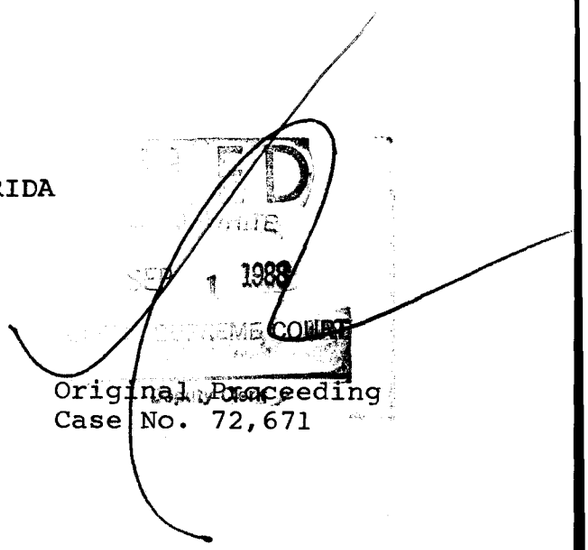
IN THE
SUPREME COURT OF FLORIDA



IN THE MATTER OF	
INTEREST ON TRUST ACCOUNTS; A PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR	Original Proceeding Case No. 72,671

RESPONSE OF SOUTHERN LEGAL COUNSEL, INC.
IN SUPPORT OF THE PETITION OF THE FLORIDA BAR FOUNDATION
FOR MODIFICATION OF THE INTEREST ON TRUST ACCOUNTS PROGRAM

w/not attend o.a.

The Interest of Southern Legal Counsel

Southern Legal Counsel, Inc. (SLC) is a tax exempt public interest law firm organized in Florida in 1977. SLC has been committed to enhancing the access of traditionally unrepresented and underrepresented groups and interests to judicial and administrative tribunals.

As concerns this proceeding, SLC has appeared before the Court in several cases raising the access issue, including The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979) (representing legal secretary who provided low-cost dissolution form processing); The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980) (citizen access to administrative proceedings); Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981) (as amicus urging adoption of IOTA); The Florida Bar, In re: Emergency Delivery of Legal Services to the Poor, 432 So.2d 39 (Fla. 1983) (representing Common Cause as amicus urging a mandatory IOTA program); The Florida Bar v. Furman, 451 So.2d 808 (Fla. 1984) (as amicus pointing out lack of low-cost legal service alternatives for the poor).

Furthermore, three of SLC's Board members, former Governor LeRoy Collins, Immediate Past President of The Florida Bar Foundation Roderick Petrey and former ABA president Chesterfield Smith, and two SLC attorneys, Jodi Siegel and Alice K. Nelson, are individual

signatories to the original petition in this action. However, this submission represents the views of SLC as an organization.

SLC wishes to disclose that it has been a recipient of IOTA funds since 1982. The grant amounts have been relatively small -- $2000 in 1982, $8000 in 1983, $12,000 in 1984, $27,000 in 1985, $12,000 in 1986 and $12,000 in 1987. However, without these IOTA funds, SLC would have been financially unable to represent juvenile delinquents in a statewide juvenile justice reform suit as well as to advocate for particular individual's treatment programs and placements. The IOTA grants have been used by SLC to provide legal representation to many individuals who typically have no or few legal service options.

SLC thus can attest to the utility of IOTA funds. Further, SLC is interested in informing the Court about the implications of the Court's decision here on the delivery of legal services to the poor. SLC respectfully submits that a comprehensive IOTA program is necessary to resolve the many access problems long acknowledged by this Court.

Response to Petition

The present petition must be placed in the context of the progress which has been made toward providing legal services to indigents since this Court's decision in The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979). There, this Court stated:

> Without question, it is our responsibility to promote the full availability of legal services. We deem it more appropriate, however, to address this issue in a separate proceeding. By doing so under our supervisory power, we insure a thorough consideration of the overall problem without delaying the present adjudication. Devising means for providing effective legal services to the indigent and poor is a continuous problem. The Florida Bar has addressed this subject with some success. In spite of the laudable efforts of the bar, however, the record suggests that even more attention needs to be given to this subject. Therefore, we direct The Florida Bar to begin immediately a study to determine better ways and means of providing legal services to the indigent. We further direct that a report of the findings and conclusions from this study be prepared and filed with this court on or before January 1, 1980, at which time we will examine the problem and consider solutions.

376 So.2d at 381-82.

In conformance with this Court's mandate, and in cooperation with the Center for Governmental Responsibility at the University of Florida, The Florida Bar conducted a study of the legal needs of Florida indigents. The findings and recommendations made in that study were published and are commonly referred to as the "Furman Study". The Study concluded that "there are substantial deficiencies in the delivery of legal services to both middle income and poor persons in Florida...." Furman Study, at 6. It found that

> [w]hile there is a gap between needs and services for all levels of income, the need is most critical for the poor. Whereas many legal issues are left unresolved for middle income groups, the unmet needs for the poor usually have more severe consequences in terms of effects on their property, health, and lives.

Furman Study, at 5.

The Study presented a "Priority Agenda for Reform," which listed 13 items for action by the Supreme Court, The Florida Bar, the Legislature, the Executive Branch and the Legal Services Corporation. Those recommendations were divided into the three areas found to be critical to an effective legal system: (1) information about the system; (2) access to representation; and (3) access to a means of dispute resolution. The Priority Agenda included the entity assigned responsibility for each task recommended. It is reproduced here in its entirety:

Information about the Legal System

1. Coordination of a public information program on the law directed toward poor and middle income persons. (Florida Bar)

2. Implementation of statutes that require simplified language in legal documents and implementation of rules to provide for simplified language in court documents. This recommendation also responds to the third criteria, access to means of dispute resolution. (Supreme Court, Legislature)

3. Provision for education on the law in primary and secondary schools. (Executive Branch)

Representation

4. Implementation, on a statewide basis, of a plan similar to the Orange County Bar Association Plan for pro bono representation. (Supreme Court, Florida Bar)

5. Expansion of the coverage of the Citizen's Assistance Office or enactment of an Office of Public Advocate. (Legislature, Executive Branch)

6. Expansion of legal services coverage and funding. (Legal Services Corporation)

7. Expansion of the use of paralegals and lay representation. (Supreme Court, Florida Bar)

8. Enactment of an attorneys' fee provision to apply to public interest cases. (Legislature)

9. Promotion of the establishment of prepaid legal plans. (Florida Bar)

10. Expansion of statewide lawyer referral and inclusion of pro bono referral. (Florida Bar)

Access to a Means of Dispute Resolution

11. Reform of the in forma pauperis rule. (Supreme Court, Legislature)

12. Simplification of the proceedings in dissolution and other cases. (Legislature)

13. Enactment of legislation to facilitate the establishment of dispute settlement centers throughout the state. (Legislature)

The following items are in need of further research:

1. Survey of the entire potential client group as to their specific needs. Sufficient resources for that study were not available. (Florida Bar)

2. Appointment of a select committee to review the rules of civil procedure for those which adversely affect the poor. (Supreme Court)

3. Study of the impact on the poor of state agency actions, as those actions relate to legal rights. (Executive Branch)

Furman Study, at 1-2 (page cross-references omitted).

The Furman Study was filed in this Court, as ordered. However, no proceedings were conducted to examine the Study's findings or to consider its recommendations as the Court promised it would do. 376 So.2d at 382. Two Florida Bar studies conducted since the Furman Study have affirmed the vast unmet need for legal services in Florida. Special Commission on Access to the Legal System, The Florida Bar (1985); Nelson, et al., The Legal Needs of the Mentally and Developmentally Disabled Citizens of Florida, The Florida Bar (1982).

Although no comprehensive review of the progress which has been made toward achieving the Furman Study goals will be attempted,[1] it is clear that many, if not most, of the important goals set out in the Priority Agenda have not been achieved. In the critical area of representation, the record has been most disappointing. The Furman Study's "Priority Agenda for Reform" stated that its top priority recommendation in the area of representation was:

> [i]mplementation, on a statewide basis, of a plan similar to the Orange County Bar Association Plan for pro bono representation.

Furman study, at 1. The Orange County Bar Association Plan requires that each member of the association handle two pro bono cases a year, or pay $250. When the study discussed the alternatives available to increase indigent representation, it characterized the Orange County Bar Association Plan as "the alternative deserving most scrutiny." Furman Study, at 9. The Furman Study concluded:

> The Florida Supreme Court can promulgate rules to encourage or require lawyers to donate services for pro bono activities.

Furman Study, at 8-9.

The legal aid crisis prompted concerned members of The Florida Bar to petition this Court to require members of The Florida Bar to assist the poor during this time of need. In The Florida Bar, In Re: Emergency Delivery of Legal Services to the Poor (Mandatory Pro Bono), 432 So.2d 39 (Fla. 1983), over 50 bar members petitioned this Court to implement a plan similar to the Orange County Plan on a statewide basis. That proposal suggested that this Court has the power and the duty to require all members of The Florida Bar to provide 25 hours of free legal service to the poor or, in the alternative, donate $500 to The Florida Bar Foundation or participate in the IOTA program during this time of crisis. The Court unanimously rejected that proposal.

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1. The Center for Governmental Responsibility at the University of Florida has apparently been unable to obtain funding for a follow-up to the study. It does not appear that there is any comprehensive analysis of which of the Furman Study's recommendations have been adopted or rejected.

However, this Court has never denied the unmet need for legal services in the poor community. Indeed, the Mandatory Pro Bono case recognized that:

> [t]here are people in need of legal services who are unable to pay for those services. All persons, however, should have the opportunity of obtaining effective legal services and should have meaningful access to the courts.

432 So.2d at 41. This Court noted there that Ethical Considerations contained in the Code of Professional Responsibility seemed to require the type of activity that the petition attempted to mandate. However, the Court found the applicable Code provisions to be directory only, and concluded that compliance with the clearly stated responsibilities set out in those sections could not be mandated by the Court, but must come from "within the soul" of the practitioner. 432 So.2d at 41. With this admonition, the Court refused to require Florida lawyers to lend any assistance whatsoever to the poor. The Furman Study's primary recommendation to increase indigent representation thus was soundly rejected.

However, the Court subsequently adopted another creative solution designed to increase indigent representation in civil matters by allowing retired attorneys who are or were admitted to practice law in Florida or elsewhere in the United States to provide pro bono legal services. The Florida Bar, Re: Amendment to the Integration Rule, Article XXII (Emeritus Attorneys Pro Bono Participation Program), 478 So.2d 338 (Fla. 1985). SLC applauds the emeritus attorney program, yet points out that this program alone cannot and has not filled the void of unmet legal representation to the poor.

Another key recommendation of the Furman Study in the area of representation was that legal services coverage and funding be expanded. The Furman Study was completed prior to the federal budget cuts which crippled legal services programs in 1982-84 and created what was called a legal aid crisis. That crisis gave new urgency to the search for a means to meet the increasing need for civil legal assistance.

Not only was available federal funding for legal services programs reduced, but the poverty population in Florida has increased, and the federal government has enacted restrictions on the type of clients who can be represented and the type of legal problems which can be handled by federally funded legal services programs. With these factors, the ability of legal services programs in Florida to serve the poor community has been limited, even with the additional IOTA funds in recent years. Therefore, in the years since the Furman Study, cutbacks in funding and coverage have been the rule.

These cutbacks have had a dramatic adverse effect, especially in light of this Court consistently reading the constitutional right to counsel narrowly, and therefore depriving many indigents of free appointed counsel. For instance, in Andrews v. Walton, 428 So.2d 663 (Fla. 1983), this Court held that there are no circumstances in which a parent facing incarceration for child support arrearages is entitled to court-appointed counsel in civil contempt proceedings. Further, in In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980), this Court recognized a right to appointed counsel in dependency proceedings where parents face permanent loss of custody, but found that where there is no threat of permanent termination of parental custody, the test announced in Potvin v. Kelly, 313 So.2d 703 (Fla. 1975) would be applied on a case by case basis to determine if counsel would be appointed.

In summary, in the important area of the availability of free counsel to represent indigents in civil matters, the poor are no better off today than they were at the time of the Furman Study. The poor population has grown, and the ability of legal services and legal aid offices to deliver legal services has been substantially diluted. Some of those who had access to legal counsel when the Furman Study was written, prior to federal budget cuts and coverage restrictions, no longer have access. The only conclusion which can be drawn from these developments is that the system, which the Study found had "substantial deficien-

cies" eight years ago, has substantially more deficiencies today.

In the area of "access to a means of dispute resolution," the Furman Study's top priority recommendation was reform of the in forma pauperis rule. The Study noted that section 57.081, Fla. Stat., had been enacted to allow indigents the benefit of court processes without prepaying costs so as to lower the cost barrier to access to courts, but that it had not achieved that goal. Furman Study, at 7. The Legislature answered the call for reform by enacting Chapter 80-348 §1, Laws of Florida, deleting the statutory language that Florida courts had used to deny free services to indigents.

This Court, however, refused to apply the new statute retroactively. Ludlow v. Brinker, 403 So.2d 969 (Fla. 1981). Justice England, writing for the three dissenting justices, stated:

> The Third District's decision and our affirmance today may line up nicely with the general trend of Florida case law, but the result of that alignment flies squarely in the face of our responsibility "to promote the full availability of legal services to the poor." The Florida Bar v. Furman, 376 So.2d 378 (Fla. 1979). The fact that Florida's district courts have over the years consistently parsed the legislature's grant of free access to the civil justice system is no reason to continue that trend in the future.

403 So.2d at 971 (England, J., dissenting). Although this Court subsequently has construed the statutory change in a liberal fashion, Chappell v. Florida Dep't of Health and Rehabilitative Serv., 419 So.2d 1051 (Fla. 1982), the majority opinion in Ludlow demonstrates the resistance that the poor have confronted in their efforts to obtain equal access to our legal system.

On the other hand, this Court did respond to the Furman Study's recommendation to simplify dissolution of marriage proceedings. In The Florida Bar, Re: Amendment to Florida Rules of Civil Procedure (Dissolution of Marriage) 450 So.2d 817 (Fla. 1984), this Court provided that in certain divorce cases couples could petition for divorce without the assistance of counsel.

This Court must continue its efforts to meet the legal needs of the poor and otherwise unrepresented citizens of Florida.

Although this Court has missed some important opportunities in broadening access to the courts, it has taken some significant steps by adopting the emeritus attorneys program and in simplifying divorce proceedings. More significantly, however, this Court had the foresight to adopt the voluntary IOTA program. See In re Interest on Trust Accounts, 356 So.2d 799 (Fla. 1978); In the Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981).

While the IOTA program has been a great help, its contribution must be viewed in the context of the overall funding picture. IOTA funding has replaced only a fraction of the federal funding lost through federal cutbacks. The reality which poor Floridians face every day is that these cutbacks continue to cripple the legal services and legal aid offices on which they depend.

It was proper for the Court to begin the program slowly, with participation on a voluntary basis. The program has been in operation since September of 1981. It has a proven capability to raise and disburse substantial sums of money for legal services to the poor and the other purposes for which it was established. From all accounts, the program has been conducted in a sound, responsible and professional manner by the Florida Bar Foundation. Indeed, it has become an example for courts and organized bars throughout the United States.

Unfortunately, while IOTA funding could do more to ease the crisis, it has been limited because many lawyers refuse to participate in the IOTA program. In adopting the voluntary IOTA program, this Court "envision[ed] extensive participation by lawyers and law firms." 402 So.2d at 395. In the Mandatory Pro Bono case, this Court urged members of the Bar to participate in the program and recognized the significant role such funding could play in providing legal services to the poor. 432 So.2d at 41-42. However, the active recruiting efforts that have been undertaken by bench and bar have thus far failed to produce a level of participation sufficient to generate even enough funds to replace the amount lost through federal budget cuts. Although

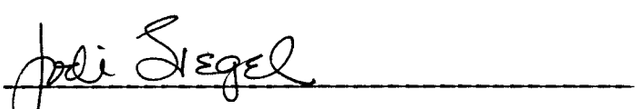
Florida led the nation in adopting IOTA, participation in the program here now lags behind that in many states which followed our example in adopting an IOTA program.

The suggestion that this Court make IOTA mandatory previously was made by Common Cause in the Mandatory Pro Bono case. Regrettably, that suggestion was not acted upon by this Court at that time. The present petition offers a new opportunity. Now is the time to bring the program to its full potential by approving the Florida Bar Foundation's petition to extend IOTA to include all the qualifying trust deposits held by attorneys in Florida. As this Court has pointed out on numerous occasions, there exists a great unmet legal need for the poor, and the IOTA program is a potentially great resource to fill that need.

Given a choice between leaving trust accounts in non-interest bearing accounts or placing them in the IOTA program, it is difficult to see why the funds should not be required to be part of the IOTA program. By definition, non-interest bearing accounts produce no benefit to the clients who provide the funds. Only banks are the real beneficiaries in the current system.

With the constitutionality of IOTA affirmed, Cone v. The Florida Bar, 819 F.2d 1002 (11th Cir.), cert. denied, 108 S.Ct. 268 (1987), there are no strong countervailing reasons for not making IOTA mandatory. The crisis in legal access for the poor clearly demands it.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been sent by U.S. Mail to William O. E. Henry, Esquire, President, The Florida Bar Foundation, 880 N. Orange Avenue, Suite 102, Orlando, Florida 32801-1023; Roderick N. Petrey, Esquire, Immediate Past President, The Florida Bar Foundation, 3400 One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131; and John F. Harkness, Jr., Esquire, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 31st day of August, 1988.

By: Jodi Siegel

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