IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC20-1543

TASK FORCE ON DISTRIBUTION OF IOTA FUNDS RESPONSE TO COMMENTS

Table of Contents

I. Introduction 2

II. Substantive concerns that the task force believes can be accommodated in its proposal 2

A. Commenters want IOTA funds to be used for loan repayment 2

B. Commenters want IOTA funds to be used for training and technology 3

III. Substantive concerns with which the task force disagrees 4

A. Commenters want to keep the status quo and propose a "consensus rule" to accomplish that goal 4

B. Commenters want to remove the cap on administrative expenses 8

C. Commenters want to allow for reserves 12

D. Commenters want to allow for distribution of funds later than 6 months of receipt 13

E. Commenters object to many proposed reporting requirements 13

F. Individual programs are concerned about losing IOTA funding 16

III. Response to Criticisms of the Task Force Process 18

IV. Oral Argument Is Not Necessary 20

V. Conclusion 20

I. Introduction

The Task Force on Distribution of IOTA Funds (the task force) respectfully responds to comments filed on proposed changes to Rule Reg. Fla. Bar 5-1.1(g) as directed by this Court in AOSC20-96 on October 29, 2020, based on unanimous agreement by the task force on the content of this response. Rather than address the comments point by point, the task force will address the substantive concerns raised in the comments, beginning with 2 concerns that the task force believes can be accommodated with amendments to the task force's proposal, followed by 6 concerns with which the task force has fundamental disagreement based on this Court's charge to the task force in the administrative order establishing the task force, AOSC19-70 (the AO). Finally, we conclude with a response to the criticisms about process and address the oral argument requests.

II. Substantive concerns that the task force believes can be accommodated in its proposal

A. Commenters want IOTA funds to be used for loan repayment

Commenters assert that the task force's proposed rule amendments would "defund" the Loan Repayment Assistance Program of the Florida Bar

Foundation. This popular and successful program provides loans to eligible participants, who must use the loan proceeds for repayment of student loans from law school. The Florida Bar Foundation (the foundation) then forgives the loans annually. Nothing in the task force's proposed rule is intended to "defund" or otherwise disturb this program. In fact, this program is precisely the type of "facilitation" of legal service providers for which the task force suggests IOTA funds be used. To the extent that the task force's proposed rule is unclear in this regard, the task force recommends adding a new sentence to subdivision (g)(8), immediately following the first sentence, to read as follows: "For purposes of this rule, funds loaned or distributed to qualified services providers under the foundation's Loan Repayment Assistance Program are considered distributions to a qualified grantee organization."

B. Commenters want IOTA funds to be used for training and technology

Commenters assert that IOTA funds should be used for training and technology. Subdivision (g)(9)(D) of the proposed rule expressly describes "expenses that otherwise directly facilitate providing qualified legal services" as "expenditures to facilitate qualified legal services." Hence,

those technology and training costs incurred to directly facilitate a qualified service provider providing direct legal services to civil litigants, as defined in the Final Report of the Task Force on Distribution of IOTA Funds (dated September 15, 2020) (task force report or report), are not considered "administrative expenses" and are not subject to the proposed rule's 10% cap. On the other hand, general training and general technology costs are administrative expenses. To the extent the task force proposal is unclear in this regard, the task force recommends amending its proposed subdivision (g)(9) to add that "Technology and training costs incurred to directly facilitate a qualified service provider providing direct qualified legal services are not training, overhead, or other administrative expenses subject to the limitations in this rule."

III. Substantive concerns with which the task force disagrees

A. Commenters want to keep the status quo and propose a "consensus rule" to accomplish that goal

The most prominent theme through most of the comments is: don't disturb the status quo; the foundation should continue to receive all IOTA funds, unfettered by any restriction except the phrase "the administration of justice," found in the foundation's charter. This is rather puzzling, especially

in light of 2 unassailable facts: (a) in the AO establishing and charging the task force, this Court unambiguously directed the task force, in fulfilling its mission--including proposing rule amendments--to "give priority consideration to providing direct legal services for low income litigants"; and (b) the current rule, i.e., the status quo, contains no requirement whatsoever that any IOTA funds be spent to provide direct legal services for low income litigants. In fact, since the implementation, in 2017, of the foundation's "strategic reset"--suspending general support grants for organizations providing direct legal services to clients--the task force was unable to discern from the thousands of documents provided to it by the foundation whether, in practice, any IOTA funds are currently used to provide direct legal services for low income litigants and, if so, the percentage of IOTA funds used for direct legal services.

The task force's proposed rule amendments effectuate this Court's unambiguous directive, and not one of the comments seriously suggests otherwise. The task force unanimous vote to approve its report and recommended rule amendments evidences that it successfully accomplished its mission.

Just as the task force did throughout the year-long process of developing the proposed rule amendments, as outlined in this response, the task force welcomed and often embraced and endorsed those comments that helped it craft a better work product, i.e., one that assists in the charge given to it by this Court.

Yet, it seems that what underlies most of the comments and the "consensus rule" are challenges to, and disagreement with, the "priority consideration" mandate memorialized in the AO. The commenters do not want any restriction that requires IOTA funds be used for providing direct legal services to poor Floridians or that restrict the use of IOTA funds beyond the restrictions contained in the charter of the IOTA funds administrator, currently designated as the foundation. This, too, is puzzling because, underlying this Court's mandate, is the simple--heretofore noncontroversial--notion that, given the level of the State's unmet legal need, scarce IOTA funds should be used primarily, if not exclusively, to provide lawyers for poor litigants.[1]

[1] Beyond the policy merits, a rule expressly requiring the IOTA fund administrator to use IOTA funds almost exclusively to provide direct legal services is the prudent choice for the long term health of the program in light of: (i) the compulsory nature of IOTA participation; coupled with (ii) recent First Amendment jurisprudence hostile toward rules requiring

Thus, the task force's response will not address those comments that directly, or indirectly, challenge this Court's "priority consideration" mandate or otherwise question the wisdom underlying the AO. This response, therefore, primarily addresses only those portions of the comments directed toward specific portions of the work product the task force delivered to the Court, i.e., the proposed rule amendments.

Likewise, the task force finds it unnecessary to address the proposed "consensus rule," other than to state that the task force believes the "consensus rule" merely maintains the status quo. Also, much of the "consensus rule" addresses non-IOTA fund expenditures and foundation administration,[2] and therefore the task force declines to endorse it.

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mandatory contributions to fund organizations engaged in activities with which those compelled to contribute may disagree. –

[2] One of the "consensus rule's" features is a provision requiring this Court to annually approve the foundation's budget—impliedly approving, if not endorsing, all foundation activities and not just those relating to IOTA funds. Given that the foundation and many of its grantees are involved in political advocacy, it would seem that this Court would want to further vet any such proposal. If it is this Court's desire to exert more direct control over the foundation's operations, this Court could directly appoint all members of the foundation board. The task force is loath to address this issue, as foundation governance was outside its scope as set forth in the AO.

B. Commenters want to remove the cap on administrative expenses

Commenters take issue with the provision that requires all collected IOTA funds, "except for direct expenses required to administer IOTA funds," to be distributed to qualified grantees (and, relatedly, criticize subdivision (g)(1)(I)'s definition of what those "overhead" expenses entail). Underlying this criticism is the fact that the foundation, like every entity, wants the flexibility to use funds in any way it sees fit. And, in its 40+ year history, the foundation has enjoyed unbridled flexibility on its use of IOTA funds; the only restrictions placed on IOTA fund use have been the broad "mission" restrictions contained in the foundation's charter. While the foundation, of course, honors restrictions placed on donors' contributions, it is understandably reluctant to embrace restrictions on what has been, since its inception, an unrestricted revenue source.

Nothing in the task force's proposed rules, in any way, limits the foundation's overhead expenses, alters the foundation's reserve policy, hinders the foundation's implementation of its "strategic reset," impedes the foundation's innovation initiatives, dictates the foundation's priorities, or alters or amends the foundation's charter. In fact, nothing in either the AO or the task force's proposed rule amendments addresses the foundation's

charter, its governance, its priorities, or its non-IOTA spending or protocols. Nothing in the task force's proposed rule amendments in any way restricts the foundation in any of its other pursuits, limits the foundation from using non-IOTA funds for other priorities, or prevents the foundation from embarking on targeted fund-raising for any of its activities, including its pursuits to "improve the administration of justice."

In its 40+ year existence, the foundation has received and spent tens of millions of dollars wholly unrelated to IOTA fund revenue. The foundation has successfully solicited and received multi-million dollar cy pres awards, grants from Florida's Attorney General, and countless donations from thousands, if not tens of thousands, of sources. Nothing in the task force's proposed rule amendments affects, in any way, these foundation revenue streams and pursuits.

Similarly, nothing in the task force's proposed rule amendments prevents grantees from using non-IOTA funds in any manner. Commenters noted that "most grants do not permit their funds to be allocated for indirect costs," thus making the proposed restrictions (allowing

10% of IOTA funds disbursed to grantees to be used for indirect costs) *less restrictive* than most grants.

The task force's proposed rule amendments simply place restrictions on, and require reporting regarding, IOTA funds derived from lawyers' compulsory participation in the IOTA program. The task force has little difficulty recommending to this Court that if the foundation remains as the IOTA funds administrator, IOTA funds be segregated from other foundation funds[3] and distribution be restricted to fund, almost exclusively, that priority identified by this Court in its AO (and which is consistent with the principal mission of the foundation): to provide direct legal services to poor Floridians.

The task force's original proposed rule would have limited overhead expense to 5% and did not name the foundation as the organization to distribute IOTA funds to the organizations that actually provide pro bono legal services; that rule was approved by a vote of 6-1. *See,* task force report, Appendix A, pp. 1-27. Although the task force was nearing completion of its work, had held public meetings, and sought input from any

[3] *See,* provision 5-1.1(g)(8)'s requirement that IOTA funds be segregated from other foundation funds.

and all with an interest in this matter, the task force agreed to delay its work at the request of the foundation in order to give the foundation a chance to propose a compromise rule. *Id.,* at pp. 29-30. In the hopes of obtaining a unanimous recommendation to this Court, the task force delayed its report and ultimately adopted the foundation's recommendations to the original proposed rule (becoming what has been referred to as the "hybrid rule" in the task force report), which increased the foundation's overhead cap from 5% to 15% and named the foundation as the distribution agent of the IOTA funds. Instrumental in the unanimous task force recommendation was the foundation vote, conveyed to the task force before its final vote, that the foundation was willing to serve under the restrictions placed on the use of the IOTA funds in the hybrid rule.

In light of the comments received as a part of this process, the task force notes only that the IOTA funds administrator should be in full support of whatever rule this Court adopts and understand and acknowledge not only this Court's power to determine how IOTA funds are spent, but also the responsibility to do so.

C. Commenters want to allow for reserves

With respect to the comments about using a greater percentage of IOTA funds to establish foundation reserves, the task force stands by its recommendations limiting the extent to which IOTA funds may be used by the foundation and its grantees for reserves. The task force believes the potential for gamesmanship and stockpiling funds outweighs any benefits that might otherwise be achieved if the rule allows for a greater percentage of IOTA funds to be used for reserves. Of course, the foundation and grantees may establish reserves with funds received from other sources. To stay true to the mission of this Court's directive, however, IOTA funds should be used--as they are collected--for providing direct legal services. Piling up money for some undetermined period of time with undefined purposes is inconsistent with the task force's understanding of this Court's mission for IOTA funds. Also, the task force notes that no rule language was submitted about this subject during the period in which the task force sought such suggestions. Finally, the task force notes that this is precisely the type of matter better addressed as part of the 2-year review of the distribution restrictions imposed by the proposed rule.

D. Commenters want to allow for distribution of funds later than 6 months of receipt

With respect to the comments about the requirement to disburse funds within 6 months, given the significant, urgent level of Florida's unmet legal need, the task force believes that prompt disbursement from the foundation of IOTA funds received is central to the utilization of those funds for the intended purposes. Although an argument could be made for monthly distributions, six months is a reasonable period of time to allow for orderly and efficient disbursement of IOTA funds by the foundation. The comments critical of that requirement offer no real reasons for the foundation to retain funds for a longer period of time. And, again, the task force notes that this is precisely the type of matter better addressed as a part of the 2-year review of the distribution restrictions imposed by the proposed rule.

E. Commenters object to many proposed reporting requirements

In May 2019 this Court requested that the foundation supply it with certain specific information to assist this Court in evaluating the efficacy of how IOTA funds were being used.[4] The foundation, though, was unable to supply much of the requested information precisely because the current

[4] *See,* May 6, 2019 letter to the foundation from this Court and the May 23 and 30, 2019 foundation responses to this Court (without attachments), attached as Composite Exhibit 1.

rule does not require the foundation to either segregate IOTA funds from its other funds or measure the efficiency of its IOTA fund expenditures, at least not with the precision contemplated in the proposed rule amendments

Indeed, it was not until 2019--several decades into the foundation's operations and not until 2 years after the 2017 adoption of the "strategic reset"--that the foundation first developed metrics to measure the foundation's effectiveness.

Consistent with this Court's "priority mandate," the task force's proposed rule amendments require specificity in reporting to allow this Court, the foundation, and stakeholders to account for IOTA funds. For example, one reporting metric in the proposed rule requires IOTA fund grantees to use the standard yardstick lawyers use for measuring their work: hourly reporting. While hourly reporting may be the bane of many lawyers' existence, hourly reporting remains the single best metric to measure a lawyer's performance.[5] With this metric and other very specific

[5] The "consensus rule" eliminates the proposed rule's requirement (in section (g)(11)(D)) that IOTA fund grantees report the number of hours expended delivering legal services to the poor. Hourly reporting seems the preferred method of quantifying how a lawyer provides legal services to the poor. Indeed, Rule Reg. Fla. Bar 4-6.1(d)(1) contemplates Florida lawyers reporting their pro bono legal services using numbers of hours.

grantee reporting requirements in hand, the foundation, as the IOTA funds administrator, will be able to make meaningful, albeit not perfect, efficiency determinations.

Similarly, given the scarcity of IOTA funds, the task force believes that IOTA fund grantees should report on how distributed IOTA funds are spent on overhead and reserves. The task force believes such reporting will allow for more transparency and more meaningful determinations on IOTA fund expenditures.

Also, as indicated in its report and proposed rule amendments, the task force believes that IOTA fund grantees should report to the foundation the total amount the grantee receives from non-IOTA sources. The foundation, as the grantor, should know what percentage of a grantee's total budget the donation comprises.

None of the task force's proposed reporting requirements are onerous, and all of them are designed to provide information to ensure that IOTA funds are efficiently used to provide legal services to Florida's poor.

If this Court adopts the proposed rule amendments, then, after the 2-year "look back" period in proposed rule 5-1.1(g)(12) has elapsed, this Court will be able to compare the pre- and post-amendment effectiveness of IOTA fund use based on 2 things: (i) the metrics currently being captured by the foundation as part of its "strategic reset"; and (ii) the data generated as a result of the proposed rule amendments' new reporting requirements. This empirical data will enable any necessary adjustment to ensure that scarce IOTA funds are being most effectively used. And in order for this Court to evaluate information from the foundation and its grantees, the data must be specific and uniform, regardless of the minor administrative burden to the foundation and grantees of providing the information specified by the task force's proposed amendments.

F. Individual programs are concerned about losing IOTA funding

Some individual comments raise concerns that current grantees with laudable programs may be ineligible to receive IOTA funds under the task force proposal. Whether or not specific programs receive IOTA funds is a policy call for this Court to make. The task force proposal attempts to fulfill the charge given to the task force by this Court – that "priority consideration [be given] to providing direct legal services for low income litigants."

To the extent some comments seem concerned that IOTA funds may not be used to promote and facilitate pro bono activities of foundation grantees under the task force's proposed amendments, the proposal *specifically authorizes this use* in proposed subdivisions (g)(9)(C) and (D).

Some commenters are concerned that the activities of a particular grantee will be viewed as "criminal" rather than "civil" litigation, and therefore would be ineligible for IOTA funds.[6] The task force takes no

[6] While entirely a policy issue for this Court, the task force has no objection to the proposal that this Court include in the comment to Rule Reg. Fla. Bar 5-1.1 that a qualified grantee organization's providing legal services to low-income clients in post-conviction representation, including those for wrongful conviction, is eligible for IOTA funds.

position on whether any particular activities undertaken by a grantee are "civil" or "criminal."

Some commenters expressed concerns that programs whose primary purpose is advocacy would not qualify for IOTA funds under the task force's proposed amendments. Without more information about a grantee's specific activities, the task force declines to take a position on whether a particular grantee would be eligible for IOTA funds under the proposed rule. However, the task force notes that the proposed amendment is intended to be consistent with the notion that political or legislative advocacy must not be funded or administered with IOTA funds. Nothing in the task force's proposed amendments, however, precludes the use of other funding sources for advocacy.

III. Response to Criticisms of the Task Force Process

Some comments raised concerns with the process the task force employed in rendering its report, recommendations, and proposed amendments. Section III of the task force report details the work that was done, the meetings held, the commentary received, and the "reams and reams" of paper submissions. The task force asked the bar to conduct a

survey of IOTA entities in other jurisdictions, and a web page was available that included meeting notices, agendas, minutes, and submitted materials. All meetings were open to the public.

The task force engaged in a transparent process in which all meetings were open to the public with many opportunities for input from any interested person, as shown in the task force report previously filed with this Court. In fact, the task force amended its proposals many times in response to concerns raised by participants in the process (including some of those commenting in response to this petition), as also evidenced by the task force report and its appendices and by this response. The task force thus declines to further address comments on the task force process, except to note that its members received what we believe (and hope) was unprecedented criticism, which included testimony that this Court has no jurisdiction or power over IOTA funds, numerous suggestions that we should ignore the AO, and rather pointed interrogation by the then president-elect of the foundation about "who drafted" the AO. We stand by the work product of the task force, and wholeheartedly endorse the proposed rule.

IV. Oral Argument Is Not Necessary

The task force does not believe that oral argument is necessary, nor that it would meaningfully assist this Court in any way. The task force met over an extended period of time in open meetings, took testimony from all who desired to speak, and reviewed thousands of pages of material. The commenters all had the opportunity to present their points of view during the term of the task force's work. The task force believes it has presented cogent and clear responses to the comments presented during this rule process. Thus, the task force respectfully requests this Court implement the proposed rule without further delay.

V. Conclusion

Well over a year ago, the task force set out to accomplish this Court's clear and unambiguous directive described in the AO. The task force believes it has done what this Court has asked of it.

The task force is grateful for the input from all of the comments at all stages of this process, and for the tremendous interest the stakeholders understandably have in the task force recommendations. Indeed, as

outlined below, the task force has embraced some of the comments' constructive recommendations.

In sum, the task force recommends this Court adopt its proposed rule amendments with the following 2 revisions, based on the comments submitted to this Court:

- Add a new sentence to subdivision (g)(8), to immediately follow the first sentence, to read as follows: "For purposes of this rule, funds loaned or distributed to qualified services providers under the foundation's Loan Repayment Assistance Program are considered distributions to a qualified grantee organization."

- Amend proposed subdivision (g)(9) to add: "Technology and training costs incurred to directly facilitate a qualified service provider providing direct qualified legal services are not training, overhead, or other administrative expenses subject to the limitations in this rule."

To assist this Court, the task force proposal, with the above 2 changes double-underlined, is attached as Appendix A.

Finally, the task force appreciates the opportunity to assist this Court, and will continue to assist this Court in any way this Court deems appropriate.

Respectfully submitted,

/s/ Mayanne Downs

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Mayanne Downs, Chair
Florida Bar Number 754900
GrayRobinson P.A.
301 E. Pine Street, Suite 1400
Orlando, FL 32801-2741
Telephone: (407) 244-5647
mayanne.downs@gray-robinson.com

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this response is typed in 14 point Arial type.

/s/ Mayanne Downs

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Mayanne Downs, Chair
Florida Bar Number 754900

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this motion has been sent by e-mail to the following individuals on this [ ]th day of March, 2021: Chris W. Altenbernd; Rob Bradley; Steven L. Brannock; Michael M. Brownlee; Raoul Cantero; Christopher Carlyle; Gerald B. Cope, Jr.; John A. DeVault; Raymond T. Elligett, Jr.; Kristen M. Fiore; Christine B. Gardner; Katherine E. Giddings; Bryan S. Gowdy; Thomas D. Hall; Bailey Howard; Samantha Howell; Torri D. Macarages; John B. Macdonald; John S. Mills; Anthony C. Musto; George E. Schulz, Jr.; Elliot H. Scherker; Jodi Siegel; Radhika M. Singh; Sylvia H. Walbolt; Dineen Pashoukos Wasylik; Peter D. Webster

/s/ Mayanne Downs

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Mayanne Downs, Chair
Florida Bar Number 754900