72,671

IN THE SUPREME COURT OF FLORIDA

O/A 10-3-88

In re Proposed Amendment of the Rules Regulating The Florida Bar Pertaining to Interest on Trust Accounts

Brief of Respondent Joseph W. Little in Opposition of the Petition and in Favor of Alternative

Joseph W. Little
Respondent
3731 N.W. 13th Place
Gainesville, Florida 32605
(904) 392-2211
Fla. Bar. #0196749

Contents

Table of Citations

Summary of Argument

The petition should be denied. First, the proposed rule has no direct and close connection to the constitutional powers of the Court to regulate admission to and discipline of members of the Bar or to regulate practice and procedure in the courts. Consequently, it is outside the constitutionally granted powers of the Court. Second, the matter is not so germane to the inherent functions of the judiciary as to constitute one of those rare occasions upon which a court may validly exercise the police powers. Third, that part of the measure that obligates banks to make payments with respect to clients' funds directly to the Florida Bar Foundation constitutes a tax. As such, it may be validly imposed under the Florida Constitution only by direct authorization of the Florida Legislature. Finally, Respondent asserts that the promulgation of this extreme measure would create bitter division in the Bar and diminish the respect of the Bar and this Honorable Court in the eyes of many members.

As an alternative, Respondent proposes a rule change that will permit, but not require, lawyers to set up interest bearing trust accounts for the benefit of clients and that will require lawyers to obtain the consent of clients to place trust funds in the charitable trust account program.

Argument

I. PETITIONERS' PROPOSAL EXCEEDS THE CONSTITUTIONAL POWER OF THE COURT TO DISCIPLINE LAWYERS AND REGULATE THE PRACTICE OF LAW.

The proposed modification to the IOTA rule mandates that all lawyers deposit all clients' funds without their consent and direction into one or more interest bearing trust accounts: either for the benefit of the client or for the benefit of The Florida Bar Foundation. The only constitutional source of authority available to this Court to promulgate such a rule is the power granted it by Article V. §15 Florida Constitution as follows: "The Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted;" and by Article V §2(a) Florida Constitution as follows: "The Supreme Court shall adopt rules for the practice and procedure in all courts..."

Although no one may seriously question the authority of the Court to mandate that clients' funds be maintained in trust to uphold the integrity and credibility of the bar and of the courts and also to safeguard the public, these protective purposes related to the Court's disciplinary power and are not served by regulations proposed by Petitioners. Consequently, under the unquestioned theory that general police powers are reposed in the legislature and that the regulatory powers of the Court are limited to acts that pertain to its inherent power to see to the proper administration of justice in the courts, the proposal cannot be validly mandated. See, e.g., Petition of Florida State Bar Ass'n, 40 So.2d 902 at 906 (Fla. 1949): "While the police

power is generally considered an exclusive power of the legislature, it may for reasons not necessary to detail here, be exercised by the Courts." Nothing about the proposal provides for extraordinary intervention of the Court into the legislative sphere.

Nevertheless, Respondent acknowledges that it would be beneficial to clients to modify the rule to permit lawyers to open interest bearing trust accounts that accrue interest for the clients' benefit. Consequently, Respondent proposes an alternative modification that would permit, but not require, lawyers to open interest bearing trust accounts with the consent and for the benefit of clients. This, in fact, would constitute not new regulation by the Court but a partial lifting of that aspect of existing regulations that do not permit lawyers to open interest bearing trust accounts that accrue interest for the benefit of the clients themselves.

Although unnecessary to establish that Petitioners' proposal exceeds the authority delegated in the Constitution to the Court, Respondent observes that the true reason for Petitioners' proposal is to generate a larger flow of funds into The Florida Bar Foundation. Indeed, as materials included as Attachment B plainly reveal, the proposal itself has been promoted by officials of The Foundation. There is, of course, nothing unlawful about doing this. Nevertheless, this observation reveals the purpose and effect of Petitioners' proposal. It is, in short, to create an enlarged source of revenue for the support of The Foundation. No matter how salutary the works of the Foundation may be, this remains a purpose that is wholly outside

the Court's authority to discipline lawyers and regulate the practice of law.

II PETITIONERS' PROPOSAL CREATES A TAX AND AS SUCH IS BEYOND THE POWER OF THE COURT UNDER ARTICLE VII, §1 OF THE FLORIDA CONSTITUTION.

Under Article VII, §1(a) Florida Constitution the sole power to tax is reposed in the legislature of The State of Florida as follows: "No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law." See also City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla. 1972).

Florida courts have time and again invalidated unauthorized attempts of governmental entities to levy taxes in the guise of some other exaction such as a regulatory or proprietary fee. Contractors & Builders Ass'n v. City of Dunedin, 329 So.2d 314 (Fla. 1976); Broward County v. Janis Development Corp., 311 So.2d 371, (Fla. 4th DCA 1975). In general, every governmental exaction that creates surplus funds for disposition other than to defray the exact cost of a police power regulation, Williams v. Hawkins, 372 So.2d 1010 (Fla. 4th DCA 1979), or to provide the exact services for which the exaction is imposed, Stone v. Town of Mexico Beach, 348 So.2d 40 (Fla. 1st DCA 1977) supra, is a tax. See, generally, Bateman v. City of Winter Park, 37 So.2d 362 (Fla. 1948). As a tax, it must be authorized by general law of the legislature or it is void. Birdsong Motors, supra.

In adopting the integration rule of the Florida Bar, this Court openly acknowledged the distinction between a regulatory fee, which is within the power of the Court, and a tax, which is not. The Court acknowledged the distinction as follows:

> If the membership fee could on any sound basis be construed as a tax, undoubtedly it should be imposed by the legislature under its police power....
>
> A membership fee in the bar Association is an exaction for regulation only, while the purpose of a tax is revenue. In City of Jacksonville, v. Ledwith, 26 Fla. 163, 7 So. 885, 9 L.R.A. 69, 23 Am.St. Rep. 558, this distinction was recognized. It was also recognized in United States v. Butler, 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed. 477, 102 A.L.R. 914. These cases also recognize the rule that the power to regulate may carry with it the imposition of a charge for that purpose. If the judiciary has inherent power to regulate the bar, it follows that as an incident to regulation it may impose a membership fee for that purpose. It would not be possible to put on an integrated bar program without means to defray the expense. We think the doctrine of implied powers necessarily carries with it the power to impose such an exaction.

Petition of Florida Bar Ass'n, 40 So.2d at 907.

The portion of Petitioners' proposal that mandates lawyers to place clients' funds in interest bearing trust accounts for the benefit of the Foundation without the clients' consent is designed for the pure and simple purpose of raising revenue and not to pay for regulation. As such it is plain beyond cavil that it is a tax. Consequently, the sole power to levy it is confided by Article VII, §1 Florida Constitution to the Florida Legislature and not to the Court. On no occasion has or would this Court permit any unauthorized governmental entity to raise revenues in the guise of a regulatory fee to be dedicated to

general welfare purposes. Petitioners must be told that this Court may not violate the constitution in the exercise of its own power any more than it would permit other governmental entities to violate their powers.

It would be a false answer to attempt to counter this truth with the argument that "no one is hurt" by the tax. In the most profound sense, the stability of constitutional governance would be put at grave risk if the courts were to decide that the constitution may be ignored for what seems to be a good and expedient reason. More specifically, the tax plainly exacts funds directly from the participating banks and indirectly from their shareholders, general depositors and customers. The proposed exaction is a tax. This is no better revealed than by the fact that the legislature could produce exactly what Petitioners desire by imposing a tax payable by banks on balances maintained by them in non-interest bearing trust accounts and by appropriating the sums generated to the Foundation for its purposes. Indeed, the California IOTA plan of this sort was adopted by legislative enactment, not by court rule, thereby avoiding overreaching of power by the California Court, §§ 6210-6228, Cal. Bus. and Professional Code. This solution, which is the only constitutional means under the Florida Constitution of accomplishing that portion of what Petitioners' propose, places the taxing and spending questions squarely with the legislature where they properly belong in a constitutional democracy such as that created by The Florida Constitution.

III. PETITIONERS' PROPOSAL IS DIVISIVE AND PRODUCTIVE OF FRICTION IN THE BAR AND DISRESPECT FOR THE BAR AND THIS HONORABLE COURT

As the letters to the editor in recent editions of the Florida Bar News angrily demonstrate, Petitioners' proposal is abhorred by a large number of the members of the Bar. Although one writer has snidely deemed the opposition to be based on personal advantage of the opponents (Stepter letter, Bar News, July 15, 1988), Respondent (who does not have a trust account) asserts that the reasons given by opponents are the true reasons; namely, overreaching of authority and governmental meddling in private decisions. At the very heart, this bitter exchange well demonstrates the cutting divisiveness of this proposal. If it is promulgated, the respect afforded the Bar and this Honorable Court is bound to be diminished in the eyes of many members of the Bar.

No court, on grounds of unpopularity, should ever withhold doing what the law and the constitution constrain it to do. Nevertheless, no court should voluntarily accede to the requests of a few to exercise its jurisdiction in an extreme and unconstitutional manner over the principled opposition of the many. Respondent respectfully asserts that the Petitioners' petition is of the latter variety and not the former. It should be soundly rejected.

IV RESPONDENT'S ALTERNATIVE.

As an alternative to Petitioners' proposal, Respondent proposes a revised modification of the IOTA rule, included as Attachment A, that accomplishes the following goals:

1. It permits, but does not require, lawyers with the consent of their clients to set up interest bearing trust accounts for the benefit of clients. Whether to set up the particular trust account is within the sole discretion of the lawyer, except that if he agrees in writing to do so it becomes a fiduciary obligation.
2. It permits, but does not require lawyers <u>with the consent of their clients</u> to deposit clients' funds in an interest bearing trust account for the benefit of the Foundation. The consent element is a requirement that does not exist in the current rule.
3. It plainly leaves lawyers the unreviewable discretion to open no interest bearing trust accounts, except when the lawyer has agreed with the client to do so under 1.

Respondent submits that this proposed alternative is within the power of the Court and in keeping with the best interests of clients and the Bar. It also removes a defect in the current rule in that it requires lawyers to obtain the consent of clients before using their funds to generate income to a charity that the client may or may not know about and may or may not wish to support.

If Petitioners wish to attain their larger desires constitutionally, the Florida Legislature is the correct forum.

Conclusion and Prayer

For reasons stated, Respondent respectfully urges this Honorable Court:

1. to deny the petition; and
2. to adopt proposed alternative modifications to the IOTA Rule submitted herewith by Respondent.

Joseph W. Little
Respondent
3731 N.W. 13th Place
Gainesville, Florida 32605
(904) 392-2211

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing was mailed by the United States postal service to each of the following persons on the 13 day of July, 1988:

William O. E. Henry, Esq.
880 N. Orange Ave., Suite 102
Orlando, FL 32801-1023

Roderick N. Petrey, Esq.
The Florida Bar Foundation
3400 1 Biscayne Tower
2 S. Biscayne Blvd.
Miami, FL 33131

John F. Harkness, Jr., Esq.
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

Joseph W. Little