IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,671

MATTER OF INTEREST ON TRUST ACCOUNTS: A PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR

REPLY OF THE FLORIDA BAR FOUNDATION AND PETITIONERS TO THE WRITTEN RESPONSES OF INTERESTED PERSONS

The relatively few objections to the Florida Bar Foundation's request for the adoption of a comprehensive IOTA program for the State of Florida offer no reasoned basis to reject a modification which can make a significant contribution to the public good. The Court has received approximately 20 objections, signed by fewer than 30 attorneys, opposing adoption of a comprehensive IOTA program. The lack of substantial opposition, coupled with the absence of any compelling rationale, provides further assurance that a comprehensive program should be adopted.

The National Association of Interest on Lawyers' Trust Accounts Programs, Inc., the Association for Retarded Citizens/-Florida, and Southern Legal Counsel, Inc., have each urged adoption of the Petition. So have several others, in addition to the Petitioners. Florida Legal Services, Inc., on behalf of numerous public interest and legal aid organizations, has also urged the Court to adopt the Petition. Of course, the more than 125 petitioners, including former Governors, former Supreme Court Justices, former ABA Presidents, former Presidents of The Florida Bar and Florida Bar Foundation, law school deans, a State Attorney, the former Attorney General and Secretary of State, and many other prominent members of the bar also attest to the wide-reaching support garnered by the proposal for a comprehensive program.[1]

[1]The Florida Bar Board of Governors initially voted to support the Foundation's Petition, with two conditions: (1) that the Board of Governors appoint the entire Board of Directors of the Foundation, and (2) that 10% of all funds received be devoted to public education about the legal system, a program to be administered by a new foundation to be created by The Florida Bar. Thereafter, The Florida Bar tabled its approval and appointed a Special Committee to hold public forums and report to

None of the justifications offered to reject a comprehensive program, summarized below, can withstand scrutiny in light of the experience gained in Florida and other states with both voluntary and comprehensive programs.

1. **Constitutional Objections**: Several of the objectors raise state and federal constitutional concerns. Thus, it is argued that adoption of a comprehensive IOTA program exceeds the constitutional grant of power to the Supreme Court to regulate the practice of law, and that, in a similar vein, adoption of a comprehensive IOTA program violates the doctrine of separation of powers since the rule imposes a tax, thereby invading the province of the Legislature.

Other objectors argue that the IOTA program constitutes a taking of private property for public use without just compensation.

This Court concluded a decade ago that the interest on trust accounts (IOTA) program was within the Court's constitutional authority to regulate the practice of law. In Re Interest on Trust Accounts, 356 So.2d 799, 800-802 (Fla. 1978). Arguments that the IOTA program violated separation of powers because it created a tax and thus invaded the province of the Legislature were also rejected. Matter of Interest Trust Accounts, 402 So.2d 389, 392 (Fla. 1981). Objections premised on the argument that IOTA is a "taking" similarly have no merit. That argument has been rejected by every state and federal court to consider the matter. See, paragraphs 13 and 14, Petition. Each and every constitutional objection has been raised and rejected, either explicitly or implicitly, by the 41 other state supreme courts which have adopted IOTA programs. Thus, the constitutional objections should be rejected utilizing principles of stare decisis and res judicata.

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the Board at its September 30, 1988 meeting. This Court granted the Bar permission to file its response thereafter. The Foundation and the Petitioners respectfully requests the opportunity to respond, if necessary, to any pleading filed by The Florida Bar.

2. **Administrative Burdens**: Several objectors argue that implementation of a comprehensive IOTA program will create an intolerable administrative burden, one that only large law firms can handle. One objector couples that with the argument that it will be impossible to explain to his clients why they cannot earn interest when the Bar Foundation receives interest. Actual experience demonstrates that these fears are groundless. The affidavits from other states clearly demonstrate that IOTA programs, whether comprehensive or voluntary, impose no real burdens on attorneys. In Florida, 12% of IOTA participants are, in fact, sole practitioners. Those who argue that IOTA imposes administrative burdens are not participating in the program. Were they to participate, they would immediately come to understand that the only burden is signing a form letter to their financial institution. And a second form letter to the Foundation. That's it!

It is true that the adoption of a comprehensive program will force all attorneys to think about what they do with client funds. And it will force all attorneys, or their bookkeepers, to think about which client funds can be made productive and which cannot. And they may want to discuss trust fund investment with their client. Is that bad? Hardly. It is an ethical and fiduciary duty that attorneys possessed long before the creation of IOTA. ABA Formal Opinion 348, 68 A.B.A. J. 1502, 1503 (1982).

Others argue that a comprehensive IOTA program is unnecessary because there is no evidence that banks provide benefits to attorneys in exchange for non-interest-bearing trust accounts. That has not been the experience of the petitioners, many of whom have been involved in attempting to recruit firms into the voluntary program only to be candidly told that banking benefits are the reasons why firms refuse to join. Of course, other objectors argue that comprehensive IOTA will, indeed, interfere with advantageous banking relationships.

Another objector argues that comprehensive IOTA will unfairly raise the cost of banking services for everybody else. He

attaches to his objection a Barnett Bank financial statement. Nothing suggests that the Barnett Banks, which have always participated in IOTA and which, according to the records of The Bar Foundation, have more IOTA accounts than any other financial institution in Florida, will find it necessary to increase their charges if the Foundation's proposal is approved. Indeed, the strength of the financial statement totally refutes the claim of the objector. And, when it is remembered that attorneys' trust accounts are kept in a myriad of banks and savings and loan associations throughout the State, the bottom line impact of IOTA is so minimal as to be unmeasurable.

3. **Client Consent Alternative**: Some argue that a client consent program is the better alternative. The original proposal made to the Court in 1976, and adopted in 1978, called for client consent. The Internal Revenue Service announced that client consent would carry adverse tax consequences because of the assignment of income doctrine. This Court, therefore, modified the original IOTA program to remove the necessity of client consent in order to obtain IRS approval. 402 So.2d at 390. A client consent program is not a viable alternative.

4. **Comments of Williams, Parker, Harrison, Dietz & Getzen**:

The Bar Foundation believes that several of the modifications suggested by the Williams, Parker law firm to the existing trust account rules, as well as the modifications proposed as part of the creation of a comprehensive IOTA program, have merit.[2] However, many of the Williams, Parker modifications pertain solely to trust account procedures outside of the issue of voluntary versus comprehensive IOTA. We think those issues are beyond the scope of these proceedings.

Attached to this Reply is a slightly modified version of the changes we propose to 5-1.1(d). The changes discussed in this section of our Reply will be found in **bold** on the revision.

The Bar Foundation agrees that the rules governing trust ac-

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[2]Williams, Parker is correct in asserting that the reference to Rule 4-1.5 should be corrected to Rule 4-1.15.

counts should explicitly apply to both "client funds" and "third party funds" in the hands of attorneys. Chapter 5, the Rules Governing Trust Accounts, should be modified to be consistent with Rule 4-1.15, entitled "Safekeeping of Property."

The Bar Foundation believes that permitting a client whose funds are not eligible for deposit in an IOTA account to direct that the funds be placed in an interest-free account is fully consistent with existing Rule 4-1.15. However, the Bar Foundation has no objection to making explicit the long understood practice. Perhaps it will serve to remove an unnecessary ambiguity. It should also be made explicit, however, that such funds are not eligible for deposit in an IOTA account.

The Bar Foundation suggests two other modifications to its proposal as the result of the Williams, Parker comments. First, at the express direction of a client, attorneys should be able to establish interest-bearing accounts at institutions other than banks and savings and loan associations. To accomplish this we suggest retaining the word "may" in Rule 5-1.1(d)(1). Second, 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).

5. **Policy Objections**: Several objectors argue that the IOTA program is divisive and causes disrespect for the bar and the Court. Quite to the contrary; nearly every major newspaper in the country has written an editorial complementing the legal profession for the IOTA program. Moreover, the program has brought the private bar and legal services community together to wrestle with a problem this Court has recognized for years -- how to provide better access to the courts for Florida's poor. If anything, because of IOTA, greater harmony and respect now exists between the organized bar and the legal services providers. Pro bono services have been strengthened. IOTA has become a potent

force in solving the access to courts' problem. It is a program the organized bar can, and does point to with pride. It truly serves the public, and in doing so, enhances the public image of the profession.

The support which IOTA enjoys is evident in New York's adoption of a comprehensive program on September 6th of this year. The value of a comprehensive program is evident from the affidavit of the director of the Illinois program, who reports a more than five-fold increase after Illinois converted from voluntary to mandatory.

Some claim that the Foundation is composed of the "establishment" bar and that the neither attorneys in general or the public have any say in how the Bar Foundation spends its money. In so arguing, they ignore the changes in Foundation governance which have occurred since the adoption of IOTA. Every attorney participating in IOTA is automatically a member of The Florida Bar Foundation. Every participating attorney is welcome to join in Foundation activities, attend Foundation meetings, and hold elective office. Moreover, The Foundation and The Florida Bar are currently discussing revised governance procedures to allow even greater participation by lawyers and lay persons.

Some argue that they should not be required to support social services programs with which they do not philosophically agree. Others argue that there is no evidence that the Foundation needs more money to provide poor people access to the courts. This Court has often noted that lawyers have a duty and responsibility to render legal services to the poor. In re Emergency Delivery of Legal Services to the Poor (Mandatory Pro Bono), 432 So.2d 39, 40 (Fla. 1983). The ethics rules demand no less. Rule 4-6.1, Rules of Professional Conduct. Furthermore, this Court has received study after study demonstrating that Florida's poor lack access to the courts. As recently as The Florida Bar, In re: Emergency Delivery of Legal Services to the Poor (Mandatory Pro Bono), this Court recognized "there are people in need of legal services who are unable to pay for those

services." Id. at 41. The situation has not improved in the last several years.

Some argue that this Court should adhere to its statement of seven years ago in Matter of Interests on Trust Accounts, 402 So.2d 389, 393 (Fla. 1981) that the 1981 opinion constituted the Court's "last endeavor in this field." That statement is taken totally out of context.[3] Facts and circumstances change. The 1981 opinion cannot be read to exclude future improvement. Florida's path-breaking program has since been adopted in 47 other states. A few states copied our program verbatim, many did not. They tinkered with it. It has been improved upon. It has gained nationwide acceptance. While a mandatory program in 1981 may have been premature, the experience gained in this state and in other states, as well as in foreign countries, merits this Court's adoption of a comprehensive program.

WHEREFORE, The Florida Bar Foundation and the Petitioners urge this Court to continue its tradition of striving to make equal justice under the law a reality for all of our citizens. Comprehensive IOTA is a program that adheres to the highest ideals of our profession.

Respectfully submitted,

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[3]The Court was addressing the question whether all constitutional and tax concerns had been put to rest, not whether the IOTA program should be voluntary or comprehensive.

On behalf of The Florida Bar Foundation and the following active members of The Florida Bar:

Louie N. Adcock, Jr.
James E. Alderman
Dean Jacqueline Allee
Reubin O'D Askew
John K. Aurell
Elizabeth S. Baker
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Frances R. Brown
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James A. Urban
William A. Van Nortwick, Jr.
Sylvia H. Walbolt
Susan B. Werth
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Susan K. Woodlief
Arthur G. Wroble

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to John F. Harkness, Jr., Esq., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by U.S. Mail this 12th day of September, 1988.

William O.E. Henry

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Existing Rule 5-1.1(d) of the Rules Regulating The Florida Bar with Proposed Modifications

(d) ~~Interest-bearing~~ Trust accounts. ~~A member of The Florida Bar who elects to create or maintain an interest-bearing trust account for client's funds which are nominal in amount or to be held for a short period of time for the benefit of The Florida Bar Foundation shall comply with the following provisions:~~

(1) Eligible institution. ~~An interest-bearing~~ Each trust account utilized by a member of The Florida Bar practicing from an office or other business location within the State of Florida **may** be established with any bank or savings and loan association authorized by federal or state law to do business in Florida and insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. Funds in each ~~interest-bearing~~ trust account shall earn interest and be subject to withdrawal upon request and without delay.

(2) Interest rates. The rate of interest payable on ~~any~~ interest-bearing trust accounts shall not be less than the rate paid by the depository institution to regular, nonattorney depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of deposited funds so long as there is no impairment of the right to immediately withdraw or transfer principal ~~immediately~~.

(3) Interest-bearing trust accounts. All trust funds shall earn interest in one of the following accounts:

a. Pooled interest-bearing trust accounts. A member of The Florida Bar practicing law from an office or other business location within the State of Florida and receiving client **or third party** funds shall maintain a pooled interest-bearing trust account for client's trust funds **and for third party funds** which are nominal in amount or to be held for a short period of time. The interest earned, less reasonable service charges in connection with this account, shall be forwarded to The Florida Bar Foundation in accordance with the following provisions:

1. Remittance instructions. Lawyers or law firms ~~electing to deposit~~ pooling client funds in a trust savings account shall direct the depository institution:

~~a~~i. Quarterly remittance. To remit interest or dividends, as the case may be, on the average monthly balance in the account or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to The Florida Bar Foundation, Inc.;

~~b~~ii. Remit to bar foundation. To transmit with each remittance to the foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and

~~c~~iii. Report to law firm. To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the foundation, the rate of interest applied, and the average account balance of the period for which the report is made.

b. Individual client **and third party** interest-bearing accounts. All client **and third party** funds shall be deposited in a pooled account as specified in subparagraph a. above unless they are deposited in:

1. A separate interest-bearing trust account for the particular client or client's **or third party's** matter on which the interest, net of any service or other charges or fees imposed by the institution in connection with the account, will be paid to the client **or third party**; or

2. A pooled interest-bearing trust account with sub-accounting which will provide for computation of interest earned by each client's **or third party's** funds and the payment thereof, net of any service or other charges or fees imposed by the institution in connection with the account, to the client **or third party**.

3. A client or third party may direct that funds not eligible for deposit in an IOTA account be placed in a separate, interest-free account.

(4) Nominal or short-term funds. A lawyer shall exercise good faith judgment in determining upon their receipt whether funds of a client **or third party** are nominal in amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client **or third party**. The lawyer shall also consider such other factors as:

a. The cost of establishing and maintaining the account, service charges, minimum deposit requirements, accounting fees, and tax reporting requirements;

b. The nature of the transaction(s) or proceeding(s) involved; and

c. The likelihood of delay in the relevant transaction(s) or proceeding(s).

d. The Florida Bar Foundation may establish procedures wherein attorneys whose trust accounts, over a twelve-months period, cannot reasonably be expected to produce interest income net of service charges may be authorized to **maintain interest-free trust accounts for client and third party funds which are nominal in amount or expected to be held for a short period of time.**

No disciplinary matter shall be pursued by The Florida Bar against any lawyer or law firm solely by reason of the making of a good faith determination of the appropriate account in which to deposit client **or third party** funds.