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

as corrected

REPLY OF THE FLORIDA BAR FOUNDATION AND PETITIONERS TO THE RESPONSE OF THE FLORIDA BAR

This is in reply to The Florida Bar's comments filed in response to the petition to convert the interest on trust accounts (IOTA) program from voluntary to comprehensive. The thrust of The Bar's comments is that a comprehensive program is not desired by its constituents, the lawyers of Florida. In arriving at its most recent position, unsupported by its previous committee reports, the Board of Governors has ignored its responsibilities to this Court's constituents, the people of Florida. The opt-out program proposed by The Bar is not in the best interest of justice nor will it satisfy the unmet needs of the poor for a lawyer. The immediate past Board of Governors recognized the tremendous potential a comprehensive program held for Florida as demonstrated below.

History of Prior Bar Support. Prior to the Board of Governors' close vote of 22-19 on September 30th to withdraw support for the petition,[1] every Board of Governors and Board committee or commission established to consider the matter had supported either a comprehensive or mandatory program.

In 1984 the Commission on Access to the Legal System, composed of 16 members, was appointed by the Governor of Florida, the Chief Justice of the Florida Supreme Court, and the President of The Florida Bar. The purpose of the Commission was to explore various alternatives which would increase access to the legal system on the part of the poor and middle class. After ten months of study, research and the taking of testimony around the

[1]The vote was by roll call, a seldom used procedure invoked by the minority to intimidate Board members on controversial issues.

State, the Commission recommended in 1985 that The Bar and this Court adopt a mandatory IOTA program.

Thereafter, the Board of Governors formed a Special Committee of the Board to study this and other Access Commission recommendations. After three years of study, the Board's Access Committee recommended last spring that The Florida Bar support the Foundation's petition for a comprehensive program. At its May 1988 meeting the Board of Governors voted 18-13 to support the Foundation's comprehensive petition.[2]

Then at its July 1988 meeting a new Board[3] voted to reconsider the position taken by the prior Board, tabled its support of the petition and established yet another Special Committee to Study Comprehensive IOTA. This Special Committee over a six week period met twice and held a public forum. The Special Committee recommended to the Board on September 30th that a mandatory IOTA program be adopted by the Court. After only two hours of debate, the new Board rejected the Special Committee's recommendation and reversed their prior decision. The eleventh hour reversal is unwise and contrary to the public good.

The People of Florida -- Not Lawyers -- Are the True Constituents. The primary reason given by The Florida Bar for its change of position is that "lawyers do not want it." This justification is not found, either explicitly or implicitly , in the stated purpose of The Bar in the Rules Regulating The Florida Bar.[4] Indeed, it is contrary to the very purpose of The Florida Bar. Not once did The Bar deny that the petition was in the best

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[2]The Board's May vote was premised on the Foundation making three changes to the program. The Bar and The Foundation had reached a tentative compromise on these changes prior to the vote of September 30th withdrawing support for the petition. The Bar's withdrawal of support was not the result of the compromise.

[3]It should be noted that there were 21 new Board members on the July Board. This is significant because many were unaware of the history of prior problems with recruitment and the need for additional legal services funding.

[4]Rule 1-2 states: "The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence."

interest of clients or the public. Not once did The Bar deny that the adoption of a comprehensive program would provide those monies necessary so poor people would have access to justice. Not once did The Bar deny that a comprehensive program would provide additional funding needed to improve the administration of justice and for law student scholarships. Not once did The Bar deny that the adoption of comprehensive program would help eliminate the troubling compensating balances problem. Not once did The Bar deny that the petition advances the science of jurisprudence.

Instead of serving the public and the interests of justice, The Florida Bar has shown a protectionist attitude for lawyers.

Opt Out Program is Not Acceptable. The Florida Bar's comments recognize our present IOTA program is not working and change is needed. The only difference of agreement is over the type of program now needed. The Bar's last minute suggestion of opt out is a "cop out" which is not acceptable for several reasons.

First, an opt out program is not mandatory. The Bar's characterization of it as such is without precedent. Every organization to consider the matter, including the Board's own Special Committee to Study Comprehensive IOTA, has characterized opt out as a hybrid program in which lawyers have a certain amount of time to act voluntarily to "opt-out" of participation. The Board's Special Committee correctly noted that an opt out program "retains the voluntary nature of [the] program."[5] And as with any voluntary program, attorneys would still have to take the affirmative step of signing up for IOTA or "opting-in."[6]

Second, opt out programs are operational only in states which are either small geographically or have small bars or both: Alabama, Delaware, New Jersey, Rhode Island, South Carolina,

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[5]Special Committee to Study Comprehensive IOTA, Report and Recommendations to Board of Governors Concerning Comprehensive IOTA, pg.7-8 (hereinafter referred to as Special Committee Report). Filed as Exhibit A to Comments of The Florida Bar.

[6]Id.

Utah, Montana, and the District of Columbia.[7] The Board's Special Committee points this out: "[opt out] has been adopted in nine jurisdictions most of which are either small geographically or have small numbers of attorneys which makes the recruiting effort easier."[8] The Board ignores the findings of its own Special Committee.

Florida is not comparable to those states where opt out has worked. Florida is markedly different. Florida's geographical size precludes our ability to have a closely knit state bar. Given the newness of Florida, there is not a long history of public service. In comparison to states with opt out underway, the size of our bar makes it difficult for the judiciary to become personally involved in efforts to inculcate a greater sense of public service in programs like IOTA. For example, in Delaware, the state which devised opt out, Supreme Court Justice Andrew G.T. Moore II personally called lawyers that opted out to determine their reason and to see if they could be convinced to do otherwise.[9] This type of personal involvement by the Court in a state with a small, homogenous bar accounts for a recruitment rate of 70%. No Justice of this Court can be asked to call personally the thousands of lawyers that statistically can be expected to opt-out.

Indeed, past experience has proven that even phone calls and nudges from the Justices and bar leaders has limited success in Florida. Commencing in 1982, the Foundation invited managing partners from major firms around the State to attend a series of recruitment luncheons with the Chief Justice and bar leaders. While many of these managing partners told the Chief Justice, The Foundation, and The Bar that their firms would join, to this day

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[7]Virginia and Pennsylvania recently adopted opt out programs which are not yet operational.

[8]Special Committee Report at 8.

[9]Report of Delaware Supreme Court Justice Andrew G.T. Moore II to a joint meeting of The Florida Bar Board of Governors and the Board of Directors of The Florida Bar Foundation, Tallahassee, March 16, 1984.

many have not. The Foundation has repeatedly underwritten several statewide solicitations, one of which included a letter from the Chief Justice requesting participation. That did not work. We are still at a 20% participation rate.

The opt out state with the largest number of attorneys having trust accounts is New Jersey, a small state geographically. Florida has considerably more attorneys with trust accounts than New Jersey. New Jersey's participation rate is 16%. This poignantly demonstrates that opt out does not work in states with larger numbers of attorneys. For that matter, South Florida alone has more attorneys with trust accounts than almost every opt out state.

It is puzzling for The Florida Bar to opine that changing the program to opt out is going to make an appreciable difference in the response rate. It has shared the same recruiting frustrations as the Foundation. Indeed, if The Florida Bar can only convince 21 out of its current 47 Board members in private practice to join a voluntary IOTA program, on what basis does it justify its statement that participation will be significantly enhanced with a voluntary opt out program? If the new Board of Governors has not demonstrated leadership by joining a voluntary IOTA program, on what basis can it represent that participation will be appreciably different with opt out? Put simply, they can not.

The Bar's suggestion that opt out will work in a large state like Florida is also contrary to national opinion and trend. Last February, the American Bar Association (ABA) overwhelmingly adopted Resolution 101 urging states to convert from voluntary to comprehensive. In states comparable to Florida with large numbers of attorneys with trust accounts, conversion to comprehensive has either happened, is under study or is underway. For example, last year the Illinois Supreme Court converted their program from voluntary to comprehensive. Just recently, the New York legislature converted their program from voluntary to comprehensive. Eleven states have already adopted or converted

to comprehensive or mandatory plans. None of the dire consequences feared by The Bar have come to pass. While Florida has been the pathbreaker, surely now we can build upon the positive experience of those programs to which we helped give birth.

Third, The Florida Bar is simply engaging in wishful thinking in stating that the adoption of an opt out program will offer a "distinct opportunity for greater IOTA revenues . . ." The Bar offers no evidence to support this statement. And The Bar knows that additional revenues are spent -- not collected -- through the recruitment effort required in a voluntary opt out program. As The Bar's Special Committee pointed out "[r]ecruiting affirmative sign-up in a large state like Florida is time consuming and expensive and likely to meet only limited success."[10] The Board ignores the finding of its own Committee and offers nothing to support their recommendation of opt out.

Finally, the adoption of an opt out program will not help in eliminating the troubling compensating balances issue. Nor will opt out cause lawyers to pay closer attention to client trust fund investment. Instead, it will just put off for another day the practice -- utilization of the trust account to obtain banking favors for the lawyer -- which former Chief Justice Alderman once opined from the bench as being unethical. The adoption of the comprehensive will go a long way in resolving this ethical dilemma.

The Court should also know that in 1984 The Foundation and The Florida Bar created a Joint Committee[11] to study opt out as a possible alternative to comprehensive or mandatory IOTA. After careful study of the Joint Committee's report and considerable discussion, The Foundation concluded that opt out was not a

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[10]Special Committee Report at 8.

[11]Members of the Joint Committee included four past Presidents of The Bar, past Board of Governors members, and recognized bar leaders: L. David Shear (chairman), Louie N. Adcock, Stephen D. Busey, Russell E. Carlisle, Patrick G. Emmanuel, Andrew G. Pattillo, Jr., Sidney A. Stubbs, and Russell Troutman. Five of the eight Joint Committee members are petitioners in the instant matter.

viable alternative for Florida for the reasons stated herein.

Constitutional Concerns Are Frivolous. The Florida Bar's last minute, imaginary fear that a comprehensive program is unconstitutional is, at this stage in the evolution of IOTA programs nationwide, frivolous. The Florida Bar, co-defendant in Cone v. The Florida Bar, well knows the program is constitutional. The Florida Bar, amicus curiae in the constitutional challenge to California's mandatory program, well knows that a mandatory program is constitutional. The First Amendment concerns raised by The Bar have never been raised in any court or legislature because they do not exist. The bar dues cases are inapplicable because IOTA funds do not belong to the lawyer. Likewise, since the courts have consistently held the client has no constitutionally protected interest in IOTA funds, the client's free speech rights are not implicated. The espoused First Amendment concerns about comprehensive are plain and simply an emotional red herring.

It is irresponsible for The Florida Bar under one Board to support a comprehensive petition, and then four months later question it as being unconstitutional without the citation of a single case or authority for their position.

Opt Out Program Threatens Legislative Involvement. The adoption of an opt out program could threaten the involvement of the Legislature in this Court's IOTA program. As stated in The Board's Special Committee Report:

> . . .legislators in the Florida Senate and Florida House filed companion bills in their respective judiciary committees to make the IOTA program mandatory by statute. The impetus for the legislation was the need to increase funding for legal services for the poor in the face of estimated cutbacks in current funding this year of $1.5 million.
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> Both Bar and Foundation leadership were concerned about an intrusion by the Legislature into lawyer regulation represented by the mandatory IOTA bills. Fortunately, both Senate and House leadership were willing to hold the bills in committee pending further consideration and possible action by the Bar or the Florida Supreme Court to increase legal services funding.[12]

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[12]Special Committee Report, p.1-2.

The Senate and the House leadership held these bills in committee after being assured by the leadership of The Florida Bar and The Foundation that they would use their best efforts to jointly support a comprehensive or mandatory petition to this Court. In filing this petition, The Foundation made good its promise to the legislative leadership and legal services programs. The opt out program now advanced by The Bar does not meets its commitment to the Legislature and legal services programs.

As an indication of the Legislature's concern, the sponsors of the House and Senate legislation are expected to sign on to the Florida Legal Services brief this week urging the adoption of the comprehensive petition.

More Discussion and Study is Not Needed. The Bar's suggestion in paragraph 18 that this Court would benefit from further discussion is not productive. The Bar made a similar suggestion when the Court's initial program was adopted. The Court should, as it did then, reject The Bar's effort to temporize.

As previously mentioned, The Florida Bar has been involved in the study of this issue for four years. In 1984 The Bar and The Foundation formed the Joint Committee to Study Opt Out. The Special Access Committee was established by the Board of Governors in 1985 to consider mandatory IOTA. The Foundation informed The Florida Bar about a year ago this petition was being prepared. They were given a draft of the petition last March at a concurrent meeting of the Board of Governors and the Board of the Foundation in Tallahassee. There has been abundant study and dialogue.

Only Matter Before Court is This Petition. Equally unmeritorious is The Bar's suggestion at paragraph 22 that the Court charge The Bar and The Foundation to provide "within a date certain, all desired changes in both organizations' charter documents which might address IOTA administration, uses of charitable funds, trust account ethics and other issues raised in this action." None of these matters are before the Court, and

the Court has before it the changes desired by the petitioners and The Foundation.[13]

There Are No Problems With The Proposed Rules. The Florida Bar suggests in paragraph 14 that the proposed rules are "questionable" because they require that trust accounts must earn interest for the benefit of clients in all "non-IOTA" situations. This concern is not presented in good faith. In paragraph 16 The Bar acknowledged receipt of the Petitioners' September 12th additional amendments to the Rules, which in relevant part added to proposed Rule 5-1.1(d)(3)3. the following:

> 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.

That provision merely codifies the long-standing obligation of an attorney to do as his client or a third party directs in a non-IOTA situation.

Exempting Trust Accounts That Do Not Earn Net Interest Does Not Jeopardize the Program. The Florida Bar questions in paragraph 16 whether The Foundation should be permitted to exempt trust accounts that do not provide net interest after payment of any service charges. It seems only common sense that a lawyer or The Foundation should not have to pay any deficit caused by participation if interest does not surpass service charges. The Bar seems to object to the Court using The Foundation to process such an exemption. Nevertheless, the Court chose The Foundation to implement the IOTA program. Delegation of the small ministerial power to exempt trust accounts that do not provide net interest does not jeopardize the program or exceed those powers already delegated The Foundation.

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[13]Required notice has not been given in The Florida Bar News as to any other changes. If The Florida Bar wishes to address other matters not presently in the petition before the Court, the appropriate course of action is obvious. First, it should write to The Foundation and inform its President of the changes to be addressed. A dialogue will follow between the two organizations and, if merited, any required notice can be given in The Florida Bar News and a joint petition will be filed with the Court. Then, if The Foundation rejects The Bar's desired changes, The Florida Bar can file a separate petition with the Court after giving the required notice in The Florida Bar News.

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. Opt out is not a viable alternative for Florida. Comprehensive IOTA is a program that adheres to the highest ideals of our profession. It is in the best interest of clients and the public. It is right thing to do for all Floridians.

Respectfully submitted,

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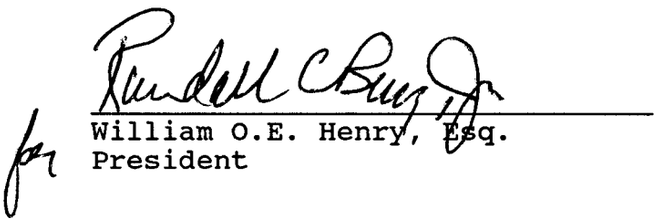

for William O.E. Henry, Esq.
President

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

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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 31st day of October, 1988.

for William O.E. Henry

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