

O/a 11-7-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,671

AMENDMENT TO RULES REGULATING  
THE FLORIDA BAR - RULE 5-1.1(d)

RE: INTEREST ON TRUST ACCOUNTS  
(I.O.T.A.)

COMMENTS OF HUGO L. BLACK, JR.  
(Florida Bar No. 006377)

I'm Hugo L. Black, Jr. of Kelly, Black, Black, Byrne, Craig & Beasley of Miami, Florida.

Our firm is an original member of the present, voluntary IOTA plan.

The Florida Bar Foundation had a tough time getting around the provisions of the United States Constitution forbidding the taking of private property without compensation in order to get the voluntary IOTA we now have in operation. Reason: It is the client's principal that produces the interest; his principal is property; interest follows the principal; therefore, compelling his interest into the Florida Bar Foundation without his permission is a taking of the client's property without compensation in violation of the Constitution.

Eighty percent of the Florida Bar members, apparently, don't like IOTA; they have refused to join up.

Instead of trying to find out why 80% of the Florida Bar is rejecting IOTA, its sponsors now want to cram it down our throats by openly making it mandatory for all of us to open up a pooled interest bearing account for the Florida Bar Foundation into which we must throw all "nominal" or "short term" amounts, whatever such amounts are.

That is bad enough. Contrary to what the Florida Bar Foundation is now telling us, the Eleventh Circuit in the Cone case did not hold that throwing principal into an interest bearing IOTA account without the specific consent of the client

can be accomplished without running afoul of the Constitution. Indeed, Cone does not even hold that "nominal" or "short term" trust amounts can be placed into a trust account for the Florida Bar Foundation without the permission of the client. On the contrary, the Eleventh Circuit said in Cone, "We do not wish to imply that the state may constitutionally appropriate property so long as the property is very small property." The Eleventh Circuit told us just about as clearly as possible that the only client interest we could compel -- consistent with the Constitution -- over to the Florida Bar Foundation was interest like the interest on the \$13.75 principal involved in Cone, that is, interest on principal so piddling that the client could not even earn anything of benefit from it, what with bank minimum account restrictions, administrative costs and the like. Actually, Cone stands for the proposition that the Florida Bar can not compel a client to throw any amount of money that can be considered as "property" into a trust account for the Florida Bar Foundation; it can only compel a client to throw in something that does not qualify as "property" for one reason or another.

But, unconstitutional as it is, compelling the client to throw all "minimal and short term" trust monies into an interest bearing account for the Florida Bar Foundation is not the worst feature of the proposed IOTA. The sponsors of the new IOTA -- implicitly acknowledging that the Constitution of the United States prohibits the Florida Bar from directly compelling Florida lawyers to open a pooled interest bearing account for the Florida Bar Foundation for substantial and long term trust amounts -- have decided to try to get around the Constitution by indirection.

The sponsors of the new "Comprehensive" IOTA would harass Florida lawyers into throwing all their trust monies into a pooled interest bearing account for the Florida Bar Foundation.

Just how would they do that? Easy. Just make all the lawyers who won't cooperate and put their substantial and long term trust monies into a Florida Bar Foundation account open up

separate interest bearing trust accounts or sub-accounts for each client -- whether that's what the client wants or not. What lawyer will not opt for the ease of throwing the money into the one Florida Bar account over opening up an individual account or sub-account for each client. That's one signature card against hundreds of signature cards; one social security number against hundreds of social security numbers; one accounting against hundreds of accountings; one tax identification number against hundreds of tax identification numbers; one bookkeeper instead of two bookkeepers, and so it goes. We might as well be told that we can either put all our monies into an account for the Florida Bar Foundation or pay a penalty of thousands of dollars annually for refusal.

What purpose is there for the feature requiring us to open up a separate account or sub-account for each client if it is not to coerce us into throwing everything into the Florida Bar Foundation account? Certainly, it is not that it is only moral and right that the client get the interest -- the client does not get the interest if you throw the funds into the Florida Bar Foundation account. The Florida Bar Foundation sheds crocodile tears for the clients and their rights to interest on their trust monies when it compels us to open up all these interest bearing accounts and sub-accounts for our clients.

I have only focused to this point on the evils of the collection part of this program.

We kid ourselves if we think things are going to continue along the same once we make IOTA mandatory as when it was voluntary. IOTA monies collected by the Florida Bar Foundation through a mandatory program resemble dues collected by a union through a closed shop or union shop contract, dues collected by force if you will. Institutions who collect monies by force are not free to spend those monies on political causes of their choice as are institutions who collect money voluntarily. Take a look at this Court's recent Schwartz case. Take a look at IBM v. Street, 357 U.S. 740 (1961). If IOTA is made mandatory, the

Florida Bar Foundation, consistent with the principles of Schwartz and Street, could not safely use the interest extracted from trust funds of defendants' medical malpractice lawyers as any part of a war chest to fight the restrictive proposals the doctors want to foist off on the lawyers.

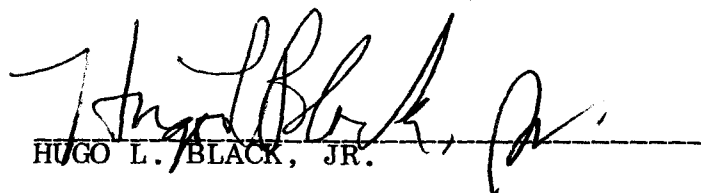
Something else. If this thing passes, it may produce more revenue than the Florida lottery. Have the sponsors really thought of the problems this is going to present? How are we going to pick the people who will have the power to channel this river of money as it pours in? Who is going to have the privilege of representing the poor once we get rich enough to pay real lawyer's fees? What are we going to do to protect against cronyism? What kind of accounting are we going to require of those who dish out these funds and receive these funds? Isn't it going to be necessary to hire another swarm of bureaucrats to administer the program? How are we going to handle the landlord who does not appreciate his trust monies being used to hold his tenants over on the premises? How are we going to handle the car dealer whose trust funds are used to sue him for fraud? How is one going to feel about the impartiality of The Supreme Court of Florida when faced here by a litigant funded in part by one's own funds through the mandatory IOTA program that exists only by license of The Supreme Court of Florida?

I hear people from the Florida Bar Foundation saying, "Hey, this lets the lawyers put something back for the privileges the state has bestowed upon us." I suggest to you that is not the way the lawyer bashers will see it. They will say, "Isn't that just like the lawyers -- taking credit for good things accomplished by snatching the interest from their clients' trust accounts. The last thing in the world they would do is use their own money to fund legal services for the poor."

I urge this Court to reject the so-called "Comprehensive" IOTA program. It may well be the straw that collapses all of us

into the Department of Professional Regulation whence all those who would kill all the lawyers would love to consign us.

Respectfully submitted,

  
HUGO L. BLACK, JR.

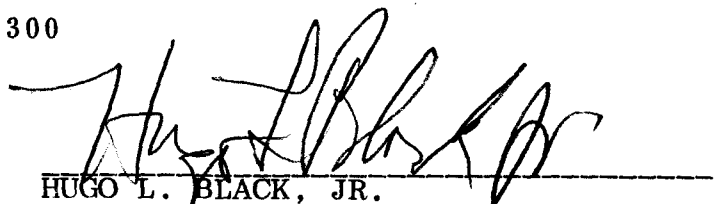
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th day of October, 1988, to:

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