IN THE SUPREME COURT OF FLORIDA

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

REPLY OF THE FLORIDA CIVIL LEGAL AID ASSOCIATION TO THE RESPONSE OF THE TASK FORCE TO COMMENTS REGARDING RULE 5-1.1(g)

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I. Introduction

As authorized by this Court's order dated March 26, 2021, the Florida Civil Legal Aid Association ("FCLAA")[1] files this Reply.

The Task Force was appointed by this Court to consider whether rule changes should be made to Rule 5-1.1(g) of the Rules Regulating The Florida Bar. The specific purpose of the Task Force was "to examine whether rule 5-1.1(g) should be amended to better ensure the most effective use of IOTA funds." (Task Force App. at A-2.) There is nothing in the referral that mandated the Task Force propose a rule change or that dictated a certain result.

The Task Force filed a Report with this Court proposing various amendments to the Rule (the "Task Force Rule".) This Court published the Task Force Rule for comment by interested parties. FCLAA and thirteen other interested parties[2] filed comments. All

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[1] FCLAA is a 501(c)(6) association comprised of the executive directors and chief executive officers of twenty-eight civil legal aid programs in Florida who provide direct legal services to Florida's poor.

[2] The commenters included two out of state groups. The Texas Access to Justice Foundation ("TAJF")(the equivalent of The Florida Bar Foundation in Texas) was one of the two groups. It noted the "Texas' bar and judiciary leaders initially learned the value and structure of IOTA from Florida. TAJF strives to live up to Florida's

fourteen commenters opposed the proposed rule changes. The Task Force filed a single Response to all fourteen comments.[3]

FCLAA wants to stress that this is not and should not be a contest between the Task Force and the Commenters. This should not be a win/lose for either side. This should only be about a win for Florida's poor. They desperately need legal aid and the best possible support, which includes both direct representation and other services.

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legacy." TAJF comment at 9. But, they also expressed concern about the changes the Task Force recommended. *See* Discussion at 9-10.

[3] The following Commenters join this Reply – The Past Presidents of The Florida Bar Foundation, Thirty-Four Past Presidents of The Florida Bar, Southern Legal Counsel, Inc., the Innocence Project of Florida, the Florida Pro Bono Coordinators Association, and Florida's Children First, Inc.

Three groups filing comments were the Business Law Section, the Public Interest Law Section, and the Committee on Pro Bono Legal Services of The Florida Bar (the Bar Groups). The Bar Groups are in the process of obtaining approval from The Florida Bar to join in the substance of these comments, pursuant to Standing Board Operational Policies of The Florida Bar Rule 8.20. Upon obtaining the necessary approval, the Bar Groups will promptly file a notice with this Court notifying the Court of that fact.

The Task Force and the Commenters, both well meaning, see this differently. Very differently. FCLAA believes that Florida's disadvantaged should not be the subjects of a two-year experiment regarding the delivery of legal services to the poor that makes radical changes to the present system without any idea of the potential impact of the changes, especially when there has been no finding the current system is broken.

The single Response filed by the Task Force to the multiple detailed comments filed in opposition to the proposed rule changes the Task Force proposed undeniably demonstrates that the Task Force still does not fully understand how legal aid funding works or how legal aid providers function. The Task Force Rule creates more problems than it solves. The Task Force response shows that it is already backfilling. It concedes that the Task Force Rule creates several problems by eliminating the Loan Repayment Assistance Program ("LRAP"), putting unintended limitations on training and technology, and perhaps cutting off funding from valuable programs such as the Innocence Project of Florida. It now makes unvetted last-minute changes to try to fix or address these concerns.

Nevertheless, this is illustrative of a broader problem. In attempting to solve an unidentified problem, the rule simply creates more problems. Clearly, there are areas that could be addressed in the present system, and the Commenters believe they have addressed those in the rule proposed by the Past Presidents of The Florida Bar Foundation, which is supported by all the Florida commenters (the "Consensus Rule".) (A copy of the Consensus Rule is in the Appendix to the comment of the Past Presidents of The Florida Bar Foundation.) More importantly, the Task Force's concessions in its Response indicate that the Task Force's overall approach is flawed and needs to be reconsidered.

As noted in FCLAA's original comments, and the comments of others, the amendments will fatally undermine the ability of Florida's legal aid groups to provide quality, effective legal representation to the poor in Florida. The proposed changes to the Task Force Rule, offered in the Task Force's Response, do not change that.

This Court should reject the proposed changes suggested by the Task Force. To the extent this Court identifies problems with the current rule and decides a rule change is necessary to remedy

the problem, the Court should adopt the alternative "Consensus Rule." Alternatively, if the Court does not outright reject the Task Force proposals or adopt the Consensus Rule, this court should do as it did recently in *In Re Amendments to The Florida Rules of Judicial Administration and Florida Rule of Criminal Procedure 3.030 – Electronic Filing and Service,* Case No. SC19-2163, at 5 (March 5, 2021) and request the Task Force "re-engage with the interested parties and resubmit a proposal in more final form, **with greater consensus and narrowed issues**." (Emphasis added.)

II. The Task Force's Response

As noted, the Task Force filed a single Response to the fourteen comments filed in opposition to the Task Force Rule. The most telling aspect of the Task Force's Response is what it does not say. It does not refute, for example, FCLAA's assessment that "[i]f adopted, Florida's most vulnerable populations will be deprived of critically needed legal services [and,] . . . adoption of the proposed rule would be a disaster for Floridians in need." (FCLAA's comment at 8.) Instead, the Task Force continues to advocate for change for change's sake.

Most important of all, the Task Force does not address the Commenters' concern that the Task Force failed to identify a specific problem. No one disputes that the Task Force was directed by this Court to "give priority consideration to providing direct legal services for low income litigants." But the Task Force did not find there was a problem in providing direct legal services to the poor. The Task Force seems to assume that if the Court directed it to make that a priority, then there was a problem. However, the Court's direction does not mean that there was a problem with direct legal services. The referral specifically says consider "**whether** rule 5-1.1(g) **should** be amended." (Task Force App. at A-2)(Emphasis added.) It does not say "propose an amendment to the rule" to remedy a problem we have identified. As this Court is well aware, it knows how to make such a referral. And this Court certainly did not make a finding there was a problem with direct legal services. The Court's direction only means that **if** it were identified as a problem, it should be given priority.

And it has not been a problem. Data provided to the Task Force in the Foundations' submissions shows that since 1982, about 83 percent of all Foundation revenues were from IOTA. In

that same period, about 89 percent of all Foundation expenses have gone to grantees for direct support. (Exhibit A FCLAA's App. to this Reply.)

The Task Force's Response is limited to certain substantive issues raised by the Commenters as well as a procedural matter and the need for oral argument. A full discussion of the critical issues raised in the Response follows below. The Task Force opined that oral argument is not necessary. This Court has already rejected that assertion and set the matter for oral argument.

As noted in FCLAA's comment "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." (Task Force Report at 7.) This network will be imperiled by the changes the Task Force suggests.

III. Reply to Task Force Response

To aid the Court, FCLAA will track the Task Force's organization of its Response in this Reply.

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

Yes, they certainly do! The Task Force, to its credit, has recognized that it did not intend to "defund or otherwise disturb" the LRAP of the Foundation. (Task Force Response at 3.) As a result, the Task Force has recommended amending its proposed rule and adding the following as subdivision (g)(8): "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." FCLAA appreciates this step. However, the change suggested does not solve the problem. Moreover, it creates a problem. It appears the "considered distributions to the qualified grantee organization" is intended to deal with the proposed percentage limitations elsewhere, but it could cause confusion and a risk of adverse tax consequences. This is perhaps the clearest example of the disconnect between the Task Force's stated objective and the real-world negative consequences of the Task Force's proposed rule. Additionally, there would not be an annual award of LRAP funds and thus attorneys receiving LRAP would only know a few months

at a time the amount of the LRAP funds they would be receiving. That would highly discourage some attorneys from taking the job.

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

Once again, yes, they do. The Task Force asserts in its Response that if technology and training is used as "expenditures to facilitate qualified legal services," then they do not run afoul of the rule because the rule provides "expenses that otherwise directly facilitate providing qualified legal services." (Task Force Response at 3.) FCLAA assumes that the Task Force means that those expenses are then not capped. However, that is the Task Force's interpretation and it is inconsistent with rules of interpretation as the Task Force Rule explicitly states otherwise. The Task Force, apparently in recognition that its interpretation is not clear, offers an amendment to the proposed rule.

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." (Task Force Response at 4.) However, that still seems unclear.

The Response also states that "general training and general technology costs are administrative expenses" but fails to articulate what entails "general" training or technology, particularly as it relates to "[t]echnology and training costs incurred to directly facilitate a qualified service provider providing direct qualified legal services [….]." As such, it is a completely ineffective rule.

The Texas Access to Justice Foundation (TAJF) in its comment expresses the issue well: "a blanket limitation on indirect expenses would limit legal aid organizations from accomplishing their mission in optimally efficient and impactful ways." (TAJF comment at 4.) TAJF further explains, "Organizations with robust infrastructure—which includes sound information technology systems, financial systems, continuing education training, fundraising processes, and other essential infrastructure support are more likely to succeed than those without." (TAJF comment at 5.)(Citation omitted.) Both TAJF and FCLAA in its comment explain that the Task Force Rule results in the opposite of facilitating expanded direct legal services being provided. It severely undermines the creation of adequate

infrastructure for the legal aid groups. The Court should not adopt the Task Force Rule.

C. Commenters want to keep the status quo.

The Commenters would accept the status quo, at least over the Task Force Rule because the Commenters do not believe the current system is broken. However, the Commenters have not suggested keeping the status quo, necessarily. The Commenters do not think anything needs changed because no problem has identified, but if something must be changed, then use the Consensus Rule. The Consensus Rule unquestionably changes the status quo. The Consensus Rule is simply not the status quo. The real question that the Task Force never answered is: what is the problem with the status quo? The Task Force concedes that no Foundation funds have been misspent. The Task Force concedes that the legal aid groups in Florida are doing and excellent job. Even more importantly, the Task Force never explains why its new rule improves on the so-called status quo. The appropriate question is: assuming the court is convinced that changes are necessary, which proposed rule does a better job of fulfilling the Foundation's

important mission? EVERY commenter agrees that the Consensus Rule does a better job.

The Task Force defends its position by arguing that it simply did what the referral directed them to do, make funding of direct legal services a priority. That could have been done far better by simply stating in the Rule that the Foundation "shall make funding of direct legal services a priority" and not imposing all the other restrictions in the rule that prevent the Foundation from exercising sound business judgment as it has done for the past 40 plus years in administering IOTA funds.

The Task Force seemingly does not understand that there are many different ways to provide legal solutions to low income Floridians, and it is not just the one-case-at-a-time-litigation solution. The ultimate question is finding the best, most efficient and cost-effective way of solving the typical legal problems faced by poor people. That certainly has to be the goal of any legal aid system and certainly should be for one using IOTA funds. There is not a word in the Task Force's Report about how its new rule might better accomplish this worthy goal. Nor is there anything in its Response about how its new rule might do that. To the contrary,

the Commenters unanimously agreed that it would undermine that very goal. The Commenters all agree that the Consensus Rule does a far better job of accomplishing it.

Indeed, as Florida's Children First, Inc. ("FCF") explained in its comment, there are many different ways to deliver legal solutions to low-income clients. Direct representation of clients in litigation is only one. The proper focus should not be on funding litigation, but rather on funding legal solutions in the most efficient and cost-effective manner. FCF's comment discusses this concept extensively (*see* FCF comment at 16-20), and the Task Force did not even discuss it in its Response

Most of the Task Force's Response, in what is categorized as status quo issues, are generalized comments about various non-issues. One is the Task Force's comment that certain IOTA fund recipients engage in political activity. The Task Force does not say who that is, what they do and it certainly does not define political activity. This concern is not even discussed in its original Report. It was not raised by the Commenters, so the Commenters do not understand what the Task Force is responding to. Nor is there any indication that the use of IOTA funds for improper advocacy has

been a problem. IRS rules delineate the line between the proper use of IOTA funds and the use of funds to support political or controversial causes. (*See* 26 U.S.C. 501(h).) The Task Force concedes, as noted above, that there is "no indication that IOTA funds have been improperly used by the Foundation." This was the subject of FCF's comment at 12-14. There is simply no evidence that any of the current grantees have been engaged in improper advocacy.

The Task Force also seems to address indirectly a so-called *Janus*[4] issue. If the Task Force thinks that is a problem, then it should have directly addressed that issue in its Report and it did not. More importantly, *Janus,* again, is a non-issue.

The Supreme Court first addressed the free-speech implications of compulsory membership dues in 1977 when it decided *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The case upheld a Michigan statute that authorized collective-bargaining agreements to establish agency shops, which required even non-union members to pay union dues. The Court held that

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[4] *Janus v. American Fed. of State, County, and Municipal Employees*, 138 S.Ct. 2448 (2018).

Congress's perceived interest in maintaining labor peace was sufficiently compelling to justify the intrusion on free speech resulting from compulsory financial support of union activities. *Id* at 224-32. However, the Court held that such dues could only be used in support of activities germane to collective bargaining. *Id*. at 235.

Thirteen years later the Supreme Court, relying upon *Abood*, upheld compulsory bar dues in *Keller v. State Bar of California,* 496 U.S. 1 (1990). The Court held that mandatory state bar dues may, constitutionally, be used to fund activities germane to the goals of regulating the legal profession and improving the quality of legal services, but could not be used to fund ideological or political activities. *Id.* at 235.

In *Janus v. American Federation of State, County, and Municipal Employees*, 138 S.Ct. 2448 (2018), the Court again addressed the issue of mandatory union dues. The Court expressly overruled *Abood*, finding that the justifications cited in *Abood*, avoidance of labor conflict if employees were represented by more than one union and avoidance of "free riders," were not sufficiently

compelling to support an exception to the First Amendment. *Id.* at 2466, 2478. The Court further found that experience had demonstrated that reliance upon unions to distinguish between germane and non-germane expenditures was not workable. Id. at 2460-61.

The *Janus* decision raised the question of whether mandatory bar dues would eventually meet the same fate. The United States Supreme Court has not yet addressed the question. Lower federal courts have continued to follow *Keller*. *See, e.g.*, *Fleck v. Wetch*, 868 F.3d 652 (8th Cir. 2017); *Gruber v. Oregon State Bar*, 3:18-cv-1591-JR, 2019 WL 2251826 (D. Or. Apr. 1, 2019), *aff'd Gruber v. Oregon State Bar*, No. 3:18-cv-1591-JR, 2019 WL 2251282 (D. Or. May 24, 2019). *See also McDonald v. Sorrels*, No. 1:19-CV-219, 2020 WL 3261061 (W.D. Tex. May 29, 2020)(holding that because the Bar has adequate procedural safeguards in place to protect against compelled speech and because mandatory Bar membership and compulsory fees do not otherwise violate the First Amendment, Plaintiffs' claim that the Bar unconstitutionally coerces them into

funding allegedly non-chargeable activities without a meaningful opportunity to object necessarily fails as a matter of law.)

Some of those cases cited dicta in *Harris v. Quinn*, 573 U.S. 616 (2014), a case decided four years before *Janus* in which the Court distinguished *Keller* from *Abood.*

The following principles arise from *Janus* and related Supreme Court decisions:

1. Generally, government agencies (other than legislative bodies possessing the general taxing power) cannot compel payment of money for use in support of political or ideological goals without the knowing consent of the person paying the money.

2. Notwithstanding the foregoing general rule, compulsory payments can be used for purposes that serve a sufficiently compelling state interest.

3. Regardless of the purpose of the expenditure, *Janus* does not apply to the use of money with the payor's knowing consent.

4. It has to be the payor's money being used.

IOTA funds are not the payor's money. The money that generates IOTA funds is not the lawyer's money, or the client's money, but instead is the leftover interest earned on accounts too small or short term to create an account. Any interest would be less than the cost of creating an interest-bearing account; thus, the interest is left with the banks as so-called "gleanings of the field."[5] As this Court is aware, the banking community voluntarily agreed, as part of its civic responsibilities, to use those monies to fund IOTA.

Moreover, this Court long ago addressed the underlying issue of the mandatory nature of The Florida Bar and the use of bar dues for political activity, an analogous situation, in *The Florida Bar re Frankel*, 581 So. 2d 1294 (Fla. 1991). The remedy this Court upheld there was to enjoin the Bar from lobbying on issues outside its

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[5] Gleaning is the act of collecting leftover crops from farmers' fields after they have been commercially harvested or on fields where it is not economically profitable to harvest. It is a practice described in the Hebrew Bible that became a legally enforced entitlement of the poor in a number of Christian kingdoms. Stephen Hussey, *'The Last Survivor of an Ancient Race': The Changing Face of Essex Gleaning*, 45 ". The Agric. Hist. *Agricultural History* Rev. 61, 61–72 (1997). *See also* Leviticus 19:9, 23:22; Deuteronomy 24:19, 21.

authority and providing Mr. Frankel with a proportional refund of his Bar dues applicable to the impermissible lobbying. *Id.* at 1300. In doing so, this Court fully considered *Keller*.

Finally, as to *Janus* restrictions against the use of funds for political and issue advocacy, there are already IRS rules, (26 U.S.C. § 501(h)), and the Task Force concedes that there has been no improper use of these funds. FCLAA does not see how *Janus* is a problem when it comes to IOTA funds. The inclusion of the reference to political activity is nothing more than an attempt to obfuscate the real issues.

The Task Force's Response dismisses the thoughtful and specific objections of the Commenters under the guise of arguing the Commenters' desire to maintain the status quo**.** First, many Commenters noted in detail the problems with the overhead, reserves, and six-month restrictions contained in the proposed rule. This included comments from the Business Law Section of The Florida Bar, meaning business lawyers, most familiar with these issues. Additionally, the Thirty-Four Past Presidents of The Florida Bar discussed in detail the problems with eliminating administration of justice funding ("AOJ"). The Task Force's reply

virtually ignores these detailed and specific concerns, dismissing them as simply an attempt to maintain the status quo. The Task Force's silence on the specific objections speaks volumes. If all the Commenters are wrong, then why is the Task Force unable to explain why? Moreover, why does the Task Force's Report or its many attachments not contain more to explain the need for these rules changes in the first place? Why has it ignored prudent business principles? Why has it eliminated AOJ funding? In addition, most importantly, how is its Task Force Rule an improvement over the "status quo" or the Consensus Rule?

D. Commenters want to remove the cap on administrative expenses.

The Task Force Response appears to suggest, erroneously, that the Foundation approved the imposition of the cap. (Response at 11.) To the contrary, the record is uncontroverted that the Foundation expressed its concerns, from the outset, that the Task Force's proposed budget cap would be detrimental to, and potentially destructive of, the Foundation's mission to further the delivery of legal services to those in need of them but unable to afford them. (Task Force App. J-22-35, at J-33-35; *see also* Task

Force App. at J-75-79) (March 2, 2020 letter from MacKenzie to Task Force.) The Foundation detailed its concerns and provided data about its budgets and budget process. (Task Force App. at J-89-133) (FBF Comments to IOTA Task Force; *see also* Task Force App. at J-491-505) (FBF FAQ document.) At no time did the Foundation approve the proposed Task Force Rule or agree that its proposed budget cap would serve the best interests of the delivery of legal aid services in Florida.

Instead, shortly before the Task Force's final report was issued on September 15, 2020, the Foundation agreed only that, if such a cap were adopted, the Foundation would serve under and comply with that directive. The Chair of the Task Force was specifically advised of this by one of the other Task Force members. "The Foundation is not "approving" anything – I thought only the task force approves the terms of the rule. The Foundation is willing to serve under and comply with the rule as finally adopted by the task force." (See Exhibit B FCLAA's App. To Reply.)

As importantly other Commenters explicitly objected to the budget cap as an unsound restriction on the Foundation's ability to best support legal aid providers. As noted in FCLAA's comment a

member of the Task Force itself acknowledged that the cap was "arbitrary" and could have adverse effects on the delivery of legal services to the needy. (FCLAA App. at 281-82.) Other Task Force members expressed the same concerns. (Task Force App. at 239, 248.)

Reviewing those negative consequences two years after the fact, which is what the Task Force proposes, cannot cure them. Worse, if IOTA revenues drop significantly, an arbitrary cap would require substantial cutbacks and potential elimination of the essential staff who perform the tasks necessary for responsible administration of the IOTA program. Those tasks include:

- collecting funds from the thousands of IOTA accounts and hundreds of financial institutions and assuring proper payments are received,
- investing and ensuring proper safekeeping of these funds until they are disbursed,
- reviewing and administering grants to ensure that the funds go to worthy grantees and are used by them properly,
- accounting and auditing to ensure that all of this is done correctly; and

- the other work that Foundation staff perform in order to serve the mission of the IOTA program.

(*See generally* Task Force App. at J-95 – 125 (reviewing Foundation Departments and personnel and the responsibilities of each).)

Because IOTA funds go up and down, an artificial and arbitrary cap could mean that one very bad year of IOTA revenues could require dramatic cuts in personnel and other essential costs that would have lasting, and perhaps even terminal, adverse effects on the ability of the Foundation to perform the necessary tasks to ensure that IOTA funds are used to best fund the mission. This Court should consider the comments, including especially those of the Business Law Section, that demonstrate the serious problems with this "arbitrary" cap, which would remain in effect, no matter how reduced IOTA revenues might become.

This Court asked for comments. Fourteen groups responded with comments. The Task Force seems to chastise commenters for commenting on issues that are obviously relevant. The Task Force seems to be suggesting some form of estoppel or waiver by commenters. This is a rules proceeding; it is not a formal appeal with record preservation issues. Without question, the Foundation

expressed many of these concerns throughout the process and now embraces the Consensus Rule as a better alternative. The Foundation filed comments expressing its concerns with the Task Force Rule. Presuming the Court believes any change is warranted, the Foundation now defers to the concerns of the many Commenters, many of whom are the "boots on the ground" actually providing these services.

E. Commenters want to allow for reserves.

The Business Law Section of The Florida Bar addresses this issue directly in its comments. FCLAA believes the Business Law Section's comments already sufficiently address what the Task Force says in its Response. However, it is absolutely critical that the Foundation be able to accumulate reserves that can then be made available to the legal aid organizations when emergencies arise. The non-availability of reserves will only compound an already existing disaster. As an example, reserves were the only thing that kept legal aid groups going when interest rates plummeted. There are too many unforeseen events that can happen for the Foundation, just like all individuals and businesses, to not have reserves. Reserves are a sound business practice.

The Task Force also opines in defense of its position that "potential for gamesmanship and stockpiling funds outweighs any benefits that might otherwise be achieved." (Task Force Response at 12.) There is not a scintilla of evidence showing that any "gamesmanship" or "stockpiling" has ever occurred. The factual predicate for this is mere speciousness. The Foundation has existed for more than 60 years. No problem of "gaming the system" has ever existed or been shown by the Task Force. To the contrary, one of the Task Force subcommittee reports concedes that it is "absolutely clear" that there is "no indication whatsoever that IOTA funds have been improperly used by the Foundation." (Task Force App. at F-4.)

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

Again, FCLAA believes that the Business Law Section addresses this issue completely. However, FCLAA would note that requiring six-months distributions effectively guts the Foundation's investment policy potential and makes it more difficult for both the Foundation and its grantee organizations to make long-term plans to ensure the stability of future legal services. In the end, that would be a severe blow to funding the legal needs of Florida's poor.

G. Commenters object to many of the reporting requirements.

The Task Force ignores the specific comments on this issue and just concludes, without evidence, "[n]one of the task force's proposed reporting requirements are onerous." (Response at 15.) FCLAA does not oppose reporting requirements that are clear. FCLAA's members already report a variety of substantive and financial data outcomes and achievements to the Foundation. The Task Force's proposed rule adds reporting requirements that are not clear. The Consensus Rule keeps reporting requirements, but adds clarity. It also eliminates the requirement to report on "the number of hours expended delivering qualified legal services paid for or facilitated by the use of IOTA funds." (Task Force App. at G-7.) It is not clear whose hours would be reported. Would it be attorneys, paralegals, support staff? While attorneys maintain timesheets, not all staff do. Adding such a requirement would be onerous and not helpful to determining the efficacy of the use of IOTA funds. Also, again illustrating the Task Force's misunderstanding of how legal aid programs operate, even just reporting on the number of attorney hours supported with IOTA

funds is not a simple task as IOTA does not fully support 100 percent of each attorney. Moreover, the number of hours is not the relevant outcome. Serving and achieving success for clients is what is important. Thus, the Consensus Rule deletes this requirement.

The Consensus Rule proposes reporting requirements that are more reasonable and more readily generated, based upon existing accounting and data analysis practices and reporting technology. The entities that would actually have to prepare the requested reports are telling the Court that the proposed Task Force requirements are, in fact, much more onerous, creating more administrative overhead. And, the Task Force has not identified how the data it would have these organizations report would actually assist in serving the interests of justice. This is another circumstance where it would be far better to adopt the Consensus Rule.

H. Individual programs are concerned about losing IOTA funding.

The Task Force declines to take a position on this. They specifically state, "Whether or not specific programs receive IOTA funds is a policy call for this Court to make." (Response at 17.) As

such, they conclude: "the task force declines to take a position on whether a particular grantee would be eligible for IOTA funds under the proposed rule." (Response at 18.) Without a recommendation, this Court should determine that programs being funded now are still entitled and worthy to be funded. However, if the Court is not willing to do that, it could do as it recently did with respect to another proposed rule amendment in *In Re Amendments to The Florida Rules of Judicial Administration and Florida Rule of Criminal Procedure 3.030 – Electronic Filing and Service,* Case No. SC19-2163, 2021 WL 840980, at *2 (Fla. March 5, 2021), and decline to resolve this problem. If the Court wants an immediate resolution on this matter, then it should go back to the Task Force (or another group because the Task Force has declined to offer an opinion) and get a recommendation on this issue.

I. Process Concerns.

Certainly, the Commenters had comments about the Task Force's process. The main focus of the Commenters were the flaws in the proposed rule and suggestions on how it could be approved. Even with the Task Force's proposed changes to the rule the Task Force's Rule would benefit from further work. All of that

could be avoided, however, by adopting the Consensus Rule and then evaluating how the Foundation is doing going forward under that rule.

J. Lack of support for the Task Force's position.

Perhaps of greater significance than anything said by the Task Force is what has not been said by anyone else. Other than the Task Force, not a single person or entity has filed comments in support of the Task Force's recommendation. Not one legal services organization. Not one current or former lawyer, executive director, board of directors' member, or client of such an organization. Not one present or former officer or director of The Florida Bar Foundation, other than those on the Task Force. Not one section or committee of The Florida Bar. Not one current or former President of The Florida Bar, other than those on the Task Force. Not one Governor or former Governor from the Board of Governors of The Florida Bar, other than those on the Task Force. Thus, seven people are presenting this Court with nothing more than an opinion agreed to by most of them. That does not mean that the Task Force did not work hard and have the best interests of Florida's poor in mind. They unquestionably did. Reasonable people can have different

opinions. This Court should weigh the Task Force's opinion against the highly informed, uniformly aligned opposition of the people and entities most directly involved with providing legal services to Florida's poor, all of whom oppose the Task Force recommendations.

IV. Conclusion.

For the foregoing reasons, the Court should decline to adopt the proposed amendments to Rule 5-1.1(g), especially those contained in subdivisions (8), (9), and (11). That extends to the proposed amendments the Task Force offered in its Response. Alternatively, 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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I HEREBY CERTIFY that a true and correct copy of the foregoing notice was filed with the Clerk of Court on April 5, 2021, via the Florida Courts E-Filing Portal, that will serve a notice of electronic filing to all counsel of record.

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I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

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