

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC20-1543

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

COMMENTS OF BUSINESS LAW SECTION
OF THE FLORIDA BAR TO PROPOSED
AMENDMENT TO RULE 5-1.1(g),
RULES REGULATING THE FLORIDA BAR

The Business Law Section of The Florida Bar (the "Section"), pursuant to this Court's Order entered on December 29, 2020, submits the following comments¹ to the Proposed Amendments to Rule 5-1.1(g), Rules Regulating The Florida Bar (the "Proposed Rule"), submitted for consideration by the Court by the Task Force on the Distribution of IOTA Funds (the "Task Force") on September 15, 2020.

The Task Force was appointed by the Supreme Court of Florida pursuant its Administrative Order AOSC19-70 entered October 24, 2019. That Order recognized that IOTA funds "are designed to improve the administration of justice or to expand the

¹ These comments are submitted on behalf of the Section only, and do not express the position of The Florida Bar. However, the Board of Governors of The Florida Bar has consented to the Section filing these comments.

delivery of legal services to the poor." The Section is concerned that the aggregate effect of the Proposed Rule will be to impede, not expand, the delivery of legal services to the poor. The Section opposes the Proposed Rule.

The Section's Interest: The Section's interest in maximizing the efficiency of the Foundation and the Grantees, and thereby enhancing the provision of legal services to the poor, is two-fold.

First, expansion of the provision of legal services to the poor is good for the Florida economy, which is good for Florida businesses. As noted in the study report, the Economic Impacts of Civil Legal Aid Organization in Florida, 2016, conducted by The Resource for Great Programs (found at <https://thefloridabarfoundation.org/impact/>), which was based upon 2015 data, every dollar spent on civil legal services for the state's low-income residents yielded more than \$7.19 in economic impacts. One of the largest economic impacts of civil legal aid results from assistance in obtaining the federal benefits, child support, wages and unemployment compensation to which Florida residents are entitled, which are in turn spent within Florida.

Second, the Foundation and the Grantees provide valuable mechanisms for members of the Bar to access pro bono opportunities, and the Section has long embraced those mechanisms, such as Florida Pro Bono Matters. Any amendments under the Proposed Rule which would negatively affect the efficiency of the Foundation and the Grantees in providing those volunteer structures would adversely impact, if even to a slight degree, the vehicles available to members of the Bar to access pro bono opportunities.

The Section's Concerns: Other constituencies submitting comments will address numerous specific problems apparent within the Proposed Rule, of which the Section views the following three concerns as primary (under the referenced Proposed Rule subdivisions):

Subdivisions (1)(I) and (9): There is no provision for specific funding or maintenance of reserves at any level, either at the Foundation level or the level of the qualified grantee organizations (the "Grantees"), but instead any reserves must be accrued from the 15% (Subdivision (1)(I)(ii)) and 10% (Subdivision (9)) administrative expense carve-outs for the Foundation and the Grantees. The

reserves have proven over time to be a valuable backstop in lean times, providing long-term funding stability, and their accrual should not be hampered or diminished by being lumped into general overhead.

Subdivision (1)(I) and Subdivision (9): The cap of 15% for direct expenses at the Foundation level (Subdivision (1)(I)), and cap of 10% for administrative expenses of the Grantees (Subdivision (9)), appear to be arbitrarily established, with no objective basis to confirm that the limitations will permit the continuation of valuable programs at the Foundation level or even basic subsistence at the Grantee level. The Florida Civil Legal Aid Association (the "FCLAA") suggests that the 15% Foundation limit will likely lead to the termination of many beneficial statewide programs which benefit the Grantees and thus contribute to the efficiency of delivering legal services to the poor -- technological support programs, Florida Pro Bono Matters, the Loan Repayment Assistance Program, and other beneficial programs. Arbitrary caps should not be imposed without a preliminary assessment of their effects. Even if they are imposed, there should be a mechanism established for their prompt and timely review and adjustment where warranted, rather than a two-

year threshold for review, by which time significant prejudice may have resulted.

Subdivision (9): The 10% cap on administrative expenses at the Grantee level will likely have a disproportionate impact on smaller Grantees. This is the consensus of the FCLAA, and it makes intuitive sense inasmuch as many costs are fixed and do not change elastically solely in proportion to the Grantee's size. It is unreasonable to expect the round peg of each Grantee to fit easily into the Proposed Rule's square hole.

Basic Business Considerations: The confluence of the above proposed amendments, from a business perspective, and the structure of the Proposed Rule and its imposed limitations on the cash flow of both the Foundation and the Grantees, is to impose unreasonable and arbitrary constraints on the business operations of those organizations.

While the Task Force has identified funding direct legal services for low-income litigants as the priority consideration, it has not studied the role of reserves, both (1) as an important stabilizing factor when planning for long-term expenses, like the salaries of qualified legal services providers, or (2) to support the Foundation's

ability to respond to unexpected needs. The Foundation's historical use of reserves to stabilize and plan the cash flows distributable to Grantees has been especially critical since the levels of IOTA funding have varied dramatically based upon the interest rates paid on IOTA accounts. As interest rates have again fallen in response to the pandemic, IOTA revenue is expected to decline. In response to fluctuating IOTA revenue, the Foundation has been able to draw upon its reserves in planning grant allocations, providing more predictable cash flows to Grantees.

Funds received by the Foundation, including IOTA funds and other sources of income, have historically been pooled and invested by the Foundation. Investment income and fundraising contributions are used to offset overhead expenses, maximizing the efficient use of IOTA revenue. The Foundation's Board of Directors and its subcommittees are responsible for the deployment of funds, taking into account expected revenue, funding requests and reserves.

The Foundation's recently developed Spending and Reserve Policy has been designed to continue to provide even, predictable levels of

funding to Grantees, allowing them to better plan their hiring and other decisions.

Requiring the Foundation to distribute within six months the 85% of the IOTA funds designated for the Grantees (Subdivision (8)) (thus retaining only the funding for the direct expenses to administer the IOTA funds, subject to the 15% cap), requires the Foundation to essentially operate on an “eat what you kill” basis. All the IOTA funds for Grantees must be flushed out downstream within the six-month window, irrespective of any variations in the amounts of IOTA funds receipts. Recognizing that the IOTA funds likely will be received on a periodic basis, the Foundation will have to address the accounting for the rolling six-month window, but there is still no opportunity for any reserves or smoothing of the cash flow. Thus, the funding flowing downstream to the Grantees is totally dependent upon the stability (and therefore subject to the instability) of the IOTA funding mechanism to the Foundation. The downstream distribution requirement would impair the Foundation’s ability to provide stability and to efficiently deploy IOTA revenue. It is not clear what benefits would be expected from such a change, nor has the potential harm of removing IOTA

revenue from the Foundation's existing investment and deployment framework been analyzed.

In conducting their business the Grantees' funding will not be stable. Business experience demonstrates that instable and unpredictable revenue will foreseeably impede the Grantees' ability to enter into long-term obligations, most significant of which are their employment agreements with the "qualified legal services providers" themselves -- the legal aid lawyers, their direct support staff, and their pro bono volunteer coordinators. This same circumstance will likely constrain other long-term obligations, such as rent, secured equipment purchases and rentals, and the like. The effort should be to stabilize the Grantees, not destabilize them.

The Grantees vary by mission, size, types of legal services provided, years of experience, and by the resources and community support they receive from non-IOTA sources. With such a diversity of Grantees, it is intuitive that the impact of limiting use of IOTA funding for general purposes would fall more heavily on some than on others. Without an analysis of the Grantees, how they are currently meeting the objective of delivering legal services to the poor, and how effectively they are able to leverage IOTA funding,

any expected benefits cannot be compared to the potential harm to Grantees resulting from the Proposed Rule.

Through the innovation of the Foundation and the Grantees in recent years numerous statewide programs have been developed to leverage the benefit from centralized programs, whether for sharing of information or spreading and thus reducing the costs of delivering legal services the poor. That continued innovation should be encouraged instead of constrained by arbitrary cost and expense limitations.

Conclusion: The Section commends the Task Force on its efforts to address the Court's concerns which led to the Task Force's appointment. Nonetheless, the Section is concerned that the aggregate effect of the amendments under the Proposed Rule will choke the efficiency of the Foundation and the Grantees in their efforts to maximize legal services to the poor using the precious dollars available to the task. For the foregoing reasons, the Section opposes the Proposed Rule.

The Past Presidents of The Florida Bar Foundation are filing for consideration by the Court an alternative proposed rule (the "Consensus Rule") which will remove the proposed administrative

expense caps and permit the accrual of reserves at the Foundation and Grantees levels, will provide comprehensive reporting requirements by the Foundation and Grantees, but will permit the exercise of sound business judgment and discretion by the Foundation and Grantees in administration of their respective business operations. If Rule 5-1.1(g) is to be amended, the Section supports the Consensus Rule.

Respectfully submitted,

**BUSINESS LAW SECTION OF
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Chair, Pro Bono Committee IOTA Funds
Task Force, Business Law Section of The
Florida Bar

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that these comments comply with the type-volume limitation and font requirement set forth in Rule 9.045, Florida Rules of Appellate Procedure. These comments contain 1,625 words. They have been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

/s/John B. Macdonald
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing paper 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.

I FURTHER CERTIFY that a true and correct copy of the foregoing was served on February 10, 2021, by electronic mail to Mayanne Downs, c/o Elizabeth Tarbert, Ethics Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, eto@flabar.org.

/s/ John B. Macdonald
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