

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULE REGULATING
THE FLORIDA BAR 5-1.1(g).

Case No. SC20-1543

**Florida Civil Legal Aid Association's Motion for Leave to File
Non-Argumentative Supplement To Comment By
Florida Civil Legal Aid Association**

The Florida Civil Legal Aid Association (FCLAA) respectfully requests leave to file their Non-Argumentative Supplement to Comment. FCLAA's Non-Argumentative Supplement to Comment by Florida Civil Legal Aid Association was filed on May 11, 2021.

FCLAA appreciates the opportunity to continue to assist this Court and respectfully requests that this Court accept their Non-Argumentative Supplement to Comment.

Respectfully submitted,

/s/ Thomas D. Hall

Thomas D. Hall
Florida Bar No. 310751
thall@bishopmills.com

/s/ John S. Mills

John S. Mills
Florida Bar No. 0107719
jmills@bishopmills.com
service@bishopmills.com (secondary)
Bishop & Mills, PLLC
1 Independent Drive
Suite 1700

Rob M. Bradley, Jr.
Florida Bar No. 96946
rob@claylawyers.com
Kopelousos, Bradley &
Garrison, PA
PO Box 562
Orange Park, FL 32067
(904) 269-1111
(904) 269-1115 facsimile

RECEIVED, 05/12/2021 01:43:27 PM, Clerk, Supreme Court

Bailey Howard
Florida Bar No. 1002258
bhoward@bishopmills.com
service@bishopmills.com
Bishop & Mills, PLLC
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 facsimile

Jacksonville, Florida 32202
(904) 598-0034
(904) 598-0395 facsimile

Attorneys for the Florida Civil Legal Aid Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following persons by email on May 12, 2021:

Bryan S. Gowdy
CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
bgowdy@appellate-firm.com
filings@appellate-firm.com

*Counsel for Past Presidents of
The Florida Bar Foundation*

Chris W. Altenbernd
BANKER LOPEZ GASSLER, P.A.
501 E. Kennedy Boulevard,
Suite 1700
Tampa, FL 33602
Service-caltenbernd@bankerlopez.com
caltenbernd@bankerlopez.com

Elliot H. Scherker
GREENBERG TRAUERIG, P.A.
333 Southeast Second Avenue

Suite 4400
Miami, FL 33131
scherkere@gtlaw.com
miamiappellateservice@gtlaw.com

*Counsel for The Innocence Project of
Florida, Inc.*

Sylvia H. Walbolt
CARLTON FIELDS, P.A.
Post Office Box 3239
Tampa, FL 33601-3239
swalbolt@carltonfields.com
devans@caroltonfields.com

Peter D. Webster
CARLTON FIELDS, P.A.
215 S. Monroe Street, Suite 500
Tallahassee, FL 32301
pwebster@carltonfields.com
sdouglas@carltonfields.com

George E. Schulz, Jr.
HOLLAND & KNIGHT LLP
50 N. Laura St., Suite 3900
Jacksonville, FL 32202
buddy.schulz@hklaw.com
wanda.adair@hklaw.com

Counsel for The Florida Bar Foundation

Katherine E. Giddings
Kristin M. Fiore
AKERMAN, LLP
201 E. Park Ave., Suite 300
Tallahassee, FL 32301
katherine.giddings@akerman.com
kristen.fiore@akerman.com
elisa.miller@akerman.com

myndi.qualls@akerman.com

Christine B. Gardner
AKERMAN, LLP
Phillips Point, Suite 1100 W
777 S. Flagler Drive
West Palm Beach, FL 33401
christine.gardner@akerman.com
lella.provost@akerman.com

Gerald B. Cope, Jr.
AKERMAN, LLP
Three Brickell City Centre
98 SE Seventh St., Suite 1600
Miami, FL 33131-1714
gerald.cope@akerman.com
cary.gonzalez@akerman.com

Samantha Howell
SOUTHERN LEGAL COUNSEL, INC.
1229 NW 12th Ave.
Gainesville, FL 32601
samantha.howell@southernlegal.org

*Counsel for the Florida Pro Bono
Coordinators Association*

John A. DeVault, III
BEDELL, DITTMAR, DEVAULT, PILLANS
& COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
jad@bedellfirm.com
ghw@bedellfirm.com

Raoul G. Cantero
WHITE & CASE LLP
Southeast Financial Center
Suite 4900

200 South Biscayne Boulevard
Miami, FL 33131
rcantero@whitecase.com
ldominguez@whitecase.com
MiamiLitigationFileRoom@whitecase.com

*Counsel for Past Presidents of the Florida
Bar*

John B. Macdonald
AKERMAN, LLP
50 N. Laura St., Suite 3100
Jacksonville, FL 32202
john.macdonald@akerman.com
maggie.hearon@akerman.com

*Counsel for the Business Law Section of
The Florida Bar*

Michael M. Brownlee
THE BROWNLEE LAW FIRM, P.A.
390 N. Orange Ave., Suite 2200
Orlando, FL 32801-1642
mbrownlee@brownleelawfirmmpa.com
ktaccetta@brownleelawfirmmpa.com

Jodi Siegel
SOUTHERN LEGAL COUNSEL, INC.
1229 NW 12th Avenue
Gainesville, FL 32601
jodi.siegel@southernlegal.org

Counsel for Southern Legal

Steven L. Brannock
Torri D. Macarages
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass Street, Suite 200
Tampa, FL 33606

Sbrannock@bhappeals.com
tmacarages@bhappeals.com
eservice@bhappeals.com

Counsel for Florida's Children First, Inc.

Raymond T. Elligett, Jr.
BUELL & ELLIGETT, P.A.
3003 W. Azeele Street,
Suite 100
Tampa, FL 33609
elligett@belawtampa.com
gallo@belawtampa.com

Counsel for Bay Area Legal Services, Inc.

Mayanne Downs
c/o Elizabeth Tarbert
THE FLORIDA BAR
651 E. Jefferson Street
Tallahassee, FL 32399
eto@flabar.org

Chair of the IOTA Task Force

Elizabeth Tarbert
THE FLORIDA BAR
651 E. Jefferson Street
Tallahassee, FL 32399
eto@flabar.org

Counsel for The Florida Bar

Dineen Pashoukos Wasylik
DPW LEGAL
P.O. Box 48323
Tampa, FL 33646
service@ip-appeals.com
dineen@ip-appeals.com

*Counsel for The Florida Bar Standing
Committee on Pro Bono Legal Services*

Rob Bradley
BRADLEY, GARRISON & KOMANDO, P.A.
1279 Kingsley Ave., Suite 118
Orange Park, FL 32073
rob@claylawyers.com

*Counsel for Florida Civil Legal Aid
Association*

/s/ Thomas D. Hall
Attorney

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Case No. SC20-1543

**Non-Argumentative Supplement To Comment By
Florida Civil Legal Aid Association**

The Florida Civil Legal Aid Association (FCLAA) respectfully asks the Court to accept and consider this non-argumentative supplement to its Comment, filed February 10, 2021.¹ During oral argument, there were multiple exchanges focusing on LRAP and overhead expenses that appeared to illuminate some of the Court's concerns. While the FCLAA had a full opportunity to present its points and respond to questions at oral argument, the adversarial format of oral argument does not lend itself to tweaking proposed language on the fly. Attached, as Exhibit A is altered suggested language that represents the FCLAA's best effort to accommodate concerns voiced by the Court in a manner consistent with the points raised by the FCLAA in its original comment and reply to the Task Force's response. The changes suggested by FCLAA, in Exhibit A, are to subdivisions (8) and (9) of the proposed rule. FCLAA

¹ The Task Force and Foundation filed similar filings since oral argument.

changes are highlighted in blue.² In summary, the changes suggested by FCLAA would:

- specifically allow IRS-compliant distributions to LRAP,
- clarify that training and technology costs which facilitate the provision of direct legal services are not administrative costs,
- specify that grantees must expend 80%³ of IOTA funds to facilitate lawyers providing direct legal services,
- confirm staff responsible for generating the reports required in paragraph (11) of the rule are included within those staff responsible for the facilitation of direct legal services, and
- Clarify that development of resources to assist low-income self-represented litigants is also authorized.

FCLAA stands ready to assist the Court in any way the Court deems appropriate, particularly with language that would address

² FCLAA still believes that the six-month distribution requirement of the rule contained in subdivision (8) will be particularly harmful, but it has not suggested alternative language here.

³ Instead of the 90% required in the proposed rule.

the Court's concerns but would not result in any unintended consequences that might result in harm to Florida's poor. That would include, if the Court deems it appropriate, non-adversarial, informal, collaborative discussions between a representative of the Court and representatives of those directly affected by the changes, with the Task Force, of course, also represented. Although FCLAA is not aware of such a process being used before, it might be appropriate for rules cases where the Court is trying to get the language correct and in this case, in particular, since there is so much at stake. FCLAA, above all else, wants to continue to assist in providing for the legal needs of Florida's poor. It is in a unique position to offer rule language that could satisfy the concerns raised by the Court at oral argument.

Respectfully submitted,

Rob M. Bradley, Jr.
Florida Bar No. 96946
rob@claylawyers.com
Kopelousos, Bradley &
Garrison, PA
PO Box 562
Orange Park, FL 32067
(904) 269-1111
(904) 269-1115 facsimile

/s/ Thomas D. Hall
Thomas D. Hall
Florida Bar No. 310751
thall@bishopmills.com
/s/ John S. Mills
John S. Mills
Florida Bar No. 0107719
jmills@bishopmills.com
service@bishopmills.com (secondary)
Bishop & Mills, PLLC

Bailey Howard
Florida Bar No. 1002258
bhoward@bishopmills.com
service@bishopmills.com
Bishop & Mills, PLLC
325 North Calhoun Street
Tallahassee, Florida 32301
(850) 765-0897
(850) 270-2474 facsimile

1 Independent Drive
Suite 1700
Jacksonville, Florida 32202
(904) 598-0034
(904) 598-0395 facsimile

Attorneys for the Florida Civil Legal Aid Association

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Bryan S. Gowdy
CREED & GOWDY, P.A.
865 May Street
Jacksonville, FL 32204
bgowdy@appellate-firm.com
filings@appellate-firm.com

*Counsel for Past Presidents of
The Florida Bar Foundation*

Chris W. Altenbernd
BANKER LOPEZ GASSLER, P.A.
501 E. Kennedy Boulevard,
Suite 1700
Tampa, FL 33602
Service-caltenbernd@bankerlopez.com
caltenbernd@bankerlopez.com

Elliot H. Scherker
GREENBERG TRAUERIG, P.A.

333 Southeast Second Avenue
Suite 4400
Miami, FL 33131
scherkere@gtlaw.com
miamiappellateservice@gtlaw.com

*Counsel for The Innocence Project of
Florida, Inc.*

Sylvia H. Walbolt
CARLTON FIELDS, P.A.
Post Office Box 3239
Tampa, FL 33601-3239
swalbolt@carltonfields.com
devans@caroltonfields.com

Peter D. Webster
CARLTON FIELDS, P.A.
215 S. Monroe Street, Suite 500
Tallahassee, FL 32301
pwebster@carltonfields.com
sdouglas@carltonfields.com

George E. Schulz, Jr.
HOLLAND & KNIGHT LLP
50 N. Laura St., Suite 3900
Jacksonville, FL 32202
buddy.schulz@hklaw.com
wanda.adair@hklaw.com

Counsel for The Florida Bar Foundation

Katherine E. Giddings
Kristin M. Fiore
AKERMAN, LLP
201 E. Park Ave., Suite 300
Tallahassee, FL 32301
katherine.giddings@akerman.com
kristen.fiore@akerman.com

elisa.miller@akerman.com
myndi.qualls@akerman.com

Christine B. Gardner
AKERMAN, LLP
Phillips Point, Suite 1100 W
777 S. Flagler Drive
West Palm Beach, FL 33401
christine.gardner@akerman.com
lella.provost@akerman.com

Gerald B. Cope, Jr.
AKERMAN, LLP
Three Brickell City Centre
98 SE Seventh St., Suite 1600
Miami, FL 33131-1714
gerald.cope@akerman.com
cary.gonzalez@akerman.com

Samantha Howell
SOUTHERN LEGAL COUNSEL, INC.
1229 NW 12th Ave.
Gainesville, FL 32601
samantha.howell@southernlegal.org

*Counsel for the Florida Pro Bono
Coordinators Association*

John A. DeVault, III
BEDELL, DITTMAR, DEVAULT, PILLANS
& COXE, P.A.
101 East Adams Street
Jacksonville, FL 32202
jad@bedellfirm.com
ghw@bedellfirm.com

Raoul G. Cantero
WHITE & CASE LLP
Southeast Financial Center

Suite 4900
200 South Biscayne Boulevard
Miami, FL 33131
rcantero@whitecase.com
ldominguez@whitecase.com
MiamiLitigationFileRoom@whitecase.com

Counsel for Past Presidents of the Florida Bar

John B. Macdonald
AKERMAN, LLP
50 N. Laura St., Suite 3100
Jacksonville, FL 32202
john.macdonald@akerman.com
maggie.hearon@akerman.com

Counsel for the Business Law Section of The Florida Bar

Michael M. Brownlee
THE BROWNLEE LAW FIRM, P.A.
390 N. Orange Ave., Suite 2200
Orlando, FL 32801-1642
mbrownlee@brownleelawfirmmpa.com
ktaccetta@brownleelawfirmmpa.com

Jodi Siegel
SOUTHERN LEGAL COUNSEL, INC.
1229 NW 12th Avenue
Gainesville, FL 32601
jodi.siegel@southernlegal.org

Counsel for Southern Legal

Steven L. Brannock
Torri D. Macarages
BRANNOCK HUMPHRIES & BERMAN
1111 W. Cass Street, Suite 200

Tampa, FL 33606
Sbrannock@bhappeals.com
tmacarages@bhappeals.com
eservice@bhappeals.com

Counsel for Florida's Children First, Inc.

Raymond T. Elligett, Jr.
BUELL & ELLIGETT, P.A.
3003 W. Azeele Street,
Suite 100
Tampa, FL 33609
elligett@belawtampa.com
gallo@belawtampa.com

Counsel for Bay Area Legal Services, Inc.

Mayanne Downs
c/o Elizabeth Tarbert
THE FLORIDA BAR
651 E. Jefferson Street
Tallahassee, FL 32399
eto@flabar.org

Chair of the IOTA Task Force

Elizabeth Tarbert
THE FLORIDA BAR
651 E. Jefferson Street
Tallahassee, FL 32399
eto@flabar.org

Counsel for The Florida Bar

Dineen Pashoukos Wasylik
DPW LEGAL
P.O. Box 48323
Tampa, FL 33646
service@ip-appeals.com

dineen@ip-appeals.com

*Counsel for The Florida Bar Standing
Committee on Pro Bono Legal Services*

Rob Bradley
BRADLEY, GARRISON & KOMANDO, P.A.
1279 Kingsley Ave., Suite 118
Orange Park, FL 32073
rob@claylawyers.com

*Counsel for Florida Civil Legal Aid
Association*

/s/ Thomas D. Hall
Attorney

RULE 5-1.1 TRUST ACCOUNTS

(g) Interest on Trust Accounts (IOTA) Program.

(1) *Definitions.* As used in this rule, the term:

(A) “Nominal or short term” describes funds of a client or third person that the lawyer has determined cannot earn income for the client or third person in excess of the costs to secure the income.

(B) “Foundation” means The Florida Bar Foundation, Inc., which serves as the designated IOTA fund administrator and monitors and receives IOTA funds from eligible institutions and distributes IOTA funds consistent with the obligations and directives in this rule.

(C) “IOTA account” means an interest or dividend-bearing trust account benefiting The Florida Bar Foundation established in an eligible institution for the deposit of nominal or short-term funds of clients or third persons.

(D) “Eligible institution” means any bank or savings and loan association authorized by federal or state laws to do business in Florida and insured by the Federal Deposit Insurance Corporation, any state or federal credit union authorized by federal or state laws to do business in Florida and insured by the National Credit Union Share Insurance Fund, or any successor insurance corporation(s) established by federal or state laws, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Florida, all of which must meet the requirements set out in subdivision (5), below.

(E) “Interest or dividend-bearing trust account” means a federally insured checking account or investment product, including a daily financial institution repurchase agreement or a money market fund. A daily financial institution repurchase agreement must be fully collateralized by, and an open-end money market fund must consist solely of, United States Government Securities. A daily financial institution repurchase agreement may be established only

with an eligible institution that is deemed to be “well capitalized” or “adequately capitalized” as defined by applicable federal statutes and regulations. An open-end money market fund must hold itself out as a money market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and have total assets of at least \$250 million. The funds covered by this rule are subject to withdrawal on request and without delay.

(F) A “qualified grantee organization” is a charitable or other nonprofit organization that facilitates or directly provides qualified legal services by qualified legal services providers and that has experience in successfully doing so.

(G) “Qualified legal services” are free legal services provided directly to low-income clients for their civil legal needs in Florida.

(H) A “qualified legal services provider” is a member of The Florida Bar or other individual authorized by the Rules Regulating The Florida Bar or other law to provide qualified legal services.

(I) “Direct expenses required to administer the IOTA funds” means those actual costs directly incurred by the foundation in performing the obligations imposed by this rule. Direct expenses required to administer the IOTA funds must not exceed 15% of collected IOTA funds in any fiscal year without the court’s prior approval. These costs include preparation of the foundation’s annual audit on IOTA funds, compensation of staff who exclusively perform the required collection, distribution, and reporting obligations imposed by this rule and overhead expenses of the foundation directly related to fulfilling its obligations under this rule. These overhead expenses also include:

(i) actual costs and expenses incurred by the foundation to increase the amount of IOTA funds available for distribution;

(ii) funding of reserves deemed by the foundation to be reasonably prudent to promote stability in distribution of IOTA funds to qualified grantee organizations; and

(iii) direct costs related to providing training and technology to qualified grantee organizations, as specified below.

(J)

“The court” means the Florida Supreme Court.

(2) *Required Participation.* All nominal or short-term funds belonging to clients or third persons that are placed in trust with any member of The Florida Bar practicing law from an office or other business location within the state of Florida must be deposited into one or more IOTA accounts, unless the funds may earn income for the client or third person in excess of the costs incurred to secure the income, except as provided elsewhere in this chapter. Only trust funds that are nominal or short term must be deposited into an IOTA account. The Florida bar member must certify annually, in writing, that the bar member is in compliance with, or is exempt from, the provisions of this rule.

(3) *Determination of Nominal or Short-Term Funds.* The lawyer must exercise good faith judgment in determining on receipt whether the funds of a client or third person are nominal or short term. In the exercise of this good faith judgment, the lawyer must consider such factors as the:

(A) amount of a client’s or third person’s funds to be held by the lawyer or law firm;

(B) period of time the funds are expected to be held;

(C) likelihood of delay in the relevant transaction(s) or proceeding(s);

(D) lawyer or law firm’s cost of establishing and maintaining an interest-bearing account or other appropriate investment for the benefit of the client or third person; and

(E) minimum balance requirements and/or service charges or fees imposed by the eligible institution.

The determination of whether a client’s or third person’s funds are nominal or short term rests in the sound judgment of the lawyer or law firm. No lawyer will be charged with ethical impropriety or other breach of professional conduct based on the exercise of the lawyer’s good faith judgment.

(4) *Notice to Foundation.* Lawyers or law firms must advise the foundation, at its current location posted on The Florida Bar's website, of the establishment of an IOTA account for funds covered by this rule. The notice must include: the IOTA account number as assigned by the eligible institution; the name of the lawyer or law firm on the IOTA account; the eligible institution name; the eligible institution address; and the name and Florida Bar number of the lawyer, or of each member of The Florida Bar in a law firm, practicing from an office or other business location within the state of Florida that has established the IOTA account.

(5) *Eligible Institution Participation in IOTA.* Participation in the IOTA program is voluntary for banks, credit unions, savings and loan associations, and investment companies. Institutions that choose to offer and maintain IOTA accounts must meet the following requirements:

(A) Interest Rates and Dividends. Eligible institutions must maintain IOTA accounts which pay the highest interest rate or dividend generally available from the institution to its non-IOTA account customers when IOTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(B) Determination of Interest Rates and Dividends. In determining the highest interest rate or dividend generally available from the institution to its non-IOTA accounts in compliance with subdivision (5)(A), above, eligible institutions may consider factors, in addition to the IOTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that these factors do not discriminate between IOTA accounts and accounts of non-IOTA customers, and that these factors do not include that the account is an IOTA account.

(C) Remittance and Reporting Instructions. Eligible institutions must:

(i) calculate and remit interest or dividends on the balance of the deposited funds, in accordance with the institution's standard practice for non-IOTA account customers, less reasonable

service charges or fees, if any, in connection with the deposited funds, at least quarterly, to the foundation;

(ii) transmit with each remittance to the foundation a statement showing the name of the lawyer or law firm from whose IOTA account the remittance is sent, the lawyer's or law firm's IOTA account number as assigned by the institution, the rate of interest applied, the period for which the remittance is made, the total interest or dividend earned during the remittance period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period; and

(iii) transmit to the depositing lawyer or law firm, for each remittance, a statement showing the amount of interest or dividend paid to the foundation, the rate of interest applied, and the period for which the statement is made.

(6) *Small Fund Amounts.* The foundation may establish procedures for a lawyer or law firm to maintain an interest-free trust account for client and third-person funds that are nominal or short term when their nominal or short-term trust funds cannot reasonably be expected to produce or have not produced interest income net of reasonable eligible institution service charges or fees.

(7) *Confidentiality and Disclosure.* The foundation must protect the confidentiality of information regarding a lawyer's or law firm's trust account obtained by virtue of this rule. However, the foundation must, on an official written inquiry of The Florida Bar made in the course of an investigation conducted under these Rules Regulating The Florida Bar, disclose requested relevant information about the location and account numbers of lawyer or law firm trust accounts.

(8) *Distribution of IOTA Funds by the Foundation.* Within 6 months of receipt, the foundation must distribute all collected IOTA funds except for direct expenses required to distribute IOTA funds. ~~to 1 or more qualified grantee organizations~~ all collected IOTA funds may be distributed to 1) qualified grantee organizations, and 2) qualified legal service providers through a Loan Repayment Assistance Program, except for direct expenses required to administer the IOTA funds. For purposes of this rule, funds loaned or distributed to qualified services

~~providers under the foundation's Loan Repayment Assistance Program are considered distributions to a qualified grantee organization.~~ Prior to distribution, the foundation must maintain IOTA funds separate from other foundation funds. The foundation may not condition distribution of IOTA funds to a qualified grantee organization on payment to the foundation for any purpose, including training, or technology. The foundation must select qualified grantee organizations based on objective standards it develops. When adopted, the foundation must provide those standards to both The Florida Bar and the court and also prominently publish those standards on the foundation's website. The standards must require that IOTA funds be used to provide qualified legal services and, to ensure fair distribution of IOTA funds across Florida, must consider relevant data, including:

(A) demographic data provided by an appropriate governmental agency, such as the U.S. Bureau of Labor Statistics; and

(B) data provided by the qualified grantee organization on the use of any IOTA funds previously received.

(9) Use of IOTA Funds by Qualified Grantee Organizations. A qualified grantee organization must expend at least 980% of the IOTA funds received to facilitate qualified legal service providers providing qualified legal services. A qualified grantee organization must expend no more than 240% of the IOTA funds received for administrative expenses and establishing reserves. ~~Administrative expenses include rent, training, and technology.~~ Technology and training costs incurred to directly facilitate a qualified service provider providing direct qualified legal services are not training, overhead, or other administrative expenses subject to the limitations in this rule. Expenditures to facilitate qualified legal service providers providing qualified legal services are limited to:

(C) compensation paid to qualified legal service providers;

(D) compensation paid to support staff who are directly assisting qualified legal services providers, such as paralegals;

(E) compensation paid to staff necessary for coordinating volunteer qualified legal service providers; or

(F) compensation paid to staff responsible for compliance, oversight, and reporting requirements pursuant to paragraph (11) of this rule;

(G) development and production of resources for the civil legal needs of low-income self-represented litigants; or

~~(F)~~(H) expenses that otherwise directly facilitate providing qualified legal services.

Compensation includes salary, health and other insurance, employment taxes, bar membership fees, and other employment related expenses. ~~benefits such as health insurance and bar membership fees.~~

(10) Reporting by the Foundation. In addition to providing the court with a copy of the annual audit of IOTA funds, the foundation must annually certify to the court its compliance with this rule's requirements on the use of IOTA funds. This certification must include, but not be limited to:

- (A) the amount of IOTA funds received;
- (B) a detailed breakdown of direct expenses required to administer the IOTA funds;
- (C) the name of each qualified grantee organization to which distributions were made;
- (D) the amount of distribution received by each qualified grantee organization;
- (E) a description of the process for determining eligibility and selection of each qualified grantee organization, including the objective standards developed for that purpose;
- (F) the total amount received from sources other than IOTA funds;
- (G) a detailed summary of the information provided to the foundation from qualified grantee organizations as required by section (11) of this rule; and
- (H) any other information the court determines is relevant.

(11) Reporting by Qualified Grantee Organizations. Qualified grantee organizations must annually certify to the foundation their compliance with this rule's requirements on the use of IOTA funds. This certification must include, but not be limited to:

- (A) the number of qualified legal services providers compensated or facilitated by the use of IOTA

funds:

- (B) the number of clients receiving qualified legal services paid for or facilitated by the use of IOTA funds;
- (C) the number of low-income Floridians who, while not directly represented, are nevertheless impacted by qualified legal services paid for or facilitated by the use of IOTA funds;
- (D) the number of hours expended delivering qualified legal services paid for or facilitated by the use of IOTA funds;
- (E) the types of matters for which clients received qualified legal services paid for or facilitated by the use of IOTA funds;
- (F) an accounting of the use of IOTA funds, including the amount used to establish reserves and pay for overhead and administrative expenses;
- (G) the total amount received from sources other than IOTA funds by the qualified grantee organization; and
- (H) any other information the court determines is relevant.

(12) Required Review. The court will cause a review of

these

amendments to be conducted to advise the court regarding their overall efficacy 2 years after their effective date. The scope of this review may also include any other matters related to the IOTA program.

(13) Effective Date and Transitional Rule. This amended rule becomes effective on July 1 following the date of the final adoption of these rules. During the fiscal year beginning on that July 1, the foundation must apply these rules not only to funds that will be received prospectively, but also to funds that were received during the prior fiscal year and not yet distributed to grantees.

Comment

Foundation provision of training and technology

While the foundation may use IOTA funds to provide training and technology to qualified grantee organizations, and qualified grantee organizations may use disbursed IOTA funds to pay the foundation for that

training and technology, the foundation may not condition a grant on payment for these, or any, services provided by the foundation to the qualified grantee organization. For instance, the foundation may arrange for bulk purchasing of technology which can then be provided to a qualified grantee organization at a lower cost than would be otherwise available to the qualified grantee organization, but the foundation may not, as a grant condition, require the grantee to pay the foundation for such services. A qualified grantee organization should, but is not required to, receive funds from sources other than IOTA funds to support its overall mission.