**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC20-1543**

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

# COMMENT OF THE PAST PRESIDENTS OF THE FLORIDA BAR FOUNDATION TO THE FINAL REPORT OF THE TASK FORCE ON RULE 5-1.1(g) TRUST ACCOUNTS

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## STATEMENT OF INTEREST

This comment is filed on behalf of twenty-six past presidents of The Florida Bar Foundation. The names and terms of service of each past president are in Exhibit A (attached).

These past presidents can impart to this Court their institutional knowledge and experience with respect to the Foundation's role in administering IOTA funds to support legal services for the poor and the administration of justice. Almost all the past presidents from the 1991-92 term to the 2018-19 term—spanning nearly three decades—join this comment, as do one past president each from the 1970s and 80s.

The past presidents' experience extends beyond the Foundation (the grantor of IOTA funds) and encompasses Florida's legal aid providers (the primary grantees), where many of them served for years in leadership positions. They also know pro bono legal services; some are recipients of The Florida Bar President's Pro Bono Service Award or the Tobias Simon award (this Court's highest recognition of a private lawyer for pro bono service), or both. Others have served on or led the Pro Bono Legal Services Committee of The Florida Bar or their local circuit pro bono committees.

## SUMMARY OF COMMENT

IOTA—known as IOLTA in other jurisdictions—"is a method of using the interest generated by pooled client funds in lawyers' trust accounts to raise money for law-related charitable purposes, primarily to fund civil legal aid for the poor." Juliette Lippman, *Strategic Reset: The Florida Bar Foundation's Investment in a Better Future for Access to Justice and the Rule of Law*, 44 Nova L. Rev. 1, 8 & n.44 (2019). Fifty years ago, this Court and the Bar started a decade-long project of first studying and analyzing extensive data (borrowed from other common-law jurisdictions), and then establishing and implementing the nation's first IOTA program. Less than twenty years after that, the remaining forty-nine states had adopted some variant of the Florida IOTA model.

Commendably, this Court in October 2019 established a task force to explore *whether* Florida's IOTA rule should be amended to include, among other things, an alternative model for distributing IOTA funds. The Task Force wisely has recommended reporting requirements that should serve to increase transparency. Regrettably, however, the Task Force's recommendations on distributing IOTA funds—though well intentioned—lack any

supporting evidence and, in our collective judgment, gravely endanger Florida's system for delivering legal services to the poor and administering justice. Thus, we—twenty-six past presidents of The Florida Bar Foundation—with one united voice, object to the Task Force's proposed rule and urge the Court to adopt our proposal—the Consensus Rule endorsed by *all* the commenting stakeholders—if it deems a change is needed.

We participated in the Task Force's proceedings and made known there our concerns. *Task Force Report*, Appendix J, at J-531-36. We did so because we care deeply about the tripartite mission that this Court assigned to the Foundation more than forty years ago: (i) ensuring low-income persons are ably represented in civil legal matters; (ii) improving the administration of justice; and (iii) promoting public service as a part of the law school experience. *See Matter of Interest on Trust Accounts*, 372 So. 2d 67, 69 (Fla. 1979); *Task Force Report*, Appendix J, at J-61, ¶3.1. The Task Force's proposal imperils this all-important mission.

After the Task Force submitted its proposed rule to this Court, we continued working. Individually and through our counsel, we engaged with the stakeholders who carry out the tripartite mission

established by this Court. Specifically, we have talked with the Foundation (the grantor of IOTA funds), legal aid providers and other grantees, and organizations that facilitate pro bono legal services, as well as those who represent Florida's businesses and the past presidents of the Bar.

In consultation with these stakeholders (Ex. D (attached)), we have developed the Consensus Rule (Exs. B and C (attached)) as an alternative to the Task Force's rule. *All* these stakeholders endorse our rule and reject the Task Force's proposed rule. Our proposed rule: (i) adopts, with modifications, the Task Force's reporting requirements; (ii) discards the Task Force's arbitrary caps on overhead and the six-month expenditure requirement; (iii) gives the IOTA grantor and grantees the discretion to exercise sound business judgment to meet the tripartite mission and to keep access to justice open; and (iv) removes problematic language and adds clarity.

The Court should reject the Task Force's proposal. If it is inclined to change the IOTA rule, then the Court should adopt our Consensus Rule—the one preferred by all the commenting stakeholders. Alternatively, the Court should order the Task Force to resolve the stakeholders' concerns or study the matter further.

## COMMENT

### I. The history of Florida's trailblazing IOTA program.

#### A. Florida intensely prepared for a decade to establish the first IOTA program in the United States that later became the model followed by all the other states.

Today, all fifty states operate IOTA programs.[1] Before 1978, however, no American jurisdiction had such a program. Led by Justice Arthur England and other visionary leaders, Florida in the 1970s and early 1980s founded our nation's first IOTA program—borrowing that idea from other English-speaking nations. Less than twenty years later, the other forty-nine states had adopted some variant of the "Florida model." *See In re Interest on Trust Accounts, A Petition of Florida Bar*, 356 So. 2d 799, 799–800 (Fla. 1978) (per England, J.) (noting the program was the "first of its kind in the United States," and the proposal originated from "other English-speaking jurisdictions"); *Matter of Interest on Trust Accounts*, 402 So. 2d 389, 389, 393-97 (Fla. 1981) (implementing IOTA program); IOLTA.ORG, *Leadership for Equal Justice* (http://www.iolta.org/what-is-iolta/iolta-history) (recognizing "the

[1] *See*, *American Bar Association*, Directory of IOLTA Programs (https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/directory_of_iolta_programs/).

Florida Bar Foundation launched the first IOLTA program in 1981"); Hon. John Dooley, *A Short History of the Vermont Bar Foundation*, Vt. B.J., Fall 2012, at 20, 21 & n.1 (noting Florida was the first state to establish an IOTA program, borrowing the idea from Canada); Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 Fla. St. U.L. Rev. 631, 636 & nn.38-39, 42 (1998) (attributing the IOTA program's origins to Justice England based on his observations of a similar program in British Columbia and noting the 50th state, Indiana, had approved its IOTA program in 1997); Arthur J. England & Russell E. Carlisle, *History of Interest on Trust Accounts Program*, 56 Fla. B.J. 101, 102-03 (Feb. 1982) (discussing Australian and Canadian programs and the work done from 1971 to 1981).

The hard work to establish the nation's first IOTA program took a decade of planning and was preceded by an extensive examination of data. The Florida Bar began studying the IOTA proposal in 1971, it then gathered "[e]xtensive data" from the foreign jurisdictions, and it developed "periodic reports" to understand the "feasibility and desirability" of the proposal. *In re Interest on Trust Accounts*, 356 So. 2d at 800. The project "accelerated" in 1976 when leaders of the Bar

and the pre-existing Florida Bar Foundation made specific recommendations that were approved by both organizations' boards in late 1976. *Id.* This Court approved the IOTA program in 1978, *id.*, and it implemented the program in 1981, *see* Lippman, *supra*, 44 Nova L. Rev. at 8 & n.46; *Matter of Interest on Trust Accounts*, 402 So. 2d at 389, 393-97; *see also* England & Carlisle, *supra*, 56 Fla. B.J. at 102-03 (discussing the work to launch Florida's IOTA program).

This Court designated the Foundation to receive and administer the IOTA funds. *In re Interest on Trust Accounts*, 356 So. 2d at 807. In approving the Foundation's charter and bylaws, the Court in 1979 authorized three general uses of IOTA funds: (i) providing legal aid for the poor; (ii) improving the administration of justice; and (iii) providing student loans. *Matter of Interest on Trust Accounts*, 372 So. 2d 67, 69 (Fla. 1979). These three goals, more or less, are the same in the present Foundation charter: (i) "[e]xpand and improve representation and advocacy on behalf of low-income persons in civil legal matters;" (ii) "[i]mprove the administration of justice;" and (iii) "[p]romote service to the public by members of the legal

profession by making public service an integral component of the law school experience."[2] *Task Force Report*, Appendix J, at J-61, ¶3.1.

### B. Over the course of the IOTA program's history, the Foundation's ability to exercise business discretion has benefitted low-income Floridians.

#### *1. Before the Great Recession, the Foundation's business acumen increased and preserved the pool of IOTA funds.*

At the IOTA program's onset, revenues were approximately $3 million annually. After 1989, annual revenues generally were $10 million or more. In 1990-1991, IOTA revenue hit $19 million, and the Foundation created an endowment trust and began to set aside reserves. During the "golden years" of the 1990s and early 2000s, the Foundation funded approximately one-third of the total funding for Florida's civil legal aid organizations. Most Foundation funds went to general support grants that funded the operations of legal services organizations throughout Florida, while others were for specific purposes (*e.g.,* extraordinary needs, disaster relief, etc.). *See* Lippman, *supra*, 44 Nova L. Rev. at 9-10 & nn. 52-60.

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[2] The Foundation's complete articles of incorporation are at https://fbfcdn-lwncgfpygomdk2qxtd0e.stackpathdns.com/wp-content/uploads/2015/04/Amended_Restated_Articles-of-Incorporation_2016_April.pdf.

During this "golden" period, the Foundation did not sit by idly. Exercising sound business judgment, the Foundation proactively increased—and preserved—the pool of IOTA funds and developed other sources of revenue. *See id.* at 9-10 & nn. 54-55.

For example, in 2001, the Foundation alerted this Court that financial institutions were paying lower interest rates on IOTA accounts compared to the rates paid on non-IOTA accounts. To rectify this problem, this Court—at the Foundation's request—adopted the "Comparability Rule." That is, this Court mandated institutions "pay IOTA account depositors the highest interest rate or dividend generally available at their own institution to non-IOTA customers when IOTA accounts meet the same minimum balance or other requirements." *Amendment to Rules Regulating the Florida Bar--Rule 5-1.1(e)--IOTA*, 797 So. 2d 551, 552 (Fla. 2001). This Court also tasked the Foundation to determine the "eligibility of [financial institutions] to hold IOTA accounts." *Id.* at 552-53.

Like with the original IOTA rule, Florida was a trailblazing leader in implementing the Comparability Rule—thanks to the work of the Foundation and its ability to exercise business judgment. Presently, thirty-five states have adopted the rule or a variant. *See*

*Task Force Report*, Appendix J, at J-490 to 492; *American Bar Association, Commission on Interest Lawyers' Trust Accounts* (https://www.americanbar.org/groups/interest_lawyers_trust_accounts/) (noting Georgia in 2015 became the 35th state to adopt the Comparability Rule); Andrew Arthur, *A Good Rule, Poorly Written: How the Financial Crisis Highlighted the Inadequacy of Iolta Rate Rules*,[3] 64 Cath. U.L. Rev. 729, 733 & n. 38 (2015) ("[T]he majority of state IOLTA rules contain comparability provisions that ensure IOLTA accounts are eligible to earn interest that is comparable to non-IOLTA accounts of a similar type."); Jane Curran, *A New Frontier for IOLTA: Interest Rate Comparability*, 10 Dialogue No. 3, at 3 (Summer 2006) (https://www.americanbar.org/content/dam/aba/publishing/dialogue/dialogue2006sum.pdf) (noting Alabama, Florida, and Ohio were the first states to adopt the Comparability Rule).

After the Foundation implemented this "Comparability Rule," IOTA revenues "increase[d] from approximately $12 million per year

[3] Notwithstanding its title, this article does not criticize state IOTA rules. Instead, the author advocates for federal regulation of interest rates, something, of course, that neither this Court nor the Foundation can implement.

to nearly $72 million dollars per year at its peak." *Task Force Report*, Appendix J, at J-533 (letter from the Foundation Past Presidents). Wisely, the Foundation in the early 2000s saved a substantial portion of the additional funds in a "rainy day" fund and did not immediately spend it all. *See id.* at J-534. As some of us led the Foundation during this period, we report to this Court that some—perhaps misapprehending the cyclical nature of the economy—criticized us at that time for not immediately passing these IOTA funds to the legal aid providers. The Great Recession would later prove that we and the Foundation, during the pre-recession period, exercised sound business judgment by first expanding, and then *saving*, the pool of IOTA funds.

*2. The Foundation's prudent business judgment of saving IOTA funds enabled Florida's legal aid network to survive the Great Recession.*

The Great Recession had a profound, long-lasting impact on IOTA programs nationwide. *See* Arthur, *supra*, 64 Cath. U.L. Rev. at 743-45. For a seven-year period (Dec. 2008–Dec. 2015), interest rates remained at effectively zero percent, meaning a drastic reduction in IOTA revenues. While rates reached two percent in mid-2018, they were lowered again in the fall of 2019 below two percent. *See id.* at

10-11 & nn. 61-63. And the onset of COVID-19 in March 2020 caused the Federal Reserve to slash rates to effectively zero again. *See Federal Reserve Implementation Note* (Mar. 15, 2020) (https://www.federalreserve.gov/newsevents/pressreleases/monetary20200315a1.htm); *cf.* Arthur, *supra*, 64 Cath. U.L. at 745 (noting interest rates always remained above six percent during the decades immediately before and after Florida's IOTA program was started).

Florida's IOTA program, however, was in a better position than other states' programs to weather the Great Recession "because the Foundation had prudently saved for the proverbial rainy day." Lippman, *supra*, 44 Nova L. Rev. at 11 & n. 64 (internal quotes and alterations omitted). Before the recession hit, the Foundation in 2007 had $88 million in reserves. *Id.* at 11 & n.65. As a result of the Foundation's foresight in saving IOTA revenues—and not spending every cent of these revenues as they came in the door—the Great Recession's impact on Florida's legal aid providers was significantly mitigated.

Notwithstanding the steep decline in IOTA revenues from 2007 to 2010, the Foundation was able to provide the legal aid providers a stable source of funding from 2007 to 2011 and then a steadier

decline of funding from 2012 to 2015. The following charts illustrate this point:

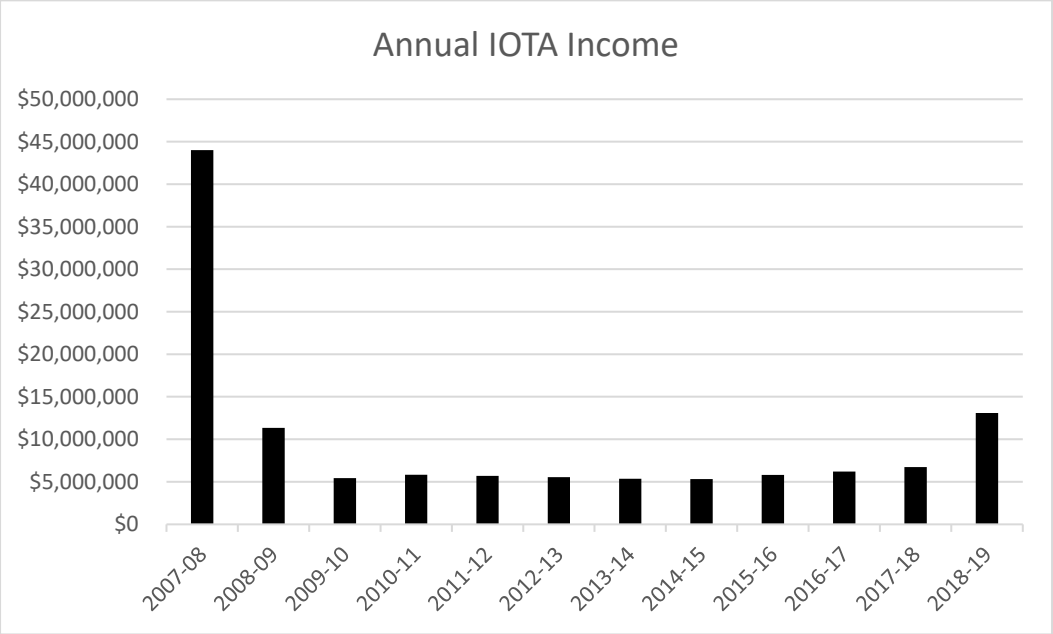


Figure 1. Florida Bar Foundation: annual IOTA income, FY 2007-2008 through 2018-2019.

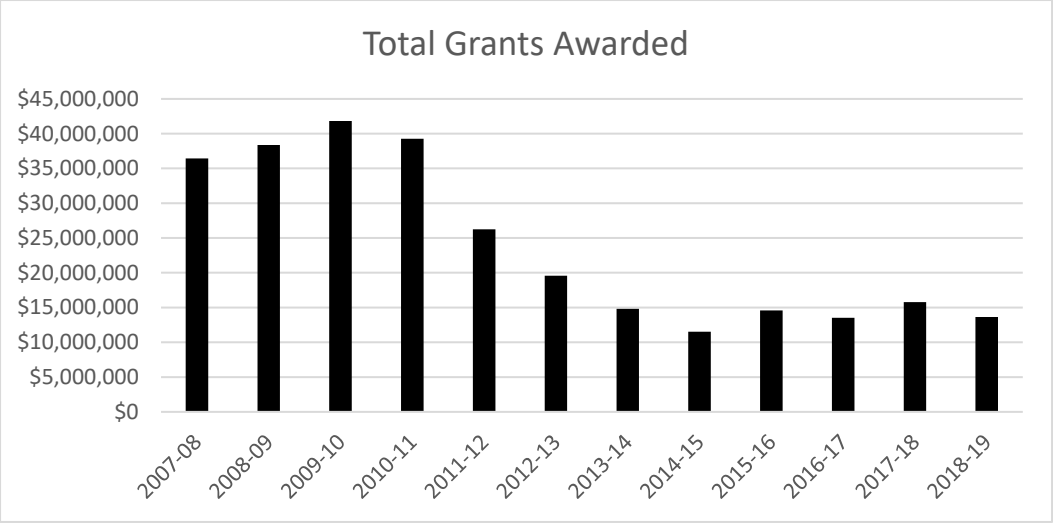


Figure 2. Florida Bar Foundation: total grants awarded, FY 2007-2008 through 2018-2019.

Had the Task Force's current recommendation—spend every cent within six months of receipt—been in effect during these years, it would have caused a severe shock to civil legal aid providers throughout Florida. The Foundation's prudent savings plan was invaluable to Florida's civil legal aid providers. It gave the legal aid providers additional time—years of time—to find other sources of funding while the IOTA revenues dropped (never to recover to their pre-Great Recession levels).

### C. In 2017, the Foundation exercised its business judgment to start a "Strategic Reset," a work that was still in progress when this Court *sua sponte* created the Task Force.

Realizing that IOTA revenues were unlikely to ever reach the levels seen during the "golden years," the Foundation's board in June 2017 once again exercised its business judgment by unanimously resolving to execute a "strategic reset" that would broaden the Foundation's role. *The Florida Bar Foundation*, *Strategic Reset* (https://thefloridabarfoundation.org/what-we-do/strategic-reset/). No longer would the Foundation be merely a source of funds and expertise; it also would be a "strategic leader and catalyst in the

cause of increased access to justice for all." Lippman, *supra*, 44 Nova L. Rev. at 4 & n. 23.

After extensive study, the Foundation in its Strategic Reset Report articulated three primary strategic directions: (i) maximize the impact and effectiveness of civil legal assistance for low- and moderate-income individuals and communities; (ii) expand the Foundation's role as an expert facilitator of effective civil legal assistance for these same individuals and communities; and (iii) serve as a catalyst for broad-based, systemic change and innovative solutions to reduce and eliminate the justice gap in Florida's civil justice system. *Id.* at 25-26 & n. 162; *The Florida Bar Foundation, Strategic Reset Report.*[4]

As part of the Strategic Reset, the Foundation suspended general support grants and shifted its focus to project-specific grants and competitive grantmaking that would make the greatest impact and further the goals of the Strategic Reset. *Id.* at 26 & n. 163. To measure the effectiveness of the Strategic Reset, the Foundation

[4] https://fbfcdn-lwncgfpygomdk2qxtd0e.stackpathdns.com/wp-content/uploads/2016/08/Strategic-Reset-and-Executive-Summary.pdf.

developed metrics.[5] *Id.* at 26 & nn.169-70; *see* The Florida Bar Foundation, *Reset Metrics* (prepared by Spark Policy Institute).[6]

With the Strategic Reset just in its infancy, this Court in October 2019 on its own motion "determined that it [was] appropriate to establish a task force to examine *whether* rule 5-1.1(g) should be amended to better ensure the most effective use of IOTA funds." *In re: Task Force on Distribution of IOTA Funds*, Case No. AOSC19-70 (Oct. 24, 2019) (emphasis added). The Court asked the Task Force for recommendations on:

- alternative models for distributing IOTA funds;
- whether the Court should: (i) establish priorities for using IOTA funds; (ii) impose requirements or limitations on the use of IOTA funds; and (iii) adopt reporting requirements for the distribution and use of IOTA funds; and
- any other matters related to ensuring the most effective use of IOTA funds.

*Id.*

[5] Strategic Reset materials are on the Foundation's website. https://thefloridabarfoundation.org/what-we-do/strategic-reset/.

[6] https://fbfcdn-lwncgfpygomdk2qxtd0e.stackpathdns.com/wp-content/uploads/2019/08/The-Florida-Bar-Foundation-Strategic-Reset-Metrics.pdf.

## II. The Court should reject the Task Force's proposed rule and recommendations.

### A. The Task Force has not presented any evidence on the impact of its proposed changes.

When this Court, the Bar, and the Foundation began the IOTA program in the 1970s, it did not just flip an "on" switch. Although no other State had such a program—and no one then had easy access to troves of online data—the Court, the Bar, and the Foundation gathered "[e]xtensive data" from foreign jurisdictions and created "periodic reports" to comprehend the "feasibility and desirability" of the IOTA proposal. *In re Interest on Trust Accounts*, 356 So. 2d at 800. Given that today forty-nine other states have IOTA programs and the ubiquitous data available online, one reasonably could have expected the Task Force to have provided this Court a treasure trove of data to support its recommended changes to Florida's longstanding, successful IOTA program.

Instead, the Task Force has failed to present any evidence—or develop any analysis—to support its recommendations or answer whether its proposed changes will:

- foster and strengthen the programs that provide legal services to Florida's impoverished population?

- improve the quality and quantity of legal services provided to this population?
- improve the administration of justice in Florida?
- increase or improve the provision of pro bono legal services?
- promote service by members of the legal profession by making pro bono service an integral part of the law school experience?

These questions—drawn from the Foundation's charter as approved by this Court[7]—should be the framework by which this Court assesses whether to adopt or reject the Task Force's proposed changes. The Task Force, however, has provided no evidence to answer these questions.

The Task Force has not presented any evidence—or made any findings—of any flaws in the present, long-standing structural arrangement for the deployment of IOTA funds. *Task Force Report*, Appendix J, at J-532. This Court should not discard the model developed by this Court, the Bar, and the Foundation over a 50-year period—that other jurisdictions have imitated—based on the Task Force's tenuous evidentiary record, lacking any expert analysis.

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[7] *See Task Force Report*, Appendix J, at J-61, ¶3.1; https://fbfcdn-lwncgfpygomdk2qxtd0e.stackpathdns.com/wp-content/uploads/2015/04/Amended_Restated_Articles-of-Incorporation_2016_April.pdf.

Granted, the Task Force did conduct a survey of sixty-eight bar associations and groups, twenty-five of which responded. *Task Force Report*, Appendix K. None of the survey responses provide any data on how the Task Force's proposed changes will impact Florida's IOTA program, the provision of legal services to the poor, or the administration of justice. *Id.* To the contrary, the survey shows that many jurisdictions are following Florida's present IOTA program in that: (i) they devote IOTA funds to the administration of justice (something scrapped by the Task Force's proposal); (ii) their programs' boards typically set the priorities for which IOTA funds are dedicated (just like the Foundation long has done); and (iii) members of their highest courts either sit on the program boards or appoint members of the board (just as is the case in Florida). *See id.*

The Task Force has proposed an alternative model for distributing IOTA funds that relies primarily on caps on administrative expenses by the Foundation and the grantees and by compelling the Foundation to expend funds in six months. Yet, nowhere does the Task Force's survey—or its 668-page report—indicate that any other IOTA program in the United States (or any other common-law jurisdiction) is following the Task Force's

proposed model, or a variant thereof. *Task Force Report,* Appendix K. Nowhere does the Task Force's report point to a scintilla of evidence—much less reasoned expert analysis—to justify its proposed caps or six-month expenditure rule.

Thus, unlike the 1978 Court that founded the IOTA program based on well-developed data, evidence, studies, and analyses, *see In re Interest on Trust Accounts*, 356 So. 2d at 800, today's Court lacks any meaningful data, evidence, studies, or analyses to assess the wisdom of the Task Force's proposal. The Task Force's proposal not only lacks supporting evidence, but it also contradicts good business sense, as argued next.

### B. The Task Force's proposal imprudently restricts the exercise of sound business judgment by the IOTA grantor (the Foundation) and the grantees (legal aid providers).

#### *1. The primary dual proposals—capping the administrative expenses and compelling the Foundation to spend funds within six months—make no business sense.*

The Foundation's prudent business acumen in the 1990s and early 2000s to first expand the pool of IOTA funds—and then save those funds—mitigated the harsh impact of the Great Recession on Florida's legal aid providers. *See* § I.B, *supra* at 8-14. The Task

Force's proposed changes, however, would prohibit these and other sound business judgments. It would require arbitrary restrictions on overhead (by the Foundation and the legal aid providers/grantees) and the immediate formulaic deployment of funds (by the Foundation)—no matter what the economic circumstances or forecast may be.

By capping administrative expenses for both the Foundation and the grantees and by forcing the Foundation to spend IOTA funds within six months, the Task Force's proposals prevent the grantees and the Foundation from exercising their discretion and common business sense. In short, the Task Force's dual proposals of caps and formulaic spending should be rejected because:

- Administrative caps on both Foundation and grantees prevent both the Foundation and grantees from adequately funding reserves.
- Requiring the Foundation to distribute IOTA funds within six months of receipt prevents any meaningful investment of IOTA funds.
- The proposed changes will promote instability, as they will hamper the programs ability to engage in meaningful budgeting and planning.
- Funding instability will lead to less-than-optimal use of funds as available funds for the programs will be more volatile, causing programs to expand and contract with the accrual of IOTA funds.

- The Task Force has presented no evidence, or any reasoned or expert analysis, that putting IOTA funds immediately into the hands of the grantees to be spent formulaically will achieve better results rather than the present system, or some other system, that spends those funds in a measured, strategic way.
- Grantees cannot budget for retaining and hiring attorneys with 6-month funding cycle; annual planning works better.
- Any organization—for-profit or non-profit—needs to have a "rainy day" reserve.
- The present system assists grantees to obtain other non-IOTA grants that require matching funds as a prerequisite for the match.

Our concerns are shared by the Business Law Section of The Florida Bar, which has persuasively explained in its comment why the Task Force's arbitrary caps and prohibition on reserves contradict sound business practices.

In short, the Task Force's formulaic caps imposed on the Foundation make no business sense. They fail to account for swings in interest rates and resulting IOTA funds or the fact that overhead is not necessarily linear. They permit too much devoted to administration when IOTA funds are in greater supply and too little when IOTA funds decline.

Nor do the Task Force's caps on the grantees—the legal aid providers—make any business sense. The comments of the Florida

Civil Legal Aid Association (composed of 28 legal aid providers), Southern Legal Counsel, and the Florida Pro Bono Coordinators Association more fully elaborate on this topic. The caps deprive legal-aid leaders from exercising sound business judgment.

For example, the caps overlook the need for incidental and administrative costs that must be spent to give a legal-aid attorney the necessary tools—online legal research, a cloud-based computing system, funds to pay a court reporter, CLEs, etc. These tools—all of which a well-heeled client's attorney will possess—enable the legal-aid attorney to provide an equal level of legal services to the impoverished client. The Task Force's restrictions on the grantees' discretion to spend IOTA funds on rent, training, legal research, and technology—by classifying these as "overhead"—will severely hamper the ability of Florida's legal aid providers to serve the poor.

The imprudence of the caps on the legal aid providers also is illustrated by something we see all the time in Florida and will see again—hurricanes. A hurricane may cause damage to a legal aid provider itself, such that the provider is unable to provide legal services until repairs are made. But, under the Task Force's rule, the repair of such damages would be mere "overhead" subject to a strict

cap. In the past, the Foundation has been able to immediately disburse funds "to repair damage sustained by [the legal aid provider] or to aid those in need of civil legal aid after a disaster." *See Task Force*, Appendix J, at J-111 (quoting), J-548. The Task Force's formulaic rule, however, unwisely impedes such disaster relief in the future.

*2. The Task Force's proposal overly restricts the Foundation's discretion in deploying funds for the administration of justice.*

The Task Force's proposed distribution requirements eliminate the prospect of devoting any meaningful portion of IOTA funds to the administration of justice, also called "AOJ" funding—part of the Foundation's mission set out in its governing documents as approved by the Court, *Matter of Interest on Trust Accounts*, 372 So. 2d at 69; *Task Force Report*, Appendix J, at J-61, ¶3.1. In their comments, the Past Presidents of The Florida Bar and the Pro Bono Legal Services Committee of The Florida Bar have documented the importance of AOJ funding, giving many examples of how this funding has benefitted Florida's poor.

One example of AOJ funding with which this Court may be familiar is the *Pro Se* Appellate Handbook

(https://prose.flabarappellate.org/). This Court and all the district courts of appeal, on their websites, refer *pro se* litigants to this handbook[8]—which the Foundation funded with IOTA funds as part of its AOJ mission. Funding this handbook, at a minimal cost, advanced the administration of justice and is an example of a small investment of IOTA funds assisting a large and perpetual population of vulnerable Floridians—many of whom have no prospect of obtaining the assistance of a legal aid or pro bono attorney.

However, the Task Force's proposal would prohibit the Foundation in the future from such "self-help" measures because they do not constitute "qualified legal services." *See* Task Force Proposed Rule 5-1(g)(1)(G)&(9); *Task Force Report*, Ex. 1, at 1-3 & 1-6, 1-7. For instance, the *Pro Se* Appellate Handbook is not a "qualified legal service" under the Task Force's proposed rule because it does not provide legal services "directly" to low-income clients. *See* § III.C.1, *infra* at 35-37 (discussing the "directly" issue further).

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[8] https://www.1dca.org/Resources/Frequently-Asked-Questions-by-Unrepresented-Pro-Se-Litigants; https://www.2dca.org/Practice-and-Procedures/Legal-Resources; https://www.3dca.flcourts.org/Resources/Pro-Se-Information; https://www.4dca.org/Practice-and-Procedures/Reference-Legal-Research-Materials; https://www.5dca.org/Clerk-s-Office/Resources.

As this handbook example illustrates, the Task Force's proposal assumes that the *only* way to improve the administration of justice in Florida is to fund lawyers who can directly provide legal services. *Cf. Task Force Report*, Appendix D, at D-4 (Task Force subcommittee calculating how may attorneys could be hired if 100% of IOTA were used for solely to hire attorneys). This assumption is mistaken and impractical. Not every *pro se* litigant can be provided a lawyer; there is just not enough money (in IOTA funds or elsewhere) to do so. Thus, to improve the administration of justice in Florida, the Foundation should have the discretion to use IOTA funds for self-help measures, as well as for other innovative methods described more fully by other commenters.

*3. The Task Force's proposal hinders change and innovation, and it penalizes programs that efficiently benefit the poor.*

The Task Force's proposal—by putting a straitjacket on the Foundation's business discretion—deters change and innovation in the delivery of legal services and the administration of justice. It does this by, among things, restricting the entire pool of proposed grantees in the future to the present compliment of grantees. As times change, the best methods for delivering legal services to the impoverished

change, and the Task Force's proposed rule fails to account for the inevitable changes that will occur in the future.

The Task Force's proposal also stifles innovation by assuming—wrongly—that the most beneficial legal services to the poor are those that expend the most attorney hours. But to substantially improve the lives of impoverished Floridians, legal services do not necessarily require many hours of *attorney* work, much less work by an *attorney whose salary is paid by a legal aid provider*.

For example, one program, IDignity, assists the poor to obtain identification papers. IDignity hosts clinics where volunteers—under attorney supervision—assist qualified clients to get a birth certificate, a Florida ID, or a Social Security card. These documents are critical to a client's dignity and to becoming a self-sufficient member of our society. They enable the client to apply for work or school, gain access to shelters, seek help from social service programs, open a bank account or cash a check, secure permanent housing, etc. Much of IDignity's immensely beneficial legal services can be performed by non-attorneys with minimal oversight by pro bono attorneys (not legal aid attorneys). Under the Task Force's proposal, however, IDignity may be ineligible for IOTA funds because it is *so efficient and*

*economical* in how it uses attorney hours. *See Task Force Report*, Appendix J, at J-93 to 94 (describing IDignity).

Another innovative example of impactful legal services is Florida's Children First (FCF), which has filed its own comment. FCF does not directly represent clients—and thus, under a narrow reading of the Task Force's proposed rule, may not be eligible for IOTA funds. But the immense benefit of FCF's legal services to Florida's disadvantaged children cannot be overstated. Among other things, it educates and trains judges and attorneys handling cases concerning the care of children—a practice area with a complicated statutory and regulatory framework and for which there is no profit incentive for the private bar. FCF also helps to encourage volunteer lawyers to represent these especially needy children.

FCF's innovative way of helping Florida's children in need of legal services could be wiped away under the narrow rubric of the Task Force's prescribed use of IOTA funds. Therefore, we have recommended a change to the definition of qualified legal services to

make clear that FCF's important work remains eligible for IOTA funding.[9] *See infra* § III.C.1, at 35-37.

*4. The Task Force's proposal will diminish the ability of legal aid providers in recruiting attorneys.*

It's no secret that today's law-school graduates leave school with a lot of educational debt. Given this reality, how can legal aid providers compete against corporate law firms to hire and retain law-school graduates? Legal aid providers cannot, do not, and should not match the salaries paid by corporate law firms. But the Lawyer Repayment Assistance Program—which will be ineligible for IOTA funding under the Task Force's proposal—is an innovative method for recruiting and retaining lawyers at legal aid providers. The comments of Bay Area Legal Services, the Florida Civil Legal Aid Association, Southern Legal Counsel, and the Florida Pro Bono Coordinators Association fully explore this vital program, which could not be continued under the Task Force's proposed rule.

[9] We agree with FCF's comment to the extent it argues that its work constitutes the facilitation of qualified legal services under the Task Force's proposed rule.

***

It took a decade of hard work by Justice England and others to get Florida's IOTA program up and running. *See* § I.A, *supra* at 5-8. In the four decades since, the Foundation, the grantees, and countless other partners have worked tirelessly to execute on their vision. While that execution may be imperfect and can be criticized (like any human endeavor), the Foundation has provided leadership and connectivity, essential ingredients for operating a strong legal aid network in Florida. This Court will imperil these five decades of work if it adopts the Task Force's primary proposals—arbitrary caps and the six-month expenditure requirement—as no evidence shows they will improve the provision of the legal services to the poor or the administration of justice. To the contrary, these proposals will drastically reduce the exercise of sound business judgment in the distribution and use of IOTA funds.[10]

[10] We acknowledge the Task Force's proposed rule permits the Foundation to "select qualified grantee organizations based on objective standards it develops." *Task Force Report*, Ex. 1, at 1-6 (quoting subsection (8)). However, the Foundation already does this, as evidenced by the metrics it developed in the Strategic Reset. *See supra* at § I.C 15-16 & n.5. Moreover, granting the Foundation discretion to develop such standards does not offset the many other harms caused by the Task Force's proposal to impose arbitrary caps and a six-month expenditure requirement.

## III. If the Court is inclined to change the IOTA rule, it should adopt the Consensus Rule that we propose and that *all* the commenting stakeholders endorse.

In our judgment, the Task Force's proposal, if adopted, will imperil the Foundation's tripartite mission, first approved by this Court in 1979. *See supra* § I.A at 7-8. Given our concern, we and our counsel have worked diligently to engage all the commenting stakeholders—especially those who are on the front lines of delivering legal services to the poor and administering justice. Based on these efforts, we propose an alternative rule for the Court to consider if it is inclined to change the IOTA rule. *All* these stakeholders—who also have commented on their own to this Court—endorse our proposed Consensus Rule over the Task Force's proposed rule.

Exhibit B (attached) has the text of our proposed Consensus Rule. Exhibit C (attached) compares the text of our Consensus Rule to the text of the Task Force's proposed rule. Exhibit D (attached) lists all the stakeholders who endorse our Consensus Rule. We next explain the similarities and differences between our Consensus Rule and the Task Force's rule.

### A. Our Consensus Rule adopts, with modifications, the Task Force's recommended reporting requirements and proposes amendments on the oversight, governance, and budget of the Foundation.

We applaud the reporting requirements developed by the Task Force. *See Task Force Report*, Ex. 1, at 1-7 to 1-8. Thus, our proposed Consensus Rule largely adopts the reporting requirements in subsections (10) and (11) of the Task Force's rule. *See* Ex. C, at 8-9 (attached). Our proposal does not change any of the Task Force's reporting requirements for the Foundation. Based on our consultations with the grantees, we have modified the Task Force's reporting requirements for the grantees. The grantees have explained to us that some of the Task Force's reporting requirements are impractical and onerous based on how their organizations operate. Florida's Children First (FCF) addresses these practical problems more fully in its comment, and the Florida Civil Legal Aid Association adopts FCF's position.

We also have added in subdivision (9) two provisions concerning oversight and governance of the Foundation. First, in subdivision (9)(A), we clarify and codify the Foundation's existing role in determining the eligibility of financial institutions to hold IOTA

accounts. *See* Ex. B, at 5 (attached); *In re: Amendment to Rules Regulating the Florida Bar--Rule 5-1.1(e)--IOTA*, 797 So. 2d 551, 552 (Fla. 2001). Second, in subdivision (9)(B), we propose a process for this Court to review and approve the Foundation's budget. *See* Ex. B, at 5-6 (attached).

### B. Our Consensus Rule enables the Foundation and the grantees to exercise sound business judgment and discards the Task Force's arbitrary caps and six-month expenditure requirement.

We and many other commentors have objected to the Task Force's arbitrary caps on "overhead" and the equally arbitrary six-month expenditure requirement. The Task Force has provided no evidence to support these recommendations. It has failed to provide any reasoned or expert analysis on how its formulaic scheme for spending IOTA funds will impact the delivery of legal services to the poor and the administration of justice.

Thus, our proposed Consensus Rule strikes all the provisions in the Task Force's proposed rule concerning the arbitrary caps and the six-month expenditure requirement. *See* Ex. C, at 5-7 (attached). Our proposal restores to the Foundation and the legal aid providers/grantees the ability to exercise sound business judgment

to best fulfill the tripartite mission.

### C. Our Consensus Rule preserves the Foundation's historic distribution of IOTA funds to administration-of- justice and law-school programs.

The Task Force's proposed definition for "qualified legal services" may eliminate IOTA funding for administration-of-justice and law-school programs that result in valuable legal services to impoverished persons. The Task Force's definition says this:

> "Qualified legal services" are free legal services provided *directly* to low-income clients for their civil legal needs in Florida.

*Task Force Report*, Ex. 1, at 1-3 (quoting paragraph (1)(G)).

Our proposed Consensus Rule strikes the words "directly" from this definition. Ex. C, at 2 (attached) (subdivision (1)(H)). In addition, to clarify that the Foundation is still charged with carrying out its tripartite mission, we propose the following language in subdivision (8):

> (8) *Distribution of IOTA Funds by the Foundation.* The Foundation shall distribute IOTA funds in a manner that gives priority consideration to funding Qualified Legal Services for low-income individuals in Florida based upon standards developed by the Foundation Board of Directors and *consistent with governing documents of the Foundation, including those programs that improve the administration of justice or that promote service to the public*

*by members of the legal profession by making public service an integral component of the law school experience.*

Ex. B, at 5 (attached) (second emphasis added). We also propose a comment, discussed more *infra* § III.C.2 at 40. All the commenting stakeholders agree with these proposals. We explain why these changes should he adopted.

*1. The use of IOTA funds should not be limited solely to "direct" legal services.*

Generally, a paying client with means expects an individual attorney to directly provide a legal service—draft a will, review a contract, argue a motion, etc. In an ideal world, every low-income client also would have an individual attorney directly provide these same legal services. Of course, this "ideal world" doesn't exist now, and it won't exist for the foreseeable future. Unfortunately, there are not enough funds or legal-aid or pro bono attorneys for this "ideal world" to come to fruition.

So, the Foundation and its grantees—to get the most bang for their buck—often *indirectly* provide, or facilitate the provision of, legal services to low-income clients. The use of IOTA funds for indirect legal services falls within the Foundation's mission to fund administration-of-justice, or AOJ, programs. Our comment, § II.B.2

*supra* at 24-26—and the comments of Florida's Children First (FCF) and the Pro Bono Legal Services Committee of The Florida Bar (the Committee)—give several examples of indirect legal services provided under AOJ programs.

These AOJ programs efficiently assist low-income clients. For example, spending a dollar on self-help measures—like the *Pro Se* Appellate Handbook, Florida Law Help, and Bankruptcy Basics[11]—may impact more low-income persons than spending that same dollar on a legal aid attorney. Similarly, "access" services that match a *pro bono* attorney with a low-income client—meaning not a penny is paid to a legal-aid attorney's salary—get a lot of bang for their buck in terms of assisting low-income clients.[12]

In sum, the Foundation historically has used IOTA funds for AOJ programs that provide indirect legal services. The Task Force's proposed rule—by using the word "directly" in the definition of "qualified legal services"—may eliminate these AOJ programs that provide worthy indirect legal services. Accordingly, the Court should

[11] The Committee provides more detail on these self-help programs.

[12] The Committee's and FCF's comments provide more depth on access/matching programs.

strike the word "directly" from the definition as our proposed rule does.

*2. This Court should re-affirm that IOTA funds may be used for administration-of-justice and law-school programs, even if they involve criminal law.*

Let's be clear about one point that we, all the stakeholders, and the Task Force should agree: IOTA funds should *never* be used to provide legal services to which an accused is entitled under the Sixth Amendment and *Gideon v. Wainwright*, 372 U.S. 335 (1963). Such *Gideon* services must be funded by the Legislature through public defender offices and other means.

But a low-income person's legal needs—even when clearly outside of *Gideon*—cannot always be easily classified as "civil" or "criminal." Sometimes, the civil/criminal line is murky. For example, many children in the dependency system are "crossover kids," meaning they also may be facing delinquency charges in juvenile court. Thus, one grantee, Florida's Children First, helps children in the dependency system by providing information on how to expunge

juvenile records. *Task Force Report*, Appendix J, at J-164.[13] Is this serving a "civil" or "criminal" legal need?

Another murky example is the *Pro Se* Appellate Handbook, previously discussed *supra* § II.B.2at 24-25. Both criminal and civil litigants use this handbook. Did the Foundation's funding of the handbook serve a civil or criminal legal need?

Whether considered "civil" or "criminal," both these examples of legal needs clearly fall outside of *Gideon*'s purview. How a legal need is characterized—"civil" or "criminal"—should not be dispositive of whether the Foundation funds a program to address the legal need. Other benchmarks—like how impactful the program is in alleviating the legal need—should determine whether the Foundation funds these programs. Moreover, as previously discussed, the Foundation's charter—first approved by this Court in 1979—consistently has charged the Foundation not only to ensure low-income persons are ably represented in civil legal matters, but also to improve the administration of justice and promote public service as a part of the

[13] http://www.floridaschildrenfirst.org/wp-content/uploads/2016/04/Juvenile-Expunction-Know-Your-Rights.pdf.

law school experience. *See Matter of Interest on Trust Accounts*, 372 So. 2d 67, 69 (Fla. 1979); *Task Force Report*, Appendix J, at J-61, ¶3.1.

The Innocence Project of Florida has long been an IOTA-funded, civil program that also falls within the rubric of the Foundation's administration-of-justice mission. The Foundation began granting IOTA funds to the Innocence Project of Florida in 2006 under an AOJ grant. Given the number of exonerations achieved, it is hard to imagine a grant that has administered more justice than the one given to the Innocence Project of Florida.

The post-conviction and habeas legal services provided by the Innocence Project of Florida are "civil" in nature, though they do involve criminal law too. *See, e.g., State ex rel. Lee v. Buchanan*, 191 So. 2d 33, 34 (Fla. 1966) (characterizing a habeas corpus proceeding as "civil"). The Task Force's proposed rule, however, creates uncertainty, as the Innocence Project of Florida more fully explains in its comment. Our proposed Consensus Rule wipes away that uncertainty by expressly authorizing in subdivision (8) the distribution of funds to "programs that improve the administration of justice." Ex. B, at 5 (attached) (subdivision (8)).

To ensure there is no doubt that exoneration services (like those provided by the Innocence Project of Florida) are still eligible for IOTA funds, we also propose the following official comment be added to the rule:

> **Foundation's funding of legal services to exonerate the wrongfully convicted.**
>
> The term "civil" in subdivision (1)(H) includes services provided to low-income clients by a qualified grantee organization in post-conviction representation, including those for wrongful conviction. The Foundation has provided grants to the Innocence Project of Florida, Inc. to assist in the delivery of these services for many years, and no change in the ability of the Foundation to make such grants is made by the inclusion of the word "civil" to describe the "legal needs" to be served by IOTA funds. *See Woodford v. Ngo*, 548 U.S. 81, 91 n.2 (2006) (alternations in original) ("[H]abeas corpus [is] an original . . . civil remedy for the enforcement of the right to personal liberty, rather than . . . a stage of the state criminal proceedings . . . or as an appeal therefrom."); *accord Darling v. State*, 45 So. 3d 444, 450 (Fla. 2010) (habeas corpus is at least "technically civil in nature"); *State ex rel. Lee v. Buchanan*, 191 So. 2d 33, 34 (Fla. 1966) ("proceeding in habeas corpus is civil rather than criminal in nature, even though sought in behalf of one charged with or convicted of a crime").

Ex. B at 8 (attached).

Finally, IOTA funds, per the Foundation's charter, long have been used to promote public service as a part of the law school experience. *See supra* at 3, 7-8, 29, 38-39. The Lawyer Repayment

Assistance Program[14] is one example of how IOTA funds have been used to fulfill this mission. This program is often used by newly minted attorneys who participated in access-to-justice fellowships when they were law students. Our Consensus Rule, unlike the Task Force's proposal, expressly preserves funding for programs "that promote service to the public by members of the legal profession by making public service an integral component of the law school experience." Ex. B, at 5 (attached) (subdivision (8)).

In sum, though we agree that IOTA funds should never be used for *Gideon*-required legal services, they should be used for programs that administer justice or promote public service as part of the law school experience, even if those programs have some connection to criminal law. Our proposed Consensus Rule preserves IOTA funding for such programs.

## CONCLUSION

The Court should reject the Task Force's proposed rule. If it is inclined to change the IOTA rule, then the Court should adopt our proposed Consensus Rule—endorsed by all the commenting

[14] This program is more fully discussed in the comments of Bay Area Legal Services and the Florida Pro Bono Coordinators Association.

stakeholders and attached at Exhibit B. Alternatively, the Court should order the Task Force to resolve the stakeholders' concerns or study the matter further.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document complies with the word count limitation of Rule 9.210, Florida Rules of Appellate Procedure, in that it contains 7,754 words (including words in headings, footnotes, and quotations), according to the word-processing system used to prepare this document. This document also complies with the line spacing, type size, and typeface requirements of Rule 9.045, Florida Rules of Appellate Procedure.

/s/Bryan S. Gowdy
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was filed with the Clerk of Court on February 10, 2021, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record.

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