IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULE REGULATING THE FLORIDA BAR 5-1.1(g). Case No. SC20-1543

COMMENT OF THE FLORIDA CIVIL LEGAL AID ASSOCIATION

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I. Introduction

> Equal justice under law is not merely a caption on the façade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists …. It is fundamental that justice should be the same, in substance and availability, without regard to economic status.
>
> Justice Lewis Powell, Jr.[1]

Representing organizations that put the "boots on the ground" by using grants of IOTA funds to provide civil legal representation to low-income Floridians, the Florida Civil Legal Aid Association ("FCLAA") respectfully opposes the proposed amendments. In their present form, the amendments would fatally undermine the ability of Florida's legal aid groups to provide quality, effective legal representation, and would do so at the worst possible time.

After introducing the issues and FCLAA's interest, this comment identifies four substantive problems with the proposed amendments and four critical shortcomings in the well-intentioned Task Force's process.

FCLAA asks this Court to reject the proposed amendments and, to the extent this Court identifies problems with the current

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[1] Laurel Bellows, *Stepping Up for the Underserved*, ABA J., Nov. 2012, at 9.

rule, to either adopt an alternative rule proposed by the past presidents of The Florida Bar Foundation (the "Consensus Rule") or reappoint or create a new task force to study the issue further through a process correcting the shortcomings identified herein.

A. FCLAA's Interest

FCLAA is a 501(c)(6) association comprised of the executive directors and chief executive officers of the twenty-eight civil legal aid programs in Florida listed in the Appendix hereto. (App. 542.) These organizations serve a wide variety of rural and urban communities, each with different needs for legal services. Although some of these legal aid organizations have overlapping service areas or types of service, each organization represents a unique commitment to providing Floridians with critical legal services they could not otherwise afford.

In its report, the Task Force recognizes the excellent work done by these agencies in assisting Floridians in need:

> Florida is fortunate to have an established network of legal service providers who, for years, have provided direct legal services for low income Floridians. These highly dedicated providers have developed delivery systems using a combination of staff attorneys, volunteers, and pro bono attorneys.

(Report at 7.) The Task Force even opined that between the track record of Florida's current groups providing legal aid and "the scarcity of IOTA funds," "[f]unding the existing network of providers is the most effective mechanism for providing direct legal services to Florida's low income litigants" and "risks should not be taken on 'start ups.' " (Report at 3, 7.) The report is complimentary of FCLAA current members, but also recognizes that, despite their efforts, large areas of unmet need exist in Florida.

FCLAA agencies have served their respective communities for several decades. Floridians have relied on them to provide legal assistance in numerous areas, including but not limited to: housing, family law, government benefit programs, domestic violence, immigration, veterans' rights, community economic development, consumer rights, employment, education, and disability rights. In 2019, Florida's civil legal aid agencies that received funding from The Florida Bar Foundation resolved legal matters in 96,014 individual cases. FCLAA's agencies and their clients will be the group most directly affected by the Task Force's proposed rule changes.

Florida's civil legal aid system employs more than five hundred attorneys providing direct legal services to Floridians in need. The work done by legal aid lawyers is often not replicated within the private bar, and is some of the most difficult and complex legal work done by Florida lawyers. There is often a misconception that low-income Floridians do not experience complex legal issues. Clients of FCLAA's members are, however, often at the most risk of being preyed upon or taken advantage of because they do not have the resources themselves to seek redress and protect their interests. They lack bargaining power but often deal with complex contracts, bureaucracies, and situations that place their interests or livelihoods at risk. These people form the backbone of Florida's agriculture and tourism-based economy, but on an individual basis they are often unable to afford private legal representation.

To these Floridians in need, legal assistance is critical. Florida's civil legal aid providers fill that critical need. All of FCLAA's agencies are or have been grantees of The Florida Bar Foundation.

B. Overview of FCLAA's Concerns

FCLAA commends this Court for its efforts to address the plight of at-risk Floridians in need represented by civil legal aid

groups in Florida. This Court's efforts help reinforce that portion of the Oath of Admission to The Florida Bar that calls on all Florida attorneys not to reject the cause of the defenseless or oppressed. One such initiative is Administrative Order AOSC19-70, which created the Task Force to examine whether to amend Rule Regulating The Florida Bar 5-1.1(g) "to better ensure the most effective use of IOTA funds." *In re* Task Force on Distribution of Iota Funds, Fla. Admin. Order No. AOSC19-70, at 1 (Fla. Oct. 24, 2019) (on file with Clerk, Fla. Sup. Ct.).

The Administrative Order required the Task Force to examine and make recommendations in four specific areas: (1) alternative models for distributing IOTA funds; (2) whether to establish specific priorities for the use of IOTA funds; (3) whether the use of those funds should be regulated; and (4) whether reporting requirements should be adopted for the distribution and use of funds. *Id.* at 1–2. It also tasked the Task Force with examining "any other matters related to ensuring the most effective use of IOTA funds." *Id.* at 2. This Court directed the Task force to "give priority consideration to the need for funding direct legal services for low-income litigants in Florida." *Id.*

Unfortunately, however, the proposed amendments do not further the goals the Administrative Order established. To the contrary, they not only fail to ensure the effective use of IOTA funds, but they also threaten to financially starve Florida's civil legal aid groups and essentially vitiate their ability to provide quality, effective legal representation to Florida's poor. If adopted, Florida's most vulnerable populations will be deprived of critically needed legal services. Candidly, adoption of the proposed rule would be a disaster for Floridians in need.

This view is widely shared by all stakeholders and most observers, as this Court will quickly surmise from reviewing the number of critical comments opposing the Task Force's recommendations filed by a broad coalition of organizations and individuals represented by a diverse cadre of experienced supreme court practitioners working pro bono. Although FCLAA has had the opportunity to review drafts of and strongly agrees with nearly all of the other comments being filed in opposition, FCLAA will endeavor to "stay in its lane" and focus this comment on the parts of the proposed rule that deal with grantees – subdivisions (g)(8), (9), and (11). (App. 281–82.) This comment identifies four substantive

concerns that most threaten the ability of civil legal aid groups to provide efficient and effective legal representation, and three shortcomings in the process that led to the proposed amendments.

In summary, and as noted in a number of the other comments, the recommendations fail to recognize the business realities in which civil legal aid firms operate, and threaten catastrophic results in at least four substantive areas by: (1) imposing unworkable overhead limitations under which no law firm – and certainly not the nonprofit law firms that make up the majority of legal aid groups – could operate successfully; (2) dismantling a critical program used for both recruitment and retention of attorneys to represent Floridians in need (the Loan Repayment Assistance Program or "LRAP"); (3) eliminating the modicum of stability provided by reserves; and (4) preventing any meaningful annual allocation process.

Through first-hand observations gained while attempting to engage with the Task Force, attending its meetings, and reviewing its work product, FCLAA was able to see and appreciate how much time, effort, and good intentions were contributed by the conscientious and well-meaning public servants serving on the Task

Force. Nonetheless and in the spirit of providing constructive suggestions should this Court decide further study is warranted, FCLAA submits the process yielding the final report and proposed amendments suffered from three flaws.

First, there was never any careful identification, much less clear articulation, of any specific problems with the current rule warranting amendments. It is difficult to fully comment on or propose alternatives to problematic changes without knowing the specific problems they were intended to address.

Second, there was never an attempt to conduct a business analysis, much less to get the assistance of an expert, to determine how the amendments will impact grantees' ability to efficiently use IOTA funds to provide legal services. This resulted in arbitrary and untested regulations that unwisely rely on what will likely be a post-mortem analysis two years down the line to determine the impact of the amendments.

Third, although FCLAA and other stakeholders were given notice and the opportunity to provide their concerns, those concerns were never expressly addressed, and ultimately the recommendations suggest a failure to have meaningfully considered

these concerns. (Transcripts of all the Task Force's meetings for which transcripts are available are included in FCLAA's Appendix at pages 6–278.)

For these reasons, FCLAA asks this Court to decline the proposed amendments, especially those to subsections (g)(8), (9), and (11). If this Court wishes to adopt other amendments without further study, FCLAA has reviewed and supports the Consensus Rule proposed by the past Presidents of The Florida Bar Foundation. If, however, this Court is concerned that any other amendments may be in order, especially any that would impose overhead or other spending limits, then FCLAA would respectfully ask this Court to reappoint or create a new task force to study the matter further, including by articulating the problems to be solved, conducting a thorough business analysis to determine the most likely effect of any changes (calling on experts as warranted), and to solicit and meaningfully consider the views of FCLAA and other stakeholders before recommending any specific limitations.

II. Substantive Problems With the Proposed Rule

A. Unworkable Overhead Limitations

The Task Force's Proposed Rule provides in pertinent part:

(9) Use of IOTA Funds by Qualified Grantee Organizations. A qualified grantee organization must expend at least 90% of the IOTA funds received to facilitate qualified legal service providers providing qualified legal services. A qualified grantee organization must expend no more than 10% of the IOTA funds received for administrative expenses and establishing reserves. Administrative expenses include rent, training, and technology.

(App. 281.) Those limitations make the rule unworkable.

Florida led the country in expanding access to justice by establishing the first IOTA (often referred to as IOLTA in other states) program. Historically, Florida's IOTA fund administering agency, The Florida Bar Foundation, has provided core operating support, sometimes called general support, to Florida's civil legal aid programs and has been a collaborative partner of Florida's civil legal aid system. The Foundation has also historically provided budgetary security and stability for legal aid providers by ensuring support of the core operating expenses of the civil legal aid system through programs to bridge gaps in funding obtained from other sources.

For example, The Florida Bar Foundation has used IOTA funds to match funds obtained through other grants that had limitations on overhead. These are also referred to as indirect expenses. Indirect expenses also differ from core operating support

in that they are associated with the organization as a whole – which presumably led the Task Force to refer to them as "administrative expenses" – while direct expenses are associated entirely with a specific project or program, such as staff salaries or project materials. Furthermore, some of the expenses the proposed rule would characterize as "administrative expenses" are actually considered direct expenses by nonprofits. This includes, for example, the costs of providing training and continuing education to attorneys, as well as purchasing the technological resources that attorneys and other staff use to provide legal services to Floridians in need.

With these distinctions in mind, any meaningful review of Florida's system, especially as compared to other state IOTA models has to include the overarching reality that Florida is one of only three states in the country that does not provide state funding for core operating support of its legal aid organizations. The proposed limitations on overhead are made more onerous by the absence of state funding to cover actual costs. Forty-seven other states provide such funding to their civil legal aid organizations. Texas, for

example, provides more than $50 million annually in core operating support for legal aid.

The proposed rule fails to account for the real-world, street-level impact its overhead limitations will have on the direct delivery of legal services to Floridians in need – a group that includes almost half the population of the State of Florida.

A hypothetical example illustrates the practical problem with the proposed rule. Under the proposed rule, if a civil legal aid firm received a $90,000 grant of IOTA funds, those funds could be spent as follows:

- a minimum of $81,000 to facilitate qualified legal service providers; and
- no more than $9,000 allocated for reserves and what the proposed rule describes as "administrative expenses," but which, as explained above, are in reality direct expenses.

Therefore, if the grant was used to support one full-time attorney, the proposed rule would allow that attorney to be allocated a salary of $63,000 per year, with payroll taxes and benefits averaging 25%, plus $2,250 in litigation expenses, for a total of $81,000.

Under the proposed rule, the civil legal aid organization would then somehow need to stretch the remaining $9,000 to cover all other expenses associated with hiring the attorney, including both direct and indirect expenses. Direct expenses in this category include training legal staff and purchasing technology to assist in serving clients, such as case management software and subscriptions to research resources. Indirect expenses include rent, building insurance, utilities, building security, and the appropriate portion of support by finance and administrative departments. The training and technology vary widely depending on the project, but given current remote work circumstances and the rapidly changing legal landscape our clients are operating in during the pandemic, these costs are likely to be higher than previous years.

A conservative estimate for what the proposed rule refers to as "administrative expenses" would be $20,250 per year. The IOTA grant, by contrast, would cover only $9,000. Furthermore, Article V revenues are down, and most grants do not permit their funds to be allocated for indirect costs. Instead of relying on IOTA funds to fill that gap in funding, the organization would have to operate on the hope that it could somehow raise those additional funds; or else it

would have to examine whether to divert resources from some of its projects to help with others. The proposed rule thus creates a quandary for civil legal aid organizations that could actually force them to contract the services they offer rather than expanding them or improving efficiency.

Even if the legal aid firm is able to obtain the additional funding, the proposed rule would still create shortfalls that would hamper the new lawyer's ability to effectively represent Floridians in need and place many professional resources beyond her reach. The new lawyer would not be able to attend education conferences, since there is no money available for travel or training. The legal aid organization would be unable to provide access to commonly employed resources such as www.FloridaLawHelp.org or www.FlAdvocate.org because no funds would be available to support maintenance nor to create content for clients. And as argued in the next section, the lawyer would initially have to weigh the personal risks of beginning her career at a lower-paying legal aid job without the student loan repayment assistance she may have planned to rely upon when making the decision to attend law

school and become a legal aid lawyer, as LRAP would have been terminated.

The proposed rule's categorization of technology expenses as indirect "administrative" expenses rather than direct expenses, as they customarily would be by a nonprofit, represents a failure to leverage efficiencies that allow legal aid providers to better serve clients and conserve funds. For example, the Florida Online Intake System allows prospective clients to apply for legal assistance online. By automatically verifying client eligibility and routing the client to the correct legal aid organization, this system creates substantial efficiencies by saving valuable staff time that would otherwise be spent on screening. Last year, it served 96,831 applicants.

Similarly, www.FloridaEvictionHelp.org assists pro se clients with completing an answer to a complaint seeking eviction and preparing the necessary affidavits under the current eviction moratorium. Nearly 4,000 applicants have used this system since August 2020, and nearly 13,000 users have viewed it. These systems serve clients by helping them preserve critical defenses to eviction and avoid homelessness, and they also create substantial

efficiencies in terms of staff and attorney time. The proposed rule does not account for the ability to create substantial efficiencies by allocating IOTA funds to systems such as these.

Additionally, under the proposed rule, the legal aid firm must cover almost twenty percent of the expense associated with each new lawyer hired to provide direct services to Floridians in need with non-IOTA funds. Those are funds the legal aid organizations do not have, and legal aid organizations have come to rely on IOTA funds as a stable source of funding to enable them to maintain and, when possible, expand the services they provide to Floridians in need. If those funds are not available from IOTA, the new lawyer's ability to competently serve clients – and by extension, the ability of the legal aid organization to perform its mission – is drastically diminished.

Respectfully, the proposed overhead limitations are based on a world that does not exist and are predicated on assumptions that are not true. The proposed limitation of administrative expenses to ten percent would force civil legal aid organizations to make dramatic cutbacks in services due to lack of funding. The problem is exacerbated by the proposed rule's inclusion of rent, training,

and technology within the definition of administrative expenses or overhead.

There is no record support for this significant limitation, which was added in the last iteration of the proposed rule with little explanation after months of re-writes. Moreover, it jeopardizes the stability and effectiveness of Florida's legal aid organizations by stripping them of the resources they need to perform their mission.

There are at least two workable models that could and should have informed the examination of overhead issues. First, there is the traditional law firm model. The Florida Bar's own Consumer Pamphlet on fees differs dramatically from the Task Force's concept of overhead:

> The cost of doing business, referred to as overhead, usually includes rent, equipment, salaries and the cost of maintaining the lawyer's level of professional skills and education. A lawyer's overhead normally is 35 percent to 50 percent of the legal fees charged.

Consumer Pamphlet: Attorney's Fees, The Fla. Bar, https://www.floridabar.org/public/consumer/pamphlet003/ (last visited Feb. 9, 2021).

Civil legal aid organizations **are** law firms. The only difference is that civil legal aid firms generally do not charge their clients a fee

due to the client's indigent status, so they have to recoup the cost of overheard differently. Civil legal aid firms simply do not generate sufficient income to support all administrative expenses such that IOTA funds could be diverted directly to support attorney and staff salaries. Civil legal aid organizations must increasingly rely on grants that limit administrative expenses, and traditional funding through Article V is rapidly decreasing. For example, Jacksonville Legal Aid's budget contains a predicted $67,880 drop in Article V collections from the City of Jacksonville for fiscal year 2020–21 alone, which tracks the overall drop in Article V collections throughout Florida. The Revenue Estimating Conference of the State's Office of Economic and Demographic Research estimates the 2020 net shortfall for revenue collections for Article V Fees and Transfers at $26.7 million.

The proposed rule is unclear as to whether litigation costs are included within administrative expenses, but that possibility is even more troubling. As a result of the pandemic and the current financial crisis, FCLAA expects a tsunami of traditional legal aid cases, from evictions to foreclosures, all of which require costs to litigate. There is no civil firm in the State of Florida (or anywhere)

which expects or should have to go into court for civil clients limited in such a way.

The appendix and record contain numerous examples of the numerous communications from FCLAA and others to the Task Force focusing on the related fact that the overall costs of training and technology will increase statewide, as the Foundation will be prohibited from subsidizing all statewide resources if the current proposed rule is adopted. (Report at 643, 645.) This includes LegalServer (the case management system now used by almost all civil legal aid firms in Florida), Westlaw, the training initiative, and statewide technology efforts. The proposed rule's negative impacts here are obvious. By depriving Florida's legal aid organizations of reliable access to funding for these critical resources, the proposed rule would imperil their ability to serve Floridians in need.

No law firm could operate effectively under the overhead limitations imposed by the proposed rule, but that is not the only model to consider. Most civil legal organizations are not only law firms, but they are also nonprofits. The proposed rule would effectively starve them as the limitations imposed simply do not comport with the accepted mechanisms for funding nonprofits.

A review of overhead models for nonprofits in general should lead in a very different direction from the one pursued by the proposed rule. The practical meaning of "overhead" in the context of nonprofits is the subject of frequent misunderstandings and misconceptions. *(Mis)Understanding Overhead*, Nat. Council of Nonprofits, https://www.councilofnonprofits.org/tools-resources/misunderstanding-overhead (last visited Feb. 9, 2021). "[M]ore people are realizing that costs may have nothing to do with how effective a nonprofit is. In fact, overhead that is too low can be of more concern. Instead the focus is shifting toward a nonprofit's **impact and effectiveness**." *Id.* (emphasis added). In fact,

> Organizations that build robust infrastructure – which includes sturdy information technology systems, financial systems, skills training, fundraising processes, and other essential overhead – are more likely to succeed than those that do not. This is not news, and nonprofits are no exception to the rule.

Ann Goggins Gregory & Don Howard, *The Nonprofit Starvation Cycle*, Stanford Soc. Innovation Rev. (Fall 2009), https://ssir.org/articles/entry/the_nonprofit_starvation_cycle.

A five-year study conducted by the Urban Institute's National Center for Charitable Statistics and the Center on Philanthropy at Indiana University concluded that underfunding overhead in nonprofits could have disastrous effects. *Id.* A subsequent study revealed the same, explaining

> a vicious cycle fuels the persistent underfunding of overhead. The first step in the cycle is funders' unrealistic expectations about how much it costs to run a nonprofit. At the second step, nonprofits feel pressure to conform to funders' unrealistic expectations. At the third step, nonprofits respond to this pressure in two ways: They spend too little on overhead, and they underreport their expenditures on tax forms and in fundraising materials. This underspending and underreporting in turn perpetuates funders' unrealistic expectations. Over time, funders expect grantees to do more and more with less and less – a cycle that slowly starves nonprofits.

Id.

Beyond direct support funding, what legal aid organizations really need are funds to build their infrastructure. A strong infrastructure leads to a more effective model in providing direct legal service.

This is just as true now as when those previous studies were conducted. Five of the leading U.S. nonprofit foundations recently conducted a joint study of over 130,000 nonprofits that focused on

similar issues. As one publication discussing that study noted: "The presidents and staffs of five leading U.S. foundations have recognized a menu of approaches to address chronic underfunding of nonprofits' indirect costs. These include **capabilities essential to achieve impact**, such as executive leadership, information technology, strategic planning, and knowledge management." Jeri Eckhart-Queenan et al., *Five Foundations Address the "Starvation Cycle,"* The Chronicle of Philanthropy (Aug, 22, 2019), https://www.philanthropy.com/paid-content/the-bridgespan-group/five-foundations-address-the-starvation-cycle (emphasis added). That is what the Court's Administrative Order directed the Task Force to do - examine whether to amend Rule Regulating The Florida Bar 5-1.1(g) "to better ensure the most effective use of IOTA funds." *In re* Task Force on Distribution of IOTA Funds, Fla. Admin. Order No. AOSC19-70, at 1 (Fla. Oct. 24, 2019). In other words, any amendment to the rule should ensure the IOTA funds will "achieve impact."

The results caused one of the nation's largest foundations, the MacArthur Foundation, to change the way it funded overhead, or indirect costs, increasing such funding to 29%, almost double the

previous amount. *MacArthur Foundation to Increase Overhead Support for Grantees*, Philanthropy News Digest (Dec. 17, 2019), https://philanthropynewsdigest.org/news/macarthur-foundation-to-increase-overhead-support-for-grantees. The Task Force does not appear to have even researched this sort of information, but it is readily available. *See, e.g.*, *The Bridgetown Group Report - Momentum for Change: Ending the Nonprofit Starvation Cycle* (collecting and analyzing such data). (App 285-321.)

As noted, most importantly, the Task Force recommendations did not focus on effectiveness. They focused on cutting indirect costs – an outdated approach. Such a focus can prove fatal to nonprofits and FCLAA fears it will prove fatal here.

B. Defunding the Loan Repayment Assistance Program

Bay Area Legal Services has submitted a separate comment focusing on LRAP and the critical role it plays in supporting over half of all of Florida's civil legal aid lawyers. FCLAA fully supports the argument made by Bay Area Legal Services on this issue and will only add a few additional words here.

It is important to note the Foundation implemented LRAP in 2008 because of an extensive study focused on legal aid lawyer

compensation.[2] As the Foundation's then President-elect Kathleen McLeroy commented at the time,

> The disparity [in pay] was beginning to be unmanageable. We felt we would continue to lose good lawyers who otherwise would stay, but for the fact that their salaries were so compressed relative to the market, and exacerbated by the fact that young lawyers come in with student debt — they could not afford to meet their student obligations and continue as legal service attorneys.

Mark D. Killian, *Foundation to Boost Pay for Legal Aid Attorneys*, The Fla. Bar News (Jan. 15, 2008) https://www.floridabar.org/the-florida-bar-news/foundation-to-boost-pay-for-legal-aid-attorneys/.

The study found that the leading cause for attorneys leaving and not applying for positions was what the study's author characterized as the "abysmally low" salaries paid by Florida civil legal aid providers, with a median starting salary of $38,500, which is well below what most new attorneys need to meet the cost of living "and far below the salary one would expect for a highly educated professional." Mark D. Killian, *Lawyering on a Low Income*, The Fla. Bar News (Jan. 15, 2008),

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[2] A complete copy of the study, titled "The Quest for the Best: Attorney Recruitment and Retention Challenges for Florida Legal Aid," can be found in FCLAA Appendix at 322-443.

https://www.floridabar.org/the-florida-bar-news/lawyering-on-a-low-income/.

The proposed rule's defunding of LRAP, with no record evidence to support that action, would place Florida civil legal aid right back in 2007–2008, at the edge of another recession.

C. Elimination of Reserves and Annual Allocations

Subdivision (g)(8) of the proposed rule requires that "[w]ithin 6 months of receipt, the foundation must distribute to 1 or more qualified grantee organizations all collected IOTA funds except for direct expenses required to administer the IOTA funds." (App. 281.) This otherwise-innocuous phrasing on the frequency of distribution would have a disastrous impact by (1) eliminating the ability of grantees to do annual budgeting projections with IOTA funds; and (2) eliminating reserves held by the Foundation.

At present, IOTA funds are allocated annually, allowing IOTA recipients to project budgets and retain critical staff. If funds must be distributed within six months of receipt, allocation or award of funds will have to be done, at best, approximately every three to four months.

First, this will immediately eliminate annual budgeting with IOTA funds for no good reason. Greater uncertainty in funding will directly impact staff stability and the resultant ability to serve clients efficiently. For example, the newly hired lawyer in the example set out in Part II.A above could likely be hired only on a three-month contract, depriving the lawyer of long-term stability and adding a further disincentive to work in civil legal aid. The proposed rule is also internally inconsistent. It eliminates annual budgeting while still mandating that ninety percent of grants fund staff providing direct legal services. As referenced above, these staff would be advised of funding for their positions only a few months at a time.

Second, by requiring distribution of all IOTA funds within six months, the proposal ends the Foundation's reserve policy. Currently, the Foundation's reserves are invested to grow and further leverage the limited funds available for civil legal aid. Reserves provide a modicum of funding stability in a volatile economy. Eliminating reserves would cause funding levels to fluctuate and deprive legal aid organizations of the ability to sustain

themselves through lean periods, creating further and unnecessary funding instability in civil legal aid, which is already strained.

Finally, it will also end the Foundation's capacity to support the civil legal aid system's response to disasters, such as responding to civil legal needs in emergencies such as after a hurricane or a pandemic. The communities served by Florida civil legal aid organizations are vulnerable and lack economic resilience. A natural disaster, such as a hurricane, often has devastating effects on the community and resulting repercussions for the economy. As documented in the Legal Services Corporation's (LSC) Disaster Task Force Report, "[f]or low-income disaster survivors, basic subsistence and re-establishing their lives can involve months and even years of serious challenges. Law can be both a barrier and a tool as disaster survivors work to regain their lives." *Report of the LSC Disaster Task Force*, Legal Servs. Corp., 4, https://lsc-live.app.box.com/s/vro33yjtx6nlgurh434fw9jhb7npz4sh (App. 444–542.)

After a disaster, low-income communities often require extensive outreach and community education about their legal rights and government programs that can help them recover from

the disaster. For a community that lacks economic resilience, it is vital that the legal aid community serving them be responsive and flexible in meeting their needs. Reserves held by The Florida Bar Foundation would ensure that Florida's civil legal aid system could be responsive to emerging needs.

The COVID-19 pandemic mirrors past natural disasters. And this will be an ongoing problem. A recent conference organized and moderated by the LSC, and attended by a number of state court chief justices, explored these concerns. U.S. Rep. Brian Fitzpatrick of Pennsylvania, the new co-chair of the Congressional Access to Legal Aid Caucus, explained the issue well during opening remarks to the conference: "COVID-19 has led to significant increases in the need for civil legal aid . . . [It is] most especially [so] for low-income families facing job losses, financial burdens and innumerable other issues stemming from this crisis." Sameer Rao, *Justices, Leaders Address COVID-19's Barriers To Equal Justice*, Law 360 (Feb. 7, 2021), https://www.law360.com/access-to-justice/articles/1351907/justices-leaders-address-covid-19-s-barriers-to-equal-justice. Specific education sessions of the conference dealt with these issues.

> Near the top of these issues sat the eviction crisis. The LSC's press release noted that its grantees reported a 95% increase in eviction cases, which panelists said their own judiciaries and organizations were dealing with in a variety of ways. For instance, during a panel with various state supreme court justices, Nevada's Justice Kristina Pickering highlighted the state bar's eviction mediation program, which brought several groups together to develop eviction mediation protocol and reduce the judiciary caseload.
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> *Id.*

As before, Florida's civil legal aid system has risen to the challenge - learning to work remotely, often with less in the way of digital resources, to serve this important community. Examination of the efforts Florida's legal aid providers have undertaken in response to the present emergency highlight the importance of stable sources of funding, such as the reserves the proposed rule would eliminate. Such efforts include:

- educating a growing client-eligible community about their legal rights in a rapidly changing legal landscape, through extensive and adapted community outreach, including virtual town halls, media appearances, and editorials;
- creating and publishing legal information via social media and websites to update the community on the eviction moratorium and available income and benefit programs, such as reemployment assistance and economic impact payments;

- engaging agencies administering government benefit programs to provide up-to-date information and to communicate and advocate against barriers to the application process;
- training both legal aid and pro bono attorneys on the substantive areas anticipated to spike in the coming weeks and months;
- providing legal information to clients with questions regarding their legal rights with the goal of resolving their concerns and avoiding legal problems; and
- providing legal assistance on both pre-COVID-19 cases as well as COVID-19 cases.

Given the financial crisis, the demand for civil legal assistance will likely grow in the coming weeks and months to levels that will exceed anything the civil legal aid system has experienced. The legal problems clients in the community will face will be novel, complex, and voluminous, just like the issues clients of traditional private law firms have been facing. Experienced civil legal aid attorneys who have strong ties and relationships with their client community will be vital in meeting these needs. The civil legal aid system must be flexible and responsive, and must leverage the resources of the private bar. Eliminating annual budgeting and statewide reserves undermines Florida's civil legal aid response to the pandemic and other future disasters.

Moreover, eliminating the ability to hold financial reserves is unsound from a business perspective. It is contrary not only to best practices for any business, but especially for a nonprofit sector where the demand for services increases in an economic downturn. By eliminating the Foundation's ability to hold reserves for the benefit of grantees and to allocate or award funds on an annual basis, the proposed rule unnecessarily – and without any articulated reasons or support – destabilizes funding for civil legal aid.

The goal of many foundations and other funders is to increase the capacity of its grantees by providing stability. With funding and staffing stability, civil legal aid, like any law firm, can leverage the experience and expertise of their attorneys to better serve their clients. Civil legal aid provides a critical service in our justice system by ensuring that even those without the resources to pay have access to a competent and experienced advocate to represent their interests and protect their rights in matters that often involve basic essentials of life - housing, health, income, safety, and education, among others. Any amendment to the rule should prioritize maximizing IOTA revenue and providing for greater

funding stability to ensure that Floridians in need have access to justice.

Reserves allow, in an emergency, addressing unique needs. Individual grantees serve very different clients with very different needs. The needs of the clients of Legal Aid of Greater Miami are very different than the clients of Florida Rural Legal Services.

Imposition of a lack of reserve funds would diminish or possibly eliminate the Foundation's capacity to prioritize funding for unmet needs and vulnerable populations. It could remove any flexibility to address crises such as natural disasters or a pandemic. Some legal needs affect different areas of the state differently and even impact different populations within the state in unlike ways.

It is without question that in any given year hurricanes hit different parts of the state. But the needs that arise are often different within different areas even when affected by the same hurricane. For example, housing may be a more critical need in some areas where destruction of property ends up meaning fewer alternative living spaces. Some areas of the state can deal with that far better than others. It is entirely unclear whether the Foundation would be allowed to redistribute funds within a fiscal year in

response to such emergent situations, or whether universal objective standards imposed by the proposed rule would hamstring those critical efforts. A pandemic is also an excellent example. The Covid-19 virus has unquestionably affected ethnic minority populations differently. *See Health Equity Considerations & Racial & Ethnic Minority Groups*, Ctrs. for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html (last updated July 24, 2020). The proposed rule would hamstring efforts to address such critical concerns.

The cumulative effect of the Task Force's proposed changes has the opposite effect of that stated in the current proposed Rule - "to promote stability in distribution of IOTA funds to qualified grantee organizations." (Report at 14.) Instead, the proposed rule imperils those very ends.

III. Shortcomings in the Task Force's Process

A. Failure to Identify Problems To Be Solved

What is notable in a review of the transcripts of the Task Force Meetings (App. 6-278) is the absence of any discussion, evidence, documentation - anything - relating to the primary areas of concern

for civil legal aid. Nothing in the Report of the Task Force identifies a specific problem that is actually affecting the delivery of legal services to Floridians in need.

There is also nothing to support the solutions offered in the proposed rule. There is nothing to support the ten percent overhead limitation. There is nothing to support inclusion of rent, training, and technology within the definition of overhead. On the contrary, it appears that even by a Task Force member's own admission, the selection of some of the limitations in the proposed rule are, despite best efforts, "arbitrary."

Task Force member John Stewart, in an email to the group, states:

> "Finally, I have always expressed concerns about some of the percentages/timeframes we set forth in the rule such as: (1) distribution within 6 months; (2) expenses of administration of the IFA not to exceed 10%; (3) no more than 20% of the funds received by the Qualified grantee to be used for reserves or expenses etc. I have no objection to that criteria being in the rule but **even with our best efforts those suggestions are arbitrary**. This is the primary reason I requested that our report contain a request to the court that a review of the rule change be conducted within 2 years after the effective date so that the Court could be informed of any effects, positive or negative, of the changes based upon data gathered in that timeframe."

(App. 279–80 (emphasis added).) FCLAA agrees with Mr. Stewart.

If there are to be reforms of the existing rule or additional regulations imposed on the grantee organizations (or the Foundation, for that matter), the most crucial first step should be identifying the problems to be fixed with as much specificity as possible so that rational, evidence-based solutions may be tailored to fix them.

B. Failure to Conduct Business Analysis of Likely Impact of the Proposed Amendments

Not only does it appear that many of the proposed restrictions were arbitrarily chosen, but it is also clear that there has been no effort to conduct any form of business analysis to determine the most likely impacts of any particular restriction. Nobody stopped to take a look at how these restrictions will affect the Foundation or the grantees by running projections going forward or even looking backward at existing data to see how drastically things would be changed. Given what is at stake here, an expert should be retained to closely examine any potential restrictions to be imposed on the use of IOTA funds so that the Court can make educated decisions as to whether a given set of restrictions will be workable and

consistent with the ability to efficiently and effectively provide legal services to low-income Floridians.

Instead of undertaking the difficult but crucial work of examining the likely impact of its proposed amendments, the Task Force appears to rely on any problems being identified and fixed after a review to be conducted two years after the amendments go into effect. While such a review would certainly be appropriate as a cross-check on how projections in a thorough business analysis model jibed with reality, it is no substitute.

Florida's civil legal aid is critical to support access to justice for tens of thousands[3] of vulnerable Floridians. Committing to revisit a rule that could decimate the civil legal aid infrastructure exposes that infrastructure – and the Floridians in need to whom it provides aid – to an unnecessary risk. That review is likely to be an autopsy, trying to determine what killed legal aid in Florida.

FCLAA understands this Court to want the IOTA system reviewed with a fresh perspective using sound business judgment to maximize the efficient delivery of legal services to low-income

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[3] In 2019 alone, Florida's civil legal aid providers served nearly 100,000 Floridians in need.

Floridians in the most cost-effective manner consistent with running a successful business. But "try-it-for-two-years-and-see-what-happens" is not an exercise of sound business judgment, particularly in light of the consequences of this experiment. Such a scheme should not be imposed on Florida's civil legal aid system and the communities it serves.

Footnotes 7 and 8 on page 5 of the Task Force's Report are indicative of the problem. Those footnotes explain results of surveys conducted by staff at The Florida Bar for the Task Force. Footnote 7 states: "All entities responding to the bar's survey reported having priorities, with 32% reporting that the priorities are set by rule, 4% by court order, and 64% by some other method, including statute, bylaws, and foundation boards." (Report at 5.) There is, however, no explanation of what those priorities were and certainly no explanation of a relationship with the rule proposed by the Task Force.

Footnote 8 is similar. It notes: "The responses to the survey indicated that 80% of responding entities indicated that specific limitations are imposed on the use of funds in their jurisdiction, that 33% of the jurisdictions imposed the limitations by rule, 5% by

court order, and 62% by some other method."[4] (*Id.*) But there is no explanation of what the limitations were and certainly no analysis of which method of imposing the limitations worked best – or, for that matter, if they worked at all.

C. Failure to Address Concerns of Interested Entities

Any number of suggestions were made by FCLAA and others regarding alternatives. As an example, a group of interested parties submitted an alternative rule for consideration by the Task Force. (App. 546.) That alternative proposed rule was offered as a compromise in an effort to prevent the draconian rule ultimately proposed. The Task Force never responded to the suggestions nor considered the alternative proposed rule in any of its meetings. Although FCLAA does not currently support that proposed rule, as it now supports the Consensus Rule referenced earlier, the Task Force should have at least considered alternatives. That is not the

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[4] Footnote 8 also mixes two concepts. It talks about imposing limits but also discusses reporting. The Florida Bar Foundation already has extensive reporting requirements. FCLAA has no problem with reporting. The proposed rule suggested by the past Presidents of the Foundation imposes reporting requirements. FCLAA supports that suggested alternative rule. FCLAA adopts the comment of Florida's Children First, Inc. as to the issue of reporting.

only example of suggestions made by interested parties that the Task Force did not act on. Just to name a few, FCLAA, Jacksonville Aid Legal Aid, Southern Legal Counsel, and United States District Judge Timothy Corrigan offered comments and suggestions that just were not considered. (App. 544–75.) Although the Task Force clearly devoted substantial time to its task, they did not really consider opinions other than their own. That is unfortunate. It may have prevented the many comments the Court has now received opposing the proposed rule and the widely shared view by all stakeholders and most observers that the proposed rule is a bad rule that should not be adopted.

IV. Conclusion

For the foregoing reasons, the Court should decline the proposed amendments to Rule 5-1.1(g), especially those contained in subdivisions (8), (9), and (11). To the extent this Court identifies problems with the current rule, it should adopt the Consensus Rule proposed by the past presidents of The Florida Bar Foundation or reappoint or create a new task force to study the issue further through a process correcting the shortcomings identified herein.

Respectfully submitted,

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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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CERTIFICATE OF COMPLIANCE WITH RULE 9.045

I HEREBY CERTIFY pursuant to Florida Rule of Appellate Procedure 9.045 that this document complies with any and all applicable font and word-count-limit requirements.

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