

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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

Case No. SC20-1543

**FLORIDA'S CHILDREN FIRST'S COMMENTS
TO THE FINAL REPORT OF THE TASK FORCE
ON DISTRIBUTION OF IOTA FUNDS**

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INTRODUCTION

Florida's Children First, Inc. (FCF) has been a recipient of IOTA Funds through the Florida Bar Foundation since FCF's inception in 2002. FCF's important work serves the legal needs of low-income clients, most specifically, low-income children, in non-traditional but extremely productive and efficient ways. This comment is in two parts. In Part I of its comments, FCF addresses the limitations placed upon the definition of Qualified Grantees in the Task Force's Proposed Rule, arguing first that these limitations, which take discretion out of the hands of the Foundation, are unnecessary, but endorsing the alternative rule forwarded by the Past Presidents of the Foundation. In Part II, FCF addresses the onerous and unnecessary reporting requirements placed on grantee organizations such as FCF and suggests several changes to those requirements.

Florida's Children First

FCF's mission focuses on the legal needs of the over 25,000 children that find themselves in Florida's state system of child welfare. Virtually all these children have legal needs, and virtually none of them can afford to pay for a lawyer to meet those needs. Instead of attempting to provide representation one child and one

legal problem at a time, FCF works to meet the legal needs of these kids in non-traditional, yet very effective ways.¹

Education and Support. FCF trains and supports the attorneys and judges who are on the ground handling individual cases involving children in state care. For example, it conducts programs and publishes materials designed to educate lawyers litigating these cases. Such education is critically important because these lawyers are often unfamiliar with the intricate and complicated statutory and regulatory framework that applies. To that same end, FCF administers the Florida Dependency Law Center, an online resource for attorneys litigating these cases. FCF also works to expand the availability of lawyers for the children who are its constituency by encouraging and coordinating volunteer lawyers to take cases on behalf of those in foster care. Finally, it provides its expertise on the legal problems faced by these children to the legislators and administrators who are making Florida-wide decisions that impact the legal rights of these children.

¹ A summary of FCF's important and award-winning work appears in the final Task Force Report, Exhibit J, at J-155 to J-166.

Systemic Advocacy. Some legal problems are best solved by systemic solutions instead of traditional one-case-at-a-time legal advocacy. Working with its constituency, FCF identifies systemic legal problems that have impact across the State and works with the Legislature and the Department of Children and Families (DCF) to help solve these problems, without the need for repetitive and expensive litigation.² Through its efforts, legal solutions have been reached that have impacted thousands of children and families saving untold hours of litigation time and expense.

As just one example, a local legal aid program asked FCF for appellate help for a grandmother whose monthly cash assistance for her grandchild was lowered because of the parent's misconduct. Instead of getting counsel for one appeal, FCF worked with the state to discontinue this practice statewide, eliminating the need for additional litigation and numerous appeals. These efforts thus benefitted numerous low-income clients in an efficient and cost-

² FCF's systemic advocacy has not included class action litigation. Instead, FCF works to avoid the need for litigation by facilitating non-litigation solutions whenever possible.

effective manner and solved the problem without the expenditure of state litigation resources or the involvement of the judiciary.

Legislative Support. FCF is regarded as an expert in legal issues relating to children in state care and the legal problems that children in such care face. Thus, it is often called upon to provide its expertise to the Legislature and state agencies as they work to solve and prevent legal problems faced by FCF's constituency. As one example, FCF's work with the Legislature resulted in the passage of section 39.01305, which now provides the right to court-appointed counsel for dependent children with special needs. As a result, nearly 300 lawyers have been hired to represent over 5,600 children with legal needs.

In short, FCF's work facilitates the solving of legal problems for many thousands of Florida's children. Much of the funding enabling FCF to provide these legal solutions has come directly from IOTA funds through the foundation. This comment is aimed at ensuring that FCF's ability to provide these legal services is not inadvertently curtailed by any changes to the existing Foundation Rule.

I. Restrictions of Foundation Discretion

Background

Throughout the life of the Task Force, FCF has joined with other interested parties in expressing concern about the newly crafted and overly narrow definition of “Qualified Grantee Organization” (QGO) embraced by the Task Force. This new definition sharply limits the discretion accorded to the Foundation’s Board in awarding grants of IOTA funds and risks the unintended consequence of leaving important legal needs unmet. See FCF comment to the Task Force, Task Force Report App. J at J-520. The first iteration of this new definition proposed by the Task Force seemed to limit funding to QGOs that directly performed legal services to low-income clients. See First Draft of the Proposed Task Force Rule at subdivision (1)(F) (found at Final Report App. G at G-4). This new definition, in its original form, could have been read to render the important legal work performed by FCF as ineligible for IOTA funding, because FCF did not itself perform legal services directly, but, instead, supported those who did.

After FCF expressed its concerns to the Task Force, the final form of the Task Force’s Proposed Rule broadened the definition of a

QGO to include an organization that “*facilitates* or directly provides qualified legal services.” Subdivision (1)(F) of the Task Force Rule (found at Task Force Report Ex. 1 at I-3) (emphasis supplied). The Task Force Rule similarly allows the funding of expenses that otherwise “directly *facilitate* providing qualified legal services.” Subdivision (9)(D) (found at Task Force Report Ex. 1 at I-7) (emphasis supplied).

Additionally, the Task Force’s Rule omits any reference to IOTA funds being used to further the Administration of Justice (“AOJ”). AOJ grants have long been a basis for the distribution of IOTA funds, by the Foundation, including to organizations such as FCF. The elimination of AOJ funding, which could otherwise be used to fund some or all of FCF’s important work, further limits the Foundation’s discretion and its ability to find innovative and systemic alternatives to litigation to solve statewide litigation problems.

The Consensus Rule submitted by the Past Presidents of the Foundation makes several valuable improvements.

The Past Foundation Presidents have now submitted a proposed rule which has been supported by most commenters (the “Consensus Rule”), including FCF. This Consensus Rule helps underscore the

importance of the sort of indirect support provided by organizations such as FCF by slightly modifying the definition of “Qualified Legal Services” to define such services as “free legal services provided to low-income clients for their legal needs in Florida.” This modification eliminates the word “directly” before “to low-income clients.” This clarification helps avoid any misinterpretation of the rule that would suggest that FCF’s valuable support work has become ineligible for IOTA funding.

The Consensus Rule similarly adds a reference to AOJ funding, furthering the important discretion that the Foundation should have in addressing the legal needs of low-income clients. FCF fully supports this addition to the proposed rule.

FCF remains concerned about the Task Force’s proposed rule and believes that, although the rule can and should express priorities, how those priorities are implemented should be left to the wide range of views represented by the Foundation Board. As discussed below, the artificially narrow funding constraints adopted by the Task Force will have unintended consequences and restrict the ability of the Foundation to efficiently and effectively address the needs of low-income clients statewide. Thus, FCF first argues that

these artificial constraints should be replaced by an expression of the Court's priorities.

If the Court decides that a new definition of QGO is necessary, FCF supports the Consensus Rule proposed by the Past Presidents of the Foundation, which is supported by every known commenter to the Task Force Rule. We believe the Consensus Rule is a considerable improvement because it:

- Makes clear that the facilitation of legal services by organizations such as FCF remains eligible for IOTA funding;
- Allows IOTA funding to new organizations that have the ability to serve the purposes of the rule, instead of locking in funding to the existing set of grantors;
- Restores the ability to further the Administration of Justice;
- Removes the arbitrary and unsupported overhead restrictions imposed by the rule, including the problematic limitation on expenditures for training and technology; and
- Makes clear that the Innocence Project remains eligible for IOTA funding.

Thus, FCF joins with other commentators who have recommended these changes to the proposed rule, and we embrace the Consensus Rule to the extent it recommends these changes.

Any rule should make clear that FCF's facilitation of legal services remains eligible for IOTA funding.

FCF supports this Consensus Rule with one important caveat. FCF believes that most, if not all, of the important work it does “*facilitates or directly provides qualified legal services by qualified legal services providers*” within the meaning of the Task Force and Consensus Rules, both of which use the same language. See Task Force Rule at subdivision (1)(F) and Consensus Rule at subdivision (1)(G). So long as the Court and the Foundation do not disagree with FCF's reading of the plain language of either of these proposed rules, and so long as the Foundation retains the discretion to continue to fund FCF's important facilitation of legal services, FCF will remain eligible to seek funding to enable it to support the legal needs of the population it serves.

Additionally, FCF supports the Consensus Rule because it restores discretion to the Foundation in terms of AOJ funding. FCF believes that its important work furthers the administration of justice

within the meaning of the Consensus Rule and supports that rule so long as the Court and the Foundation agree with this interpretation.

The restrictive definition of QGO is unnecessary and should be eliminated from the rule.

FCF continues to believe, however, that the better approach to funding is to establish and articulate priorities in the rule rather than establishing narrow definitions and limitations that may have unintended and negative consequences. Thus, FCF believes that instead of establishing an arbitrary definition of QGOs, eliminating AOJ funding, and setting arbitrary and unsupported limits on categories of expenditures, it would be enough for the rule to say, as the Past Foundation Presidents have proposed, in their Consensus Rule, that “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 the governing documents of the Foundation.” Consensus Rule at subdivision (8).

The limited definition of QGOs embraced by the Task Force already threatens unintended consequences. For example, the

Foundation's long support of student loan repayments (the "LRAP Program") may no longer fit within the Task Force Proposed Rule. The Innocence Project faces a similar danger if the Task Force Proposed Rule limiting expenditure to "civil" cases is read too narrowly to exclude post-conviction relief. In this regard FCF joins with the other commentators who have proposed changes to the rules to ensure the LRAP program and the Innocence Project program remain eligible for IOTA funding. *See* Consensus Rule (ensuring that LRAP and the Innocence Project remain eligible for funding); Comments of Bay Area Legal Services, FCLAA, Southern Legal Foundation, the Past Foundation Presidents, the Florida Pro Bono Coordinators (all supporting the LRAP Program); Comments of the Past Presidents of the Florida Bar and Pro Bono Legal Services (supporting AOJ funding); Comments of the Innocence Project and the Past Foundation Presidents (supporting the Innocence Project).

And most importantly, from the perspective of FCF, is the concern that the definition of QGOs, if read too restrictively, could make many of FCF's efforts ineligible for funding. FCF does not directly provide legal services on a one case at a time basis. Instead, as discussed in more detail below, it facilitates those who do in very

important ways that directly benefit thousands of low-income clients. So long as the Task Force's Proposed Rule is read fairly to embrace this facilitation or permits AOJ funding, FCF can perform its mission, but these unnecessary restrictions always give rise to the risk that others may read the rule too narrowly to the great detriment of the population FCF serves.

Similarly, the limitations on types of expenditures, particularly expenditures relating to training and technology, directly threaten the ability of many grantee organizations to carry out their mission. Again, FCF joins with the other commentators who support the Consensus Rule and who have directly addressed this problem in urging the Court to strike these limitations from the Rule. See Comments of the Business Law Section, FCLAA, Southern Legal, the Past Foundation Presidents, Pro Bono Legal Services, and Florida Pro Bono Coordinators (supporting the elimination of these artificial and unsupported constraints).

These important examples, however, illustrate the danger of an unnecessarily restrictive rule, a rule which may well have unintended and decidedly negative consequences. Far better to express priorities and leave it to the Foundation Board composed of a broad range of

respected and senior Florida lawyers to make these choices without having the Foundation's hands tied up front.

This has long been the model in Florida, and the Task Force has not identified any significant problem raised by the current rule. Ever since this Court first adopted the mandatory IOTA contribution rule in 1989, the rule has not had a definition of QGO limiting which grantees may be eligible. Nor did it have a definition that could be read to eliminate AOJ funding. Instead, the Court left to the Foundation how to spend those funds so long as they were “used to fund programs which are designed to improve the administration of justice or expand the delivery of legal services to the poor.” *Matter of Interest on Tr. Accounts: Petition to Amend Rules Regulating the Fla. Bar*, 538 So. 3d 448, 450 (Fla. 1989). The Court also charged the Foundation not to use the funds on political issues or campaigns or to spend those funds in any way that would jeopardize the Foundation's non-profit status with the IRS. *Id.* The Court's concern with keeping the funds tied to the Foundation's mission of providing and improving legal services was wise, because it avoided problems raised by cases such as *Keller v. State Bar of California*, 496 U.S. 1 (1990) (recognizing that First Amendment concerns may be raised

when mandatory funding is spent on ideologically-oriented activities outside of an integrated bar's core mission).³

The Foundation has successfully navigated these waters for thirty years. It has historically received clean audits by an independent auditing firm, and the Task Force Report concedes that it is “absolutely clear” that there is “no indication whatsoever that IOTA funds have been improperly used by the Foundation.” Task Force Report at Exhibit F. The Task Force is surely correct in this important observation. Even under the most restrictive interpretation of the *Keller* line of cases, the Foundation's IOTA funding has stayed firmly within the guidelines imposed by *Keller* and this Court. See *Florida Bar re Frankel*, 581 So. 2d 1294, 1297 (Fla. 1991); *Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1989).

Indeed, the Foundation's IOTA funding has been more conservative than even what this Court has required. All of the Foundation's grants (and FCF's work for that matter) would fit within even the more limited guidelines advocated by Justice McDonald who

³ In *Keller*, petitioners complained that the California Bar was advocating such issues such as air pollution and gun control in addition to issues that were more central to its legal mission. *Keller v. State Bar of California*, 1989 WL 429014, at *5 (Pet. Brief 1989).

dissented in *Schwarz* and concurred in *Frankel*. See *Schwarz*, 552 So. 2d at 1094, 1098 (McDonald, J., dissenting) (funding can be used to support the improvement and functioning of the courts and increasing the availability of legal services).

In short, the Task Force found no evidence that the Foundation's IOTA funding has been in any way non-compliant with the Constitution and with applicable law. Thus, to the extent that the Task Force expressed concern that additional restrictions were needed in the rule to avoid legal challenge (Task Force Report Exhibit F), those concerns are speculative, misplaced, and unsupported by the Report. The Task Force did not, for example, identify what, if any, current expenditures created legal risk, the nature of any threatened challenge, or how the new, more specific Task Force Rule would avoid those challenges.

The Task Force's other concern was that the rule should make clear that the first priority for Foundation IOTA funds should be the provision of legal services to low-income clients. Task Force Report at 1-2. FCF fully supports this worthy goal but disagrees that the way to accomplish it is by adopting a rule with narrow restrictions of QGOs coupled with arbitrary spending limits. As discussed above,

and as discussed by our fellow commenters to the rule, the Task Force's Proposed Rule interferes with, rather than serves the purpose of, efficiently providing legal services to low-income clients.

FCF's work advances the Court's interest in ensuring that the Foundation prioritizes the provision of legal services.

Having discussed the unnecessary limitations in the rule, we make one final point that circles back to our concern, expressed above, that any definition of a QGO not be read so restrictively so as to prevent the Foundation from funding the important work that FCF does in facilitating the provision of legal services by others to low-income children with legal needs. The early version of the Task Force Rule suggests that the Task Force had a narrow vision of how best to provide legal services to low-income clients. Although the final Proposed Rule (and particularly the Consensus Rule proposed by the Past Foundation Presidents) somewhat broadens the rule to include the facilitation of legal services, and funding that furthers the administration of justice, the Task Force's Report suggests that the Task Force's vision remains centered around the traditional vision of a pro bono or legal services lawyer representing one client, one dispute at a time.

FCF agrees that many fact specific disputes need to be resolved in this traditional manner, and there is no doubt that funding such a need should be a high priority. But as the statistics gathered by the Task Force reveal, without a huge commitment of public and private resources, there will never be enough funding to support the legal needs of every low-income client one case at a time. See Task Force Report Exhibit D at D-3. This great unmet need is precisely why FCF's work is so vital. By understanding the legal needs of the children it serves, identifying potential solutions to the legal problems they face, and working with the Legislature and DCF and other agencies to implement those solutions, FCF's work can eliminate what otherwise might be repetitive and expensive individual litigation around the state. FCF's submission to the Task Force describes this work. Task Force Exhibit J at J-155 to J-166. Examples include:

- Working to change agency practices that penalized funding for grandparents based on the misconduct of the parents;
- Working to change agency practices resulting in the over-medication of children in foster care;

- Helping to ensure funding that provides lawyers for Florida children with special needs;
- Working to change agency practices to ensure that siblings are kept together when possible;
- Working to allow children in foster care to participate in routine activities without the need for a costly court approval process; and
- Working with its constituency to understand the legal problems they face.

Each of these successes represents the savings of potentially thousands of hours in individual legal representation, freeing up pro bono and legal services lawyers to turn to other important cases. And each saves the important time and resources of Florida's judiciary, who would otherwise be charged with deciding hundreds of individual disputes. It is hard to imagine work that more epitomizes the furtherance of the administration of justice.

Equally important, FCF directly facilitates traditional case-by-case litigation by lawyers on behalf of low-income clients. As discussed in detail in its submission to the Task Force, examples include:

- Providing education and on-line resources to attorneys litigating such matters;
- Publishing materials that educate lawyers about the legal framework that applies to FCF's constituency;
- Recruiting, training, and supporting additional pro bono volunteer lawyers; and
- Working to increase funding sources for legal aid lawyers.

To the extent the Task Force is concerned with ensuring that adequate funding exists for traditional case-by-case individual solutions to problems, it should be equally concerned that these lawyers be adequately trained and equipped to handle these often-complicated cases. A lawyer who is adequately trained and supported and does not have to spend time floundering to learn an unfamiliar area of law will efficiently and effectively represent his or her client and will have time to represent more such clients. Equally important, more lawyers will be willing to volunteer to take on such cases if they know they will have education and support. Ultimately the clients and the judicial system benefit.

In short, FCF's work to facilitate the provision of legal services fits squarely within this Court's charge that priority be given to

providing legal services to low-income clients. Lawyers are not just litigators. At core, their charge is to find solutions to tough problems. Those problems can be solved in many ways, and often the best solution is not individual litigation. Care must be taken, in adopting any rule, that the definitions and limitations in the rule not stand in the way of innovative and efficient advocacy for this population which is so in need.

II. The Proposed Rule Contains Unnecessary Grantee Reporting Requirements.

The Task Force Report expresses a legitimate concern that funding, as much as possible, go to the provision and facilitation of legal services to low-income clients rather than to overhead. For the reasons expressed in our comment and other comments, FCF does not believe that this goal is efficiently accomplished by arbitrary and unsupported limitations on overhead contained in the Proposed Rule and certainly not by arbitrary definitions that include technology and training within overhead. The Foundation and its financial staff will have the tools in the grant process to ensure that funds are spent wisely. Thus, we join in the comments of the Business Law Section, which apply a practical business perspective to the problem, as well

as the other commenters who have described the impact these artificial constraints will have on their mission. See Comments of FCLAA, Southern Legal, Past Foundation Presidents, Pro Bono Coordinators, and Pro Bono Legal Services.

The Task Force's concerns are also contradicted by the extensive grantee reporting requirements found in subdivision 11 of the Proposed Rule. These reporting requirements take valuable staff time and effort to prepare and add to, not detract from, the overhead necessary to run an efficient organization. Thus, FCF suggests that the Foundation, as part of the grant award process, decide, in particular cases, the necessary reporting requirements in connection with a particular grant.

Turning to the specific reporting requirements, FCF has three suggestions, all of which have been embraced by the Consensus Rule. First, subdivision (11)(D) of the Task Force's Rule should make clear that reporting should be based on the grantee's previous fiscal year rather than the Bar Foundation's fiscal year. It will add great time and expense if grantees must gather reporting from multiple fiscal years to prepare their reports.

Second, subdivision (11)(G) of the Task Force Rule, which relates to reporting funds from other sources, is unnecessary and, thus, has been struck from the Consensus Rule. Grantees are already required to file a form 990 that details such information. The publicly available form 990 should suffice.

Third, subdivision (11)(H) of the Task Force Rule is potentially onerous to the extent it may impose after-the-fact reporting requirements on grantees and, thus, has been struck from the Consensus Rule. If there are any special reporting requirements in connection with a grant, those reporting requirements should be included in the grant application or contract so that the grantee can decide, in advance, whether to accept the grant and comply.

CONCLUSION

For the reasons explained above, FCF respectfully suggests that the Court eliminate the narrow definition of Qualified Grantee Organization and the artificial limitations on overhead spending imposed by the Task Force Proposed Rule. These limitations have unintended and negative consequences. Alternatively, FCF embraces the Consensus Rule proposed by the Past Presidents of the Foundation. FCF believes that any fair reading of the Task Force and

Consensus Rules would capture its work because FCF “facilitates” the provision of legal services and furthers the administration of justice. To the extent this Court adopts a definition of QGO, the language of the rule and this Court’s opinion adopting the Rule should make clear that the definition is not intended to defund the important work of grantees like FCF. Finally, FCF respectfully suggests that the grantee reporting requirements be eliminated and left to the Foundation to impose or limit as discussed in its comment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via the Florida Court’s E-Filing Portal on all counsel in the attached service list on this 10th day of February 2021.

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