first time, give to some entity other than this Supreme Court the power to regulate lawyers in their professional practices; in effect, the Foundation now asks that it be given the power to regulate attorneys to the extent that it may "excuse an attorney from participation in the IOTA program." While this point, in the abstract, may seem of little consequence, it is a landmark precedent which could form the basis, in future years, for regulation of other aspects of attorney practice by an entity other than The Florida Bar which is, in the final analysis, a creature of this Supreme Court and thus its surrogate. No such claim can be advanced concerning the identity of The Florida Bar Foundation. The Florida Bar Foundation is a private non-profit corporation, not controlled by this Court.

5. The Reply of The Florida Bar Foundation misrepresents and unconscionably down plays the existence of very substantial opposition existing to the proposed changes in rules governing "IOTA." Thus, the Reply states, "The lack of substantial opposition, coupled with the absence of any compelling rationale, provides further assurance that a comprehensive program should be adopted." It is noteworthy that The Florida Bar News, approximately eight weeks ago, advised the Bar that due to the overwhelming response of negative mail concerning the compulsory IOTA program no more letters on the subject would be printed. Further, The Florida Bar News reported on October 1, 1988, that, "Debate over a proposal to change Florida's Interest on Trust Accounts (IOTA) program from voluntary to comprehensive moved to Tampa September 7, as a special Bar panel heard testimony from attorneys on both sides of the issue." The article went on to say that this program, which has been the subject of substantial opposition, was heard by a special committee on comprehensive

IOTA which was appointed to assist the Board of Governors in reconsidering its previous actions on the program. Further, it was reported in the same article that the "Board was expected to re-address the comprehensive IOTA issue at its September 29-30, meeting in Naples." Noting that the Bar was in a uproar, the article went on to say, "Mindful of (the) protest, the Board last July voted to reconsider its endorsement of comprehensive IOTA." For The Florida Bar Foundation to represent to this Court that there is a lack of substantial opposition is simply, intellectually and factually dishonest. While it can certainly be discerned that lawyers have not devoted attention to this matter by filing negative comment in this Court on a pro bono basis in great numbers, it is equally clear that the disproportionately vocal proponents of compulsory/mandatory IOTA stand to realize a direct economic benefit from their Herculean efforts to instill such a program in this State. Thus the exhaustive nature of their efforts on behalf of The Florida Bar Foundation are readily understood.

6. Moreover, arguments to the effect that the IOTA program must somehow satisfy the Internal Revenue Service, but not the Federal Constitution, or the Constitution of the State of Florida, are patently absurd. It is no response to the constitutional requirement that clients consent to the use of their money for the benefit of The Florida Bar Foundation to argue that, "The Internal Revenue Service announced that client consent would carry adverse tax consequences because of the assignment of income doctrine." If the Internal Revenue Service has created a doctrine which causes a problem in the operation of an IOTA program, the problem should be addressed four square rather than through a back door effort to subvert the principles of the Federal and Florida Constitutions to gain some tax advantage.

7. In the final analysis, all arguments of The Florida Bar Foundation of a policy nature must take a back seat to the controlling requirements of due process which are inherent in our

constitutional law. Client property, that is to say interest on trust funds, may not be taken without compensation unless the client willingly gives same. To create an anomaly in even a few cases where interest on client monies is used to support programs which work in opposition to those clients whose money earns the interest is to create a morally indefensible situation, that defies logic and basic fairness. The fact that powerful money interests represented by The Florida Bar Foundation have been able to amass a list of petitioners which reads like a who's who of political leaders in the Bar should not be the basis upon which this Court renders a decision in this case or any other; rather, it is for this Court to weigh the legal issues before it, not political arguments or measurements of the numbers of persons who support any particular position. After all, this is a judicial, not an electoral issue and this is a judicial and not a political forum. In sum, the fact that former governors or former Supreme Court Justices take a particular position has nothing whatever to do with whether or not this Court should approve a program which creates inherent conflicts of interest, violates established rules of ethics, and takes property without considering the rights and wishes of the property owners or their entitlement to compensation for the taking.

8. The "de minimis" argument that "nominal sums" of interest are not property simply will not work. If this Court accepts such argument, it will soon be faced with arguments that petty theft is not a crime, that use of "seemingly abandoned" property by unauthorized persons is not a wrong and that any unauthorized taking or "borrowoing" of "unused and insubstantial property" is not compensable.

WHEREFORE, Harvey M. Alper submits his Response to Reply of The Florida Bar Foundation and Petitioners to the Written Responses of Interested Persons.

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 30th day of September, 1988.

Respectfully submitted,

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