

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC20-1543

**COMMENTS OF 34 PAST PRESIDENTS OF THE FLORIDA BAR
ON PROPOSED AMENDMENTS TO
RULES REGULATING THE FLORIDA BAR 5-1.1(g)—
INTEREST ON TRUST ACCOUNTS (IOTA) PROGRAM**

The undersigned thirty-four Florida Bar Past Bar Presidents submit the following comments on the proposed Amendment to Rule 5-1.1(g).

Florida's IOTA program, established in 1981, was the first IOTA program in the nation. It later became the model for every other state IOTA program. Florida's miraculous achievement established The Florida Bar—which filed the petition—as the national leader in enhancing lawyers' awareness and performance of its unique societal obligation to protect the rule of law, promote the administration of justice, and ensure that society's poor had access to justice.

These 34 Past Presidents of the Florida Bar endorse and adopt the insightful comments of the Florida Civil Legal Aid Association,

The Florida Bar Business Law Section, The Pro Bono Legal Services Committee of The Florida Bar, Bay Area Legal Services, Florida's Children First, and Past Presidents of The Florida Bar Foundation. These comments identify provisions in the Task Force's proposed rule that will hinder, rather than help, the critically essential efforts of Florida's civil legal service providers to serve the civil legal needs of the poor. Rather than repeat those comments, we focus on preserving as an IOTA purpose the administration of justice—which has been an integral part of the IOTA Program from its inception. This category funds programs that complement, facilitate, and assist direct legal representation as part of a holistic approach to ensure the poor's access to legal services.

Over forty years ago, this Court issued several opinions giving birth to, and then refining, the IOTA Program. Since then, three IOTA fund purposes have been consistently essential: (1) ensuring legal access for the state's poor; (2) the administration of justice; and (3) law-related education and scholarship.

Contrary to that long-standing focus, the Task Force's proposed rule limits the use of IOTA funds to direct legal services to the poor. The undersigned Past Presidents seek to ensure that the

administration of justice is preserved as an essential purpose of Florida's IOTA program.

A. The History of this Court's Inclusion of Administration of Justice in the IOTA Program

For nearly 42 years, this Court has affirmed that the administration of justice is as important a purpose of the Foundation as is the delivery of legal services to the poor. In fact, in its opinion creating the Program, the Court directed the Foundation to amend its charter to expressly authorize the use of Foundation funds for seven different purposes, one of which was “. . . to improve the administration of justice.” *In re Interest on Trust Accounts*, 356 So. 2d 799, 811 (Fla.1978).

Subsequently, when the IRS disapproved three of the seven proposed IOTA fund uses, this Court pared down the proposed uses to four—but again included the administration of justice. *See Matter of Interest on Trust Accounts*, 372 So. 2d 67, 69 (Fla. 1979). In a later opinion, this Court noted that the matter before it arose from the Court's 1978 program regarding the generation of IOTA funds “for the improvement of the administration of justice in Florida.” *See In re Interest on Trust Accounts*, 402 So. 2d 389, 389 (Fla. 1981). While

maintaining the Program’s then-voluntary nature, the Court reiterated its commitment to the Program’s purposes.

In 1989, this Court began requiring all trust accounts to participate in IOTA. The Court cited its 1979 opinion and reaffirmed that IOTA funds were to be used to “fund programs which are designed to improve the administration of justice or to expand the delivery of legal services to the poor.” *In re Interest on Trust Accounts: Petition to Amend Rules Reg. the Fla. Bar*, 538 So. 2d 448, 450 (Fla. 1989).

In 1997, this Court approved an amendment to Bar Rule 5-1.1 (e) to permit a voluntary IOTA sweep-account program to increase IOTA revenue. *Amendments to Rules Regulating the Florida Bar—Rule 5-1.1 (e)—IOTA*, 692 So. 2d 181 (Fla. 1997). This opinion again noted that “. . . interest generated on trust accounts is used to fund programs which are designed to improve the administration of justice or to expand the delivery of legal services to the poor.” *Id.* at 182. Thereafter, the Foundation petitioned this Court for approval of certain Charter amendments, which the Court approved. *Amendments to the Articles of Incorporation of the Florida Bar Foundation, Inc.*, 699 So. 2d 240 (Fla. 1997). The administration of

justice remained as one of the charitable activities undertaken for exclusively public purposes. *Id.* at 241.

As these opinions demonstrate, this Court has repeatedly emphasized the important role the administration of justice plays in Florida's IOTA Program.

B. To Assure Access to Justice, the Program Must Preserve the Administration of Justice as an IOTA Purpose

Florida is one of only three states (along with Alabama and Idaho) that does not publicly fund the civil legal needs of the poor.¹ Therefore, in furtherance of its responsibility to promote the administration of justice, this Court and its two arms, The Florida Bar and The Florida Bar Foundation, constantly endeavor to find new, creative ways to meet the significant legal needs of the poor. Their three-pronged approach combines: (1) direct services by legal aid attorneys and pro bono volunteers; (2) identifying and addressing systemic issues; and (3) providing self-help and community education.

¹ ABA Resource Center for "Access to Justice Initiatives" State Legislative Funding for Civil Legal Aid for 2018.

The second and third prongs complement and enhance the work of direct legal service providers. They are often covered under the umbrella title of “improving the administration of justice.” Such programs cover a range of important services not necessarily tied to direct legal representation. These include programs on improving the operation and management of the court and justice systems; “self-help” hot-lines; pro-se guides for unrepresented litigants; other law-related education; and innovative and transformative pro bono projects.

While the Foundation primarily funds direct services by legal aid attorneys and pro bono volunteers, it—like many other IOTA programs throughout the country—also uses IOTA funds for grants to improve the “administration of justice.”² The Foundation’s Improvements in the Administration of Justice (AOJ) Grant Program usually focuses on demonstration projects that can be replicated, on

² See exhibit K to Task Force’s Report, entitled, “The Florida Bar’s Results of the State IOLTA/IOTA Funds Survey.” Although the response rate for the survey was only 38%, the survey showed that, of the states that responded, ten of them include the administration of justice as a purpose of their IOTA programs: Alabama, Arizona, Arkansas, Kansas, Louisiana, Michigan, Minnesota, Rhode Island, North Carolina, and South Carolina.

start-up funds or seed money for a one- or two-year period, or on studies, commissions and other types of research.

The Foundation's website categorizes its AOJ grants under five purposes:

- (1) to enhance civil legal services through innovative and cost-effective means;
- (2) to provide direct civil legal services either to groups of clients currently underserved by legal aid providers or in an area of representation (whether substantive or geographical) that cannot be or is not effectively served by individual qualified civil legal aid providers;
- (3) to improve the operation and management of the court and justice systems;
- (4) for public education and understanding about the law, including law-related education; and
- (5) for innovative and transformative pro bono projects.

These purposes illustrate the complementary role of AOJ grants in ensuring the poor's access to justice.

Over the years, The Foundation's AOJ grants have funded a range of diverse programs, such as: pro-se divorce clinics, street-law programs, family mediation support, education on the use of the legal system, an Older Floridians Handbook, a video on the Effects of Divorce on Children, a Racial and Ethnic Bias Study Commission, a Poverty Law Call-A-Law Program, a program on Alternative Dispute

Resolution in Farmworker Cases, an Evaluation of Foster Care Project, human trafficking, a foreclosure defense project, and support for the Florida Innocence Commission established by Chief Justice Canady.

Because the administration of justice has deep historical roots in IOTA, because it is a stated purpose of many IOTA programs in the United States, and because Florida’s needs require a complementary IOTA purpose that can expand the impact of direct civil legal services to ensure the poor’s access to justice, the undersigned Past Florida Bar Presidents urge that the proposed rule (or comments to the amendments) reiterate—as it has repeatedly done in prior opinions—that the administration of justice is one of the purposes of Florida’s IOTA Program.³ The Past Presidents recognize that IOTA fund

³ We understand that the Task Force eliminated administration of justice as an IOTA fund purpose due to its concern that a recent U.S. Supreme Court decision in *Janus v. American Fed. Of State, County, and Municipal Employees*, 138 S.Ct. 2448 (2018) would subject the Program to constitutional attack. This concern is unfounded. *Janus* does not apply because—unlike the union fees at issue there, or even the mandatory bar dues in *Keller v. State Bar of California*, 496 U.S. 1 (1990)—Florida’s IOTA program amendments comply with IRS rulings. The funds at issue are neither client nor attorney funds, but are “gleanings of the field” funds that banks voluntarily pay as part of their social responsibility and community support for the compelling state purpose of ensuring the poor’s access to justice.

receipts are significantly reduced at the moment because of the reduction in interest rates. But the Foundation considers such realities. While it principally provides grants to direct providers of legal services, it also maintains its AOJ grants to fund innovation and to address unexpected demands that individual legal service providers cannot.

C. This Court Should Adopt the Consensus Rule

The undersigned Former Presidents of The Florida Bar submit that no change to the current rule is needed. If the Court decides to amend the rule, however, we—along with many other commenters—endorse the proposed alternative rule submitted by the Past Presidents of the Florida Bar Foundation (the “Consensus Rule”). As stated in the comments of those Past Presidents, among other improvements to the Task Force’s proposal, the Consensus Rule clarifies that the Foundation may fund programs that, among other things, “improve the administration of justice.” See proposed amendments to Florida Rule of Professional Conduct 5-1.1(g)(8)-*Distribution of IOTA Funds by the Foundation*.

For 40 years, the administration of justice has been an important aspect of Florida's IOTA Program. It should remain so for the next 40 years.

Dated: February 10, 2021

Respectfully submitted,

/s/Raoul G. Cantero

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CERTIFICATE OF SERVICE

I CERTIFY that on this 10th day of February 2021, a copy of the foregoing has been electronically uploaded to the Florida Supreme Court's ePortal and a copy was furnished through this Court's ePortal to all parties listed in the ePortal.

/s/ Raoul G. Cantero
Raoul G. Cantero

CERTIFICATE OF COMPLIANCE

I CERTIFY that these comments comply with Florida Rule of Appellate Procedure 9.045. They were drafted in 14-point Bookman Old Style Font.

/s/ Raoul G. Cantero
Raoul G. Cantero