SUPREME COURT OF FLORIDA

No. 72-671

In Re: INTEREST ON TRUST ACCOUNTS, A PETITION OF THE FLORIDA BAR FOUNDATION to Amend The Code of Professional Responsibility

MEMORANDUM IN OPPOSITION OF BRIAN C. SANDERS

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TABLE OF CITATIONS

CASES

FLORIDA STATUTES

FLORIDA CONSTITUTION

UNITED STATES CONSTITUTION

STATEMENT OF THE FACTS

The Florida Bar Foundation is not the Florida Bar, nor in actual practice a truly independent Foundation. It is a conduit funneling money to a discredited (Appendix Tab 2) federal bureaucracy, the local components of the Legal Service Program. The establishment of state IOTA programs was a project of the Federal Legal Services Corporation through a Federal grant to encourage the creation of such programs on a state by state basis. The federally subsidized effort was called IOLTA. The Florida IOTA Foundation is a result of that effort. Florida Legal Services, a federal grantee, reviews all grant applications for local programs. The Foundation grants subcommittee has more often than not been composed of attorneys with a history of total sympathy to the Federal program and its goals. Only local bar programs willing to abdicate any pretense of the right to tailor programs to local needs and restrain abuses, and who accept unreservedly the activist Federal Legal Service philosophy and direction may reasonably expect to receive reliable funding through the system from the funds made available to that very system by their own members. For twenty four years Federal Legal Service programs have disparaged and resisted the efforts of local voluntary bar associations to provide traditional legal aid. The Florida Bar Foundation has continued in that tradition, while feeding the unfounded fiction that most local lawyers do not care and do not, or will not, do legal

aid. It is for that reason widely disliked. Its grantees do not focus on the pedestrian, thankless task of serving individual people with individual problems. Law reform and legal activism are the "lance point of legal Services." Diversion of scarce resources from the immediate needs of individuals to such activism is justified on the grounds that it is when successful, of greater benefit to more people. The Federal Legal Service Program has been racked by waste, unrest, and scandal. Despite all attempts to prevent it by law, it has become a partisan political instrument. However cloaked, it no longer enjoys the respect of either the people of Florida or the rank and file of The Florida bar. Participation, like "the ground twixt here and Phillipii, has stood till now but in a forced affection." The tired prescription proffered now by the Foundation for evident failure is a more direct and intrusive compulsion.

SUMMARY OF THE ARGUMENT

1)The funds under a compulsory program would be public monies.

2)The constitutional power granted by the People to the Supreme Court under Article V Section 15 does not:

A)Extend to the use of the power of the state for what is in effect the appropriation of public monies;

B)Allow handling of public funds other than by deposit in the public treasury to be withdrawn only upon warrant.

C)Authorize compulsion of the client

3)Failure to observe strict limitations on Article V would

violate constitutionally mandated separation of powers.

4)The Article V power granted to the court is "closely drawn" by both the State and Federal constitutions, and "discipline" in the sense of that article is narrowly related to fitness to practice. It does not include mandatory support of even socially desirable goals.

5)Petitioner should seek amendment of the Florida Banking Code and Escheat statutes. Then the court can rule in the context of a concrete case or controversy without appearance of prejudgment.

6)There is a better, less restrictive way. Allow local voluntary bars to have their own direct IOTA IF membership therein requires an undertaking either for service in kind, financial contribution, or trust account participation in such a local program.

ARGUMENT

1. Public Funds

It is not intended that this be a legal brief with case citation. This is not a case or controversy. Some limited references to cases and statutes must be made, however. The first of these is GLAESER V. THE FLORIDA BAR, 819 F2d 1002. GLAESER did not resolve the constitutionality of the program in the context of The Florida Constitution. The pendant state issues were footnoted as dismissed when the Federal constitutional issue was resolved. Moreover, attempts through intervention to raise Florida Constitutional issues by Florida Lawyers on the alternative basis that what was not private money must be public money,

was denied. A copy of the Petition for Intervention and a portion of the complaint is attached in the Appendix hereto. (Tab 1). GLAESER is a standing case. Because the principal fund was so small that there would have been no net interest in any event, there was no "property interest abridged" to confer the right to sue. Standing cases do not resolve issues of constitutionality vel non. Only cases where the Plaintiff DOES have standing, and there is a direct resolution of the issue. Such is the doctrine of abstention. There may yet be a Glaeser II with a client who has a small, but distinctly demonstrable property right. The narrow basis on which GLAESER distinguished WEBB'S FABULOUS PHARMACIES V. BECKWITH 44 US 155, 101 S.C. 446, 66 L. Ed 2nd 358 has foreboding implications for such a case. However, more directly, in cases where the money IS so slight as to convey no property right in the float, has GLAESER not raised the question of whether it is not then Public money? Private property was carved out of Feudal law, under which the King owned everything. By such devices as Livery of Seisin and Foeffment private property in the wealth of the time (land) was created. However, the law of escheat then, as now, recognized the source of ownership and to whom "property" reverted when private rights had lapsed FOR WHATEVER REASON. Time alone was not the only form of escheat. Among the other common law reasons for escheat were treason, outlawry and others. In every instance, the property REVERTED to the sovereign as its source. "Property" is never at least in law, the property

of no one. The escheat statutes of Florida relating to trust monies impose a test of abandonment, (no activity for 7 years) but they clearly show that the monies in trust accounts ARE PUBLIC PROPERTY WHEN THEY CEASE TO BE PRIVATE PROPERTY. See FS 717.103, FS 717.106, F.S. 717.112, and FS 717.123 (the latter earmarking such funds for the STATE SCHOOL FUND.) GLEASER stands for little more than the proposition that there is another method by which private property rights in such funds may lapse. In essence Ms. Glasser had by allowing such funds to be comingled in an interest bearing account and never demanding them or an accounting relinquished any claim on them and had no reasonable expectation of reclaiming the interest. The parallel between the GLAESER court's "abandonment" language and the escheat statutes is striking. It would appear there is another form of abandonment besides mere lapse of time, and THEREFORE ANOTHER FORM OF ESCHEAT. The Legislature has already earmarked such funds, for the benefit of the school children of this state. Money is property. The rights in bank deposits are defined as intangible personal property by the intangible tax statutes of the state [199.023(1)(a)]. Fiduciary account interest is subject to taxation on that basis under chapter 199. The possibility of multiple beneficial interests in such fiduciary accounts is contemplated by Chapter 199, in denying multiple exemptions for each such beneficiary. F.S. 717.101 (9) likewise so defines both money and interest as intangible property. Interest on fiduciary trust accounts IS property.

Common sense says so. The legislature said so. It is. Thus it is EITHER private property, OR public property. It cannot be neither. It is the essence of "property" that it IS property, i.e. it BELONGS. That is why it IS property.

2. Fiscal Limitations

F.S. 215.31 requires that ALL "exactions" under the authority of the laws of the State be deposited in the State Treasury, and that no money shall be paid from it except as appropriated by the annual general appropriations act or otherwise provided by law. As long as IOTA was voluntary, and the client was given an explanation and assented at least by silence, the procedure was marginally a implied transfer of the right to the interest on money from one private owner to another. When governmental authority, (which can be exercised by a court or its instrumentalities FLORIDA BOARD OF BAR EXAMINERS RE:APPLICANT 443 SO 2D 71) is brought to bear, there IS an exaction by state law. What WILL be the result when the client, disagreeing profoundly with the activities of the Foundation's grantees, tells his lawyer NOT to put his $100.00 in a fund where they will have the benefit of it, but the Court threatens the lawyer's livelyhood if he does not? Is that not an exaction? Is there no compulsion under color of state law to collect money? In the instance of a non-consenting client, are such funds not in fact a tax, levied by a branch of government that has no power to tax? And what answer is made in that instance to the resounding comment of Mr. Justice Boyd in MATTER OF INTEREST ON TRUST

ACCOUNTS 402 So 2d 389 that there IS a taking . The right to control whether or not the foundation will get the interest, which is an incident of ownership of the fund however small is in no way diminished by the fact that no interest can be produced by the fund standing alone. The right to withhold is an incident of ownership of the fund. The right to direct that it be held in trust at no interest, or with the funds of others for ANOTHER PURPOSE (such as the support of a truly local bar legal aid program, or a church, or a labor union) is an incident of ownership. None of these issues are resolved by GLAESER because the program was not compulsory. The First Amendment was not raised, nor involved. The fact remains that Article V section 15 gives no power to the court to compel the client, or take away HIS right to direct at his pleasure the disposition of the beneficial use of incidents of his own property, however small. Focused on the unquestioned ownership IN THE TRUST RES, not the interest, compulsion raises the clearest of constitutional problems. Russell Troutman, who as president of the Florida Bar petitioned this court to establish IOTA, also sued the federal government when the Legal Service Programs was established by the executive branch without benefit of statute or appropriation. That his work, and the work of all of us who have labored so long to produce a balanced, and lawful system should be so twisted is disheartening.

Article VII section 1, of the Florida Constitution of 1968 provides that no tax shall be levied except in pursuance of

law, and NO MONEY DRAWN FROM THE TREASURY EXCEPT IN PURSUANCE OF APPROPRIATION MADE BY LAW. The Foundation's solution to this problem is to now have the money never go to the public treasury. That way, Legal Aid will not have to go back each year to the legislature and justify both its past conduct and its future needs. There will be no political control through the power of the purse over its actions. But with governmental compulsion to collect money comes all the control of the constitutional procedures. The constitutionally declared right of the sovereign people to control the activities of those to whom public money is given, and to themselves demand accountability through their legislature, applies to legal aid foundations too.

3. Separation of Powers

Article 11, Section 3 of the Florida constitution of 1968 provides that:

> "The powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches, unless EXPRESSLY provided herein."

There was a Federal counterpart of this in the proposed Bill of Rights submitted to the states. The Federal union did not adopt such language. Florida did. Separation of powers in Florida, unlike most states, is the subject of an express absolute, and unconditional constitutional imperative. All the authority (if such it can be called) from other states and other sources submitted by the Foundation to show that the Court and not the Legislature should institute the program founders on this rock. None of

their arguments or authorities show, or can show, an EXPRESS CONSTITUTIONAL POWER BY THE FLORIDA SUPREME COURT on any basis except a case by case controversy (or class action), with findings of fact and statutory or common law causes of action, to order the disposition of money, or vest the beneficial right to its use in a private foundation. Under our constitution the Legislature alone has power to levy exactions, however named, for social purposes, the Legislature alone may appropriate, and not even it can allow direct collection of public money outside the public treasury by a private foundation. This was implicitly acknowledged by the Foundation in the GLAESER brief, dated April 29, 1985 at page 20 section B. where they urged "Entitlements created by STATUTE may be modified BY STATUTE", and hence there was no private property because "THE SUPREME COURT has created property where in practice none can exist, and THUS IT has the power to DIRECT ITS USE." Mr. Justice Boyd's comment that once a deposit of money is made in a bank in any form, SOMEONE has the benefits of its use refutes beyond my poor power the sophistry of the Foundations claim that there is no property because "in practice none can exist". As he noted so aptly IN PRACTICE IT DOES, for SOMEONE DOES derive the benefit, if no one other than the bank. General prospective redirection of that benefit by the force of state authority is achieved by STATUTE under our constitutional form of representative democracy. The petition of the Foundation is little more than an assault

upon that principal. IF a statute were so enacted, then multiple challenges under a variety of applications could, and likely would arise, all to be resolved by the Supreme Court under the state constitution. IF the court itself has imposed the programs, to what impartial State judicial forum will the aggrieved go for redress? Will not their right Under Article I, section 21 have been "in practice" foreclosed? If "in practice" it has not, will not the appearance of prejudgment still remain, no matter what the outcome, to impair the effectiveness of the court? The reason for separation of powers is to preserve the vital appearance as well as reality of impartiality, and nowhere is that more important than in dealing with protection of fundamental law by the highest court.

4. Article V Section 15 Power is "Closely Drawn"

Once Florida had a Diploma privilege and the Florida Bar was voluntary. Bar membership was made compulsory. The court did away with the Diploma privilege and established the Board of Bar Examiners. The court was in a position where it could, and did, tell people they could not enter a particular profession, for a variety of reasons. There was a flood of litigation, and a firestorm of controversy within the bar. From the crucible of those times came dearly bought insights. Having served in the then Chairman's firm (and served in small ways the Board) one thing emerges from those days above all the rest. I defer however to Judge Maurice Paul, who was privy to much the

same perspective, and who said it better, (although in a different context):

> ...the state may intrude upon plaintiff's First Amendment rights where the intrusion is justified by a sufficiently important state interest, and so long as the intrustion is "CLOSELY DRAWN".

GIBSON V. THE FLORIDA BAR, TCA 84-7109 MMP, rerversed by the same judge who considered GLAESER at the trial level, Seybourn H. Lynne, at 798 F2d 1564 because given the COMPULSION, there was a LESS INTRUSIVE OR RESTIRCTIVE WAY that Judge Paul had not considered. See also LEVINE V. SUPREME COURT WISCONSIN 697 F.Supp 147. The even MORE CLOSELY DRAWN criterion seems to be that when complusion is used the objects or purposes must "REFLECT DIRECTLY TO EXPERTISE", and must be the least restrictive in the choice of means.

Here if adopted it is the court itself that will have the burden of suspending, or disbarring honest, diligent, competent lawyers of conviction and conscience on the theory that depriving them of money or livelyhood is for the "greater good" of enforcing submission to a particular social policy. That policy will have nothing to do with the commonly accepted precepts of professional competence or honesty. The court's actions in that event would be unprecedented. It remains to be seen with what acceptance they would be greeted. However the past in a similar, but far less extreme situation teaches us that the "closely drawn" limitations in Federal and Florida constitutional law, which evolved in the Bar Examiners' litigations, (not

to mention the practical realities of administration), upon the Article V authority were derived from the most cogent of reasons. (Already we seem intent upon re-inventing the wheel, as in Gibson) Given the fact that this IS something for the legislature, there is no need to repeat the experiences of the past, and good reason not to.

5. Petitioner should address the Florida Legislature

If a general amendment of the banking laws is deemed advisable by the Florida Legislature, collection will be automatic though other means, uniform from all trust savings accounts of all professions, and enforcement will be simply administered through bank auditors. Political disputes relating to matters of policy and conscience will be transferred to the proper forum, the Florida Legislature which is designed to find legislative facts and resolve such matters. Each year the people would have a ready means to enforce accountability and curtail abuses. This court would not be burdened with the consequences of enforcement, audit, or the controversy when grantees go astray. The decades long dispute over whether such funds can be used in part to lobby or for test cases or to sue governmental instrumentailties, or use resources or personnel for political activity, or procedures to protect against abuses of process, will be committed to the policy making arm of the government where they belong.

6. The Better, less restrictive way

Twenty years ago in Orange County I challenged its

assembled bar to establish and support its own expanded legal aid program, predicting the day would come when compulsion at the state level would be attempted. Determined on that day to put the lie to those who claimed that local lawyers did not care and could not or would not create a effective local bar legal aid program, and so must be compelled through the integration rule, they voted overwhelmingly to require, as a condition of membership in the local VOLUNTARY bar, participation either by service, contribution, or otherwise in its legal aid program. Since that association is voluntary, no man's rights or conscience was infringed. But the commitment was made, and it has been honored. Such programs produce more than mere money. They combine the benefit of permanent staff with the broad panel of experience, talent and expertise that is essential to an effective program. Such do not seek to change law, or lobby government, or push socially motivated class actions, or enforce preconceived views of social policy by unfounded, vexatious or protracted litigation against target classes of defendants, or divert money from legal care to advertising to stir up litigation, or commit resources for partisan political purpose, or engage in activism or agitation. Their focus is the deserving individual with a just cause in adversity. (In Okaloosa county the "public funds" problem has been solved by paying the money directly into the county and making the p aralegal a county employee.) When the Board Of Governors of the Florida Bar rejected mandatory IOTA in September,

1985, Thomas M. Ervin, Jr cited studies that have shown lawyers are contributing $35-50 million a year in time for legal services for the poor, plus another $30-40 million in work for charitable organizations. There is a way to determine if the Petitioner is truly seeking merely money and power, or is now honestly dedicated to the cause it espouses. Test it with an ernest of its intent. IF it believes in legal aid enough to amend its petition to allow programs under the sole control of local bar associations to have their own IOTA programs outside its grant structure as an inducement to increased participation in legal aid, on condition of mandatory participation at that level, then the Foundation will have served that purpose to which it is ostensibly dedicated. If not, its petition is self serving at the expense of the overall interest of the very people its seeks to benefit by putting in jeopardy services and resources now provided voluntarily which far out weigh any gain to be obtained by compulsion. In that event the interests of the poor in fact require rejection of this petition.

CONCLUSION

In 1964 the forcible funding from public moneys of legal aid was begun in Congress. It was opposed by Senator Everitt Dirksen, whose ringing prophecy then has become todays abiding reality. "Ev" looked with a baleful eye upon a publicly funded legal aid establishment, even though the ABA was for it, and the National Bar was for it, and some state bars were for it. The problem was, the people at

those levels were the movers and shakers who had no contact. They were not the men who were in County Court, or small claims, or dealing with routine domestic matters. Legal aid is done by lawyers, no matter what anyone says, and its is done by the young lawyer, the sole practitioner, the humble lawyer. It is done because of friendship, acquaintance, social affiliation, or by men who are just there and have an almost daily concern in the system really working at that level from self interest or compassion or both. If another bureaucracy is funded it will not do the job, because only by failing can it grow and grow. We can throw money at the problem that way for twenty years and it will only get worse. Let the humble lawyers do it, let the man in the trenches do it. Give HIM the means, give HIM the resources, and every encouragement. Never question that he can do the job. Never question that he will do the job. For in his efforts lie legal aid's greatest peril, but also its greatest pride, AND ITS ONLY HOPE.

This petition is a confession of failure by the Foundation. It is now time to do it right. Tired but still willing, we ask only the chance to say, now as almost twenty five years ago:

Stand with us you who dare

Work with us you who care

But give US the tools

WE WILL DO THE JOB

Respectfully Submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above document has been furnished to THE FLORIDA BAR FOUNDATION SUITE 102, 880 NORTH ORANGE AVENUE, ORLANDO, FL 32801 by regular U.S. Mail this 31st day of August 1988.

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