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RE: Case No. 72,671
IOTA Comments

May it Please the Court:

In reviewing the the relationship between the proposed amendments to the charter of the Florida Bar Foundation, and the proposed IOTA rules, the following comments are respectfully submitted:

SUMMARY OF COMMENTS

1. FOUNDATION A PRIVATE BODY. By requiring in VI, section 6.3(c) of the PROPOSED AMENDMENTS to the ARTICLES OF INCORPORATION OF THE FLORIDA BAR FOUNDATION INC, that the Supreme Court may only appoint one third of the directors, and that those MUST BE SELECTED FROM A LIST OF 8 persons "nominated" from CURRENT OR PAST DIRECTORS of the Foundation, the charter retains the status of the Foundation as a Private Body, self perpetuating in nature.
2. DELEGATION OF REGULATORY POWER. By vesting a PRIVATE BODY with the power to regulate which attorneys accounts are "exempt", as proposed in Rule 5-1.1(d)(8) and requiring disclosure of trust account information to the same under Rule 5-1.1(d)(5) the Rule would constitute an impermissible delegation of the Supreme Court's exclusive power to regulate attorneys. The very foundation of the program is THE EXCLUSIVE JUDICIAL POWER to regulate attorneys, given by the constitution TO THE COURT.
3. VIOLATION OF I and V AMENDMENT. By granting the exclusive beneficial use of clients POOLED property to a PRIVATE BODY, where clients may prefer to exercise their right to allocate to other organizations the income producing potential of their pooled funds to provide for legal representation of their group (Labor Unions, Trade Associations, Churches, etc.), the rights of Freedom of Association and of Private Property guaranteed by the I and V amendments to the Constitution of the United State would be violated. (The undersigned joins with Mr. Joe Little in urging the court to adopt a proviso to the rule allowing such 501(c) organizations to be designed by the client at his option.)

ARGUMENT UPON THE COMMENTS

Sensible of the court's instruction that the constitutionality of the

IOTA programs not be revisited VEL NON, this argument is limited to the impact upon the posture of the entire IOTA program where the instrumentality selected for its implementation is a self perpetuating private group, by the terms of its Charter not serving at the pleasure of the Supreme Court, nor subject to its control through the initial selection procedure, nor other effective method of control once the program is implemented. If such a body, for all the attempt to denominate it an "Instrumentality of the Court", is in contemplation of law still a "Private" rather than a "Public Body", the constitutional consequences are so self evident that they require no comment. In the judicial, rather than administrative law context, the question is whether this novel approach has constitutional precedent, and if so whether it is wise. This is both the point of departure, and the sum of the argument.

The wisdom of a program which, upon sanction of a displeasure that may destroy the livelyhood or reputation of men, compels their unwilling participation in a program, in which they can never have an effective voice also requires little comment. Accordingly the undersigned earnestly urges the court to consider a modification of the Articles of the Foundation where the nominating committee for the persons to be selected by the Supreme Court is elected by the membership of the Florida Bar at large in the same fashion as the Board of Governors of the Florida Bar, and the persons to be selected by that nominating committee are NOT restricted to acting or former Directors of the Foundation, or the Florida Bar Board of Governors. (The comment by Patrick Henry that all governmental power derives its just authority from the consent of the governed is not restricted to the innate urge to liberty buried in the hearts of men. There are practical considerations. Only those programs which motivate the higher levels of obedience to compulsion may hope for long term success.)

This argument is therefore addressed to the question of whether the provisions of the Foundation Charter are sufficient in law if adopted to constitute the Foundation a "quasi public body" so that it may exercise the judicial powers sought to be granted to it. Turning to what may be the nearest federal authority on the subject (since the question is one of Federal Constitutional Law) the case of LEVINE V. SUPREME COURT OF WASHINGTON 679 F.Supp. 1478 suggests:

> One of the most important factors to consider in determining whether a particular entity is an "alter ego" of the state, and hence immune from suit, is the effect on the state treasury of a judgment in the plaintiff's favor. Miller-Davis Co. v. Illinois State Toll Highway Authority, 567 F.2d 323, 327 (7th Cir.1977); Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F.2d 456, 457 (4th Cir.1987); but cf. Jensen v. State Board of Tax Commissioners of State of Indiana, 763 F.2d at 277 (effect on state treasury, standing alone, is not a dispositive factor). (FN2) Other factors include the entity's degree of autonomy from the state, its involvement with local, rather than state, concerns, the way it is treated by state law, Ram Ditta v. Maryland National Capital Park and Planning Commission, 822 F.2d at 457-58, and the interference with public administration that might result from a judgment against the entity, Jensen v. State Board of Tax Commissioners of State of Indiana, 763 F.2d at 277.

While these "yardsticks" arose in the context of the Eleventh Amendment, as well as the First, they would seem in general terms equally applicable to both. The degree of autonomy urged here for the Foundation would in practice be absolute. Its governing body is self

perpetuating. The funds of the Foundation pass outside the public treasury and its control, and alone answer to judgments. State law treats it as a corporation not for profit, under the provisions of its corporate code, not an instrumentality of the state. Its employees are not state employees. Its records do not appear to be subject to the Sunshine Act. The provision of legal aid in civil actions has never been designated as a "governmental" function, and indeed has been provided through a non-governmental agency to this very time (VIZ The Foundation, and others).

CONCLUSION

The proposed immunity of the Foundation from actual control of its policy making board by the Supreme Court itself greatly magnifies the impact upon the right of association of the clients, in the absence of an opt out provision. Exhibit A attached to the Proposal of Mr. Joseph W. Little would have a positive effect upon public acceptance of the program, even as the proposal to allow the rank and file membership access to the process would mobilize the productive efforts of that vital segment of the Bar so essential to long term success.

Respectfully

Brian C. Sanders