

IN THE SUPREME COURT OF FLORIDA

CASE NO.

**MATTER OF INTEREST ON)
TRUST ACCOUNTS: A)
PETITION TO AMEND)

THE RULES REGULATING)
THE FLORIDA BAR)**

**PETITION OF THE FLORIDA
BAR FOUNDATION FOR MODI-
FICATION OF THE
INTEREST
ON TRUST ACCOUNTS
PROGRAM**

Pursuant to Rule 1-12.1 of the Rules Regulating The Florida Bar, the undersigned fifty (50) or more active members of The Florida Bar, on behalf of The Florida Bar Foundation (hereinafter Foundation), move for entry of an Order modifying the Rules Regulating Trust Accounts by amending Rule 5-1.1(e) of the Rules Regulating The Florida Bar, stating as follows:

1. This petition has been authorized by the board of directors of The Florida Bar Foundation as the administrator of the Interest on Trust Accounts Program. The Foundation is joined in filing this petition by more than 50 members in good standing of The Florida Bar.

2. Notice of the filing of this petition was given in the February 15, 2001 issue of The Florida Bar News, and a re-notice of modifications to the proposed amendments was published in the April 15, 2001 issue of The Florida Bar News, with the re-notice advising that oral argument on the proposed IOTA rule amendments has been scheduled for June 4, 2001. Copies of the notices are attached as Exhibits 1 and 2. Copies of all comments received as a result of the February 15, 2001 notice are attached as Exhibit 3.

3. As directed by the Court, copies of all comments received as a result of the February 15, 2001 notice were given to The Florida Bar Board of Governors prior to its unanimous approval of the proposed IOTA rule amendments at its meeting on March 30, 2001.

A. INTRODUCTION

4. This is a Petition to amend this Court's Interest on Trust Accounts (hereinafter IOTA) program for the purpose of increasing revenue. If adopted, the modifications would:

- ! Introduce competition for IOTA accounts by allowing investment companies to participate in IOTA;
- ! Permit use of government money market funds¹, together with appropriate safeguards, for IOTA funds;
- ! Define institutions which are eligible to hold IOTA accounts as only those institutions which pay IOTA account depositors the highest interest rate or dividend generally² available at their own institution to

¹Only money market funds consisting solely of United States Government Securities (government money market funds) are proposed for IOTA accounts.

²Use of the word “generally” in the proposed IOTA rule amendments to define institutions eligible to hold IOTA accounts is intended to acknowledge that treatment of customers is defined by a variety of factors, not just the balance in a single account.

non-IOTA customers when IOTA accounts meet the same minimum balance or other requirements. Eligible institutions may meet the interest or dividend requirement through use of checking accounts, government money market funds with checking account features, or through an institution's standard sweep product when the investment option is a REPO or government money market fund.

5. If these modifications are approved by the Court, the Foundation would expect that the Court would charge it, not attorneys or law firms, with the responsibility of determining the initial and continuing eligibility of banks, savings & loan associations and investment companies to hold IOTA accounts. The Foundation also would work directly with these institutions to assist and promote their initial and continuing eligibility to participate in IOTA.

6. The requested modifications are essential to increasing annual IOTA legal aid funding which, at \$10.39 million, is the same today as in 1993. If approved by the Court, annual IOTA revenue could increase from between \$17 million and \$26 million, based on interest rates ranging from 3.50% to 5.00%.

7. This Court has jurisdiction pursuant to article V, section 15 of the Florida Constitution.

**B. THE PROPOSED AMENDMENTS PROVIDE THE
OPPORTUNITY TO SECURE
CRITICALLY NEEDED FUNDING FOR LEGAL AID**

8. Granting this Petition would provide the opportunity to secure critically needed funding to allow low-income Floridians to gain access to the courts. The Court is particularly aware of the continued crisis in funding for legal aid for the poor. In Florida Bar v. Furman, 376 So. 2d 378 (1979) this Court found that Furman's unauthorized practice of law was the symptom of a larger problem: the unavailability of counsel to those who cannot afford legal fees in civil matters. In 1990, the Court re-emphasized its findings in Furman, declaring, "In order for this justice system to maintain credibility, we realize that it must be available and affordable to all segments of society." In re Amendments to Rules Regulating The Florida Bar 573 So.2d 800, 806 (Fla. 1990). But, funding problems continue to plague Florida's efforts to provide minimal access to the courts.

9. In recent years, IOTA funds have played an even more important role

in Florida's legal aid delivery system. In 1995 and 1996, federal funding for Florida's 12 Legal Services Corporation (LSC) grantees was cut from \$17,568,138 to \$12,369,862. In addition, Congress applied new restrictions on federal funds prohibiting representation by LSC grantees, with any source of funding, of large numbers of immigrants, almost all prisoners, and in class actions and attorney's fees cases. These restrictions required the Foundation to increase IOTA funding of some non-LSC grantees, and award grants to additional organizations, in order to provide at least minimum access to those persons no longer able to be served by federally-funded programs.

10. Federal funds have not been restored to their pre-1995 levels, and IOTA legal aid funding has been reduced back to its 1993 level. Moreover, based upon conservative estimates, Florida's poverty population is expected to have grown by over 116,000 from the 1990 level to almost 2,000,000 today. Granting this petition would significantly enhance IOTA revenue, restoring IOTA legal aid funding to the equivalent of its 1990-91 level.

C. EARLY HISTORY AND GROWTH OF THE IOTA PROGRAM

11. This Court, as reflected by the opinions cited above, has long recognized that it has the duty to promote the full availability of legal aid. Its pioneering role in the creation of the IOTA program demonstrates that it is able to develop unique and innovative methods for funding the delivery of legal aid to the poor. On July 16, 1981, this Court issued its now landmark Opinion establishing our country's first Interest on Trust Accounts Program. In Re Interest on Trust Accounts, 402 So. 2d 398 (Fla. 1981). The Interest on Trust Accounts program was effective September 1, 1981. The Court urged all lawyers to participate. 402 So. 2d at 396-397. While participation in this Court's IOTA program got off to a good start, growth was stagnant from 1982-88.

12. As a result, more than 50 members of The Florida Bar filed a petition on behalf of The Florida Bar Foundation requesting this Court to convert the voluntary IOTA program to a comprehensive program.³ On January 26, 1989, the

³The Foundation's petition requested a "comprehensive" IOTA program requiring investment of all trust funds – whenever economically practical, for the benefit of clients or third persons, and only if investment for the benefit of clients or third-persons was economically impractical, would the "nominal" or "short-term" client or third person trust funds be deposited in accounts benefitting the Foundation. The Court declined to require investment of all trust funds and, instead, adopted a "mandatory" IOTA program requiring all

Court granted The Foundation's petition. Matter of Interest on Trust Accounts, 538 So. 2d 448 (Fla. 1989).

D. DECLINE IN CHECKING ACCOUNT INTEREST RATES

13. After the adoption of this Court's mandatory IOTA program in 1989, attorney participation soared and IOTA revenue grew to \$19.4 million annually in 1990-91. The next year, however, saw checking account interest rates begin to fall. The 1990s marked the end of the high checking account interest rates financial institutions had paid in the 1980s to attract depositors. The statewide average interest rate paid on IOTA checking accounts declined from just over three percent in 1990 to just over one percent today. See IOTA Income Portfolio attached as Exhibit 4. However, in order to keep the business of large customers, financial institutions began offering those customers sweep products paying market interest rates on idle checking account funds.

“nominal” or “short-term” client or third-person trust funds to be deposited into interest-bearing checking accounts benefitting the Foundation.

14. That trend is borne out by the 2000 Sweep Account Survey conducted by independent treasury management consulting firm Treasury Strategies, Inc. (“TSI”). TSI reported that, “More banks are offering sweep products. Among the [114 bank holding company survey] respondents, there was a 20 percent increase in the number of banks offering sweep products and the growth rate of the number of small banks offering sweep is greater than larger banks.” The Survey also revealed that, “Sweep account revenue is on the rise. From 1998 to 1999, total annual sweep income has risen by 14 percent.”

E. BACKGROUND TO THIS PETITION

15. As a result of the decline in IOTA revenue and funding for legal aid, coupled with the recognition that high average balance IOTA accounts held in checking accounts would remain undervalued by banks and savings & loan associations, the Foundation petitioned the Court to allow the recruitment of attorneys and law firms with high average IOTA account balances (in excess of \$30,000) in eligible financial institutions to establish sweep accounts utilizing daily bank repurchase agreements as the higher yield investments (IOTA Sweep/REPOs). On April 24, 1997, this Court approved the Foundation’s petition

for a voluntary IOTA Sweep/REPO program. Amendments to Rules Regulating The Florida Bar Rule 5-1.1(e) - IOTA, 696 So. 2d 181 (Fla. 1997).

16. In the past four years since the Court approved IOTA Sweep/REPOs, the Foundation has worked diligently to implement the program. The Foundation first met with chief officials at the major Florida banks which hold the majority of large-balance IOTA accounts asking that IOTA Sweep/REPOs be made available to their attorney and law firm customers. In an effort to make implementation of an IOTA Sweep/REPO program as easy as possible for banks, the Foundation offered banks technical assistance and even reimbursement of their reasonable up-front costs to modify their standard sweep/REPO product in order to remit and report REPO interest directly to the Foundation. Next, Foundation directors, legal aid grantees, and state and local bar leaders recruited law firms with IOTA account balances over \$100,000⁴ to ask their banks for a higher yielding IOTA

⁴Although some Florida banks offer sweep accounts to customers with balances as low as \$30,00, the typical threshold is \$50,000. The exact amount varies by account, depending on monthly analysis of checking account activity, the cost of which customers pay by maintaining a non-interest bearing compensating balance in the checking account. The Foundation focused its Sweep/REPO recruiting activities on the approximately 1,250 IOTA accounts with balances consistently above \$100,000.

Sweep/REPO account.

17. Attorneys and law firms have been receptive to moving their IOTA account into a Sweep/REPO product, recognizing the imbalance of their IOTA account being relegated to a standard checking account product earning rates as low as .56%. But, when they asked their banks for an IOTA Sweep/REPO, only two major banks agreed. Even the initiatives by these two banks were a limited response. The other banks declined, generally giving as the reason that their existing standard sweep/REPO product could not remit interest and report directly to the Foundation, despite the Foundation's repeated contacts with bank officials and offers of technical and financial assistance to modify their remittance and reporting systems.

18. The multiple relationships between banks and law firms prevent exercise of the kind of pressure which would cause the banks to offer IOTA Sweep/REPOs. As a result, IOTA revenue has not appreciably increased as a result of the voluntary IOTA Sweep/REPO program and cannot realistically be expected to do so under the current IOTA rule.

19. Since the early 1990s, the Foundation also has been working with banks across the state to increase IOTA revenue through other means. The Foundation modified its systems to accept IOTA account remittances and reports electronically and banks have generally responded well to the Foundation's request that, as a consequence, they reduce or eliminate their per account, per month IOTA Handling Fee to report and remit IOTA account interest to the Foundation. The Foundation also has asked banks to increase the rates they pay on IOTA checking accounts either across the board, or on a tiered-rate basis, with only larger accounts earning the higher rates. All three major Florida banks, and seven smaller banks and savings and loan associations responded positively to these requests in a gesture of public spiritedness and in recognition of the high profit level IOTA accounts represent. These institutions are recognized prominently every month in issues of The Florida Bar News in the Foundation's *IOTA Bank Honor Roll*.

20. These efforts, which have resulted in approximately \$3.7 million more in annual IOTA revenue, a steady increase in the number of IOTA accounts due to growth in Bar membership, and IOTA grant reserves, which the Foundation was able to fund only from 1989 to 1990-91, enabled the Foundation to maintain IOTA legal aid grants at relatively stable levels until 1999. But checking account interest

rates have continued to decline and the last of the IOTA legal aid grant reserves was awarded in 2000. Consequently, IOTA legal aid funding has been cut 15% in the past two years. This cut in real dollars does not fully reflect how far IOTA legal aid funding has fallen behind from inflation and growth in the number of Floridians living in poverty.

F. EXPLANATION OF REQUESTED MODIFICATIONS

21. With the efforts to successfully implement the voluntary IOTA Sweep/REPO program frustrated, and in light of this Court's expectation that "the Foundation continue to investigate alternative investment opportunities that would accomplish the dual goals of increasing IOTA revenues and safeguarding the trust funds," *Id.* at 182 n.3, in the summer of 2000, the Foundation began exploring proposed amendments to the IOTA Rule to increase IOTA revenue and offset the \$8.1 million revenue drop since 1990-91. After initial Foundation board consideration in October 2000, followed by study by an *ad hoc* Foundation committee and endorsement at the Foundation's December 6, 2000 Planning Retreat, the proposed IOTA Rule amendments were unanimously approved for submission to the Court by the Foundation's board of directors at its December 8,

2000 meeting. The full text of the proposed IOTA rule amendments, in legislative style, is attached as Exhibit 5.

22. The Foundation is convinced that any significant increase in IOTA revenue would require that institutions treat large-balance IOTA accounts fairly -- on a par with the accounts of their non-IOTA account customers. Further, based on the recruiting experiences under the voluntary IOTA Sweep/REPO program, the Foundation also believes that securing fair treatment of IOTA accounts should not be the sole responsibility of attorneys and law firms. Accordingly, this petition seeks to require that, as a condition of eligibility to hold any IOTA accounts, institutions must pay interest rates or dividends comparable to what they pay their other customers if the IOTA account meets the same minimum balance or other requirements. This approach originated with the Ohio IOLTA program, which is in the process of amending its IOLTA rules accordingly. Other IOLTA programs have expressed strong interest in following Florida's and Ohio's lead.

23. To assist institutions to comply with the proposed new interest rate and dividend requirement, this petition would further upgrade the products approved for IOTA funds beyond checking accounts and REPOs, to money

market funds, in keeping with current trends in money management. Only money market funds registered with the Securities and Exchange Commission and which are comprised solely of United States Government Securities, are proposed, in order to meet the Court's requirement for safeguarding of IOTA funds.⁵ However, to further provide for the safety of IOTA funds, only government money market funds with total asset values of at least \$250 million would be eligible to participate.

G. IMPLEMENTATION

24. If the Court were to grant this petition, the Foundation respectfully requests that the amended IOTA rule be effective thirty days after the date of the Court's order. However, the Foundation further requests that institutions currently

⁵A money market fund, as described by the Securities and Exchange Commission, "...is a type of mutual fund that is required by law to invest in low-risk securities. These funds have relatively low risks compared to other mutual funds and pay dividends that generally reflect short-term interest rates. Unlike a "money market deposit account" at a bank, money market funds are not federally insured." "[money market funds] attempt to keep their net asset value (NAV) to a constant \$1,00 per share—only the dividend yield goes up and down. But a money market's per share NAV may fall below \$1.00 if the investments perform poorly. While investor losses in money market funds have been rare, they are possible." Currently, money market funds are limited to investing in securities with maturities of 90 days or less.

holding IOTA accounts, which choose to participate in IOTA under the new “Eligible Institution” requirements of the amended IOTA rule, be provided a reasonable time period, for example six months from the effective date of the amended IOTA rule, during which to comply with the new eligibility requirements.

25. In order to avoid placing attorneys and law firms in the position of comparing interest rates being paid on their IOTA accounts to rates and dividends paid by their institution to non-IOTA account customers, the Foundation proposes that the Court charge it with the responsibility to determine initial and continuing compliance with the institutional eligibility requirements of the amended IOTA rule. The Foundation also will continue its efforts to assist eligible institutions by: 1) continuing its offer to defray reasonable up-front cost to modify remitting and reporting processes for IOTA; 2) providing reporting and remittance specifications, including free technical support; 3) assisting participating institutions in identifying IOTA accounts eligible for the higher interest rates or dividends; 4) notifying affected attorneys and law firms; and 5) facilitating completion of any new product or account sign-up forms required of attorneys or law firms.

**H. REQUEST FOR EXPEDITED CONSIDERATION
AND SUGGESTED PROCEDURE**

26. The Court is formally requested, and the Petitioners gratefully acknowledge the steps the Court has already taken, to expedite consideration of this matter. The Petitioners respectfully request ten days to respond to any additional comments received following conclusion of the 30-day comment period set forth in the April 15, 2001 notice.

I. CONCLUSION

Implementation of a increased revenue program such as that set forth herein offers immense benefit to the public with no loss of protection to clients and little inconvenience to members of The Florida Bar. Lawyers have a professional obligation to assist in improving the administration of justice, and to provide legal aid to those unable to pay for such aid. The adoption of the changes suggested herein is critical if this Court's IOTA program is to continue to provide meaningful funding for access to the courts by low-income Floridians. The Court is urged to adopt the requested modifications.

Respectfully submitted,
A. Hamilton Cooke, Esquire
President

Darryl M. Bloodworth, Esquire

President-Elect

The Florida Bar Foundation
P.O. Box 1553
Orlando, Florida 32802-1533
(407) 843-0045
(800) 541-2195
FAX (407) 839-0287
E-Mail: fbf@flabarfndn.org

A. Hamilton Cooke, Esq.
President
Fla. Bar No. 110757

Darryl M. Bloodworth, Esq.
President-Elect
Fla. Bar No. 141258

Randall C. Berg, Jr., Esquire
Fla. Bar No. 318371
Peter M. Siegel, Esq.
Fla. Bar No. 227862
JoNel Newman, Esq.
Fla. Bar No. 112320

FLORIDA JUSTICE INSTITUTE, INC.
200 S. Biscayne Blvd.
2870 First Union Financial Center
Miami, Florida 33131-2310

(305) 358-2081
FAX (305) 358-0910
E-Mail: rcberg@bellsouth.net

On behalf of The Florida Bar Foundation and the following active members
of The Florida Bar:

Charles W. Abbott
Ira Abrams
Louie N. Adcock, Jr.
Thomas D. Aitken
James E. Alderman
Ralph Armstead
Scott L. Baena
Michael R. Band
Thomas H. Barkdull, Jr.
Eunice T. Baros
Hilarie Bass
David Bazerman
Randall C. Berg, Jr.
Nora Riva Bergman
Robert A. Bertisch
Susan H. Bingham
Michael D. Birnholz
Bruce B. Blackwell
Darryl M. Bloodworth
Edward R. Blumberg
Charles Shawn Boehringer
James A. Bonaquist, Jr.
Alan B. Bookman
Donald L. Braddock
Jack P. Brandon
Harriet P. Brown
Thomas W. Brown
Rowlett W. Bryant
Mark Buchbinder
Robert J. Buonauro
Howard M. Camerik

Howard A. Caplan
Matthew Capstraw
John P. Cardillo
Russell E. Carlisle
Patrick J. Casey
Vivian Z. Chavez
Neil Chonin
Christine A. Clark
Kendall Coffey
Lawrence Collins
A. Hamilton Cooke
Henry M. Coxe, III
Philip Bruce Culpepper
John P. Cunningham
Marcia K. Cypen
Howard L. Dale
Talbot D'Alemberte
William H. Davis
Stephen E. Day
Mary Anne DePetrillo
Russell W. Divine
Kathleen Dolan-Valdes
Mayanne Downs
Paul C. Doyle
John E. Duvall
Rashad El-Amin
Stephen C. Emmanuel
Theodore D. Estes
LaShan Fagan
Terrell Keith Farr
Ladd H. Fassett

Janet L. Findling
Jose Fons
John W. Frost, II
David Fussell
George D. Gabel, Jr.
John Germany
Leonard H. Gilberg
Leslie A. Goller
Lizel Gonzalez
Barbara Goolsby
Oliver L. Green
Douglas M. Halsey
Amy Hamlin
Stephen F. Hanlon
William O.E. Henry
J. Fraser Himes
John Wayne Hogan
Mark L. Horwitz
Kelley C. Howard
Arlene C. Huszar
Christopher Jones
Richard T. Jones
Kevin Kenneally
David B. King
Theodore Klein
Kristine E. Knab
Warren LaFray
Sharon L. Langer
Noel G. Lawrence
Scott A. Livingston
Carolina Lombardi
Karen Lopez
Dominic C. MacKenzie
R. Gavin Mackinnon
Amelia Rea Maguire
Bruce Marger
Miles A. McGrane, III
Shannon P. McKenna

Kathleen McLeroy
F. Shields McManus
Christopher C. Meyer
J. Andrew Meyer
Joe Miklas
Dawn K. Miller
Gene Moore
H. Edward Moore, Jr.
Stephen B. Moss
Chandler R. Muller, Sr.
Rene V. Murai
John A. Noland
Christopher L. Nuland
Stewart O. Olson
Andrew M. O'Malley
A. L. Paoli
Daryl D. Parks
Natasha Permaul
Jean Perwin
Lawrence J. Phalin
Patrice J. Pilate
Sylvia Ponce de Leon
Michelle A. Prescott
Bette Ellen Quiat
Kelly V. Rauch
Gene Reibman
Andrea L. Reino
Gerald F. Richman
Janet R. Riley
James C. Rinaman, Jr.
Mary Anne Robertson
Bruce Rogow
Robin L. Rosenberg
Scott C. Rowland
James M. Russ
Marsha G. Rydberg
Vance E. Salter
John C. Schaible

L. David Shear
John Phillip Short
Glenn A. Shuman
Peter M. Siegel
Scott Simkins
William Reece Smith, Jr.
Robert M. Sondak
Robert F. Spohrer
Kent R. Spuhler
C. L. Stagg
Charles R. Stepter, Jr.
Eli H. Subin
Daniel Terner
John W. Thornton, Jr.
Virginia B. Townes
Russell Troutman
Mark L. Van Valkenburgh
Lynn E. Wagner
Sylvia H. Walbolt
Kelly A. Wiener
Richard C. Woltmann
Cynthia D. Woodward
Donald E. Yates

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing and all attachments have been furnished to John F. Harkness, Jr., Esq., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by U.S. Mail this 26th day of April, 2001.

—
A. Hamilton Cooke

