IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR-MISCELLANEOUS
_____/

CASE NO. SC22-1292

THE FLORIDA BAR'S RESPONSE TO THE FLORIDA BANKERS ASSOCIATION'S MOTION FOR REHEARING

The Florida Bar, by and through its undersigned counsel, opposes the motion for leave to appear as amicus curiae filed by the Florida Bankers Association's ("FBA") and its motion, as an amicus curiae, for rehearing of the final order issued by this Court on March 16, 2023. The FBA's motions present four arguments, none of which warrant delaying the implementation of the amendments to Rule 5-1.1(g) of the Rules Regulating the Florida Bar that are scheduled to go into effect on May 15, 2023.

The FBA's arguments appear to misunderstand the actual function of Rule 5-1.1(g) as a rule regulating lawyers. But even more important, the FBA's arguments overlook the principles of free market economics, which played a major role in the need for these changes to this rule. The Bar is seeking to achieve its longstanding

goal of obtaining the highest interest rates available in the free market by amending the rule to create a structure that can be successful. The Bar will first explain the problem addressed by this amendment to the rule, and then will address the four arguments of the FBA.

This amendment to the rule addresses several issues that have long interfered with the goal of achieving the highest interest rate available in a free market to fund qualified legal services for low-income clients of legal service organizations.

It is important for this Court to understand at the outset that the recent amendment does not "regulate" banks. Likewise, it does not give this Court power to sanction banks. Instead, these changes are designed to regulate lawyers in the process of opening and maintaining IOTA trust accounts.

Trust accounts are unusual accounts because the lawyer who opens and manages the account is not the owner of the funds deposited in that account. Historically, lawyers often opened trust accounts that provided no interest, and any right of the actual owner of the funds to receive interest was unclear. *See A Petition of Fla. Bar,* 356 So. 2d 799 (Fla. 1978)(approving the creation of the IOTA account concept). When IOTA accounts were authorized in 1978, at

least for short-term and nominal amounts, this Court ruled that accounts could be established that did not pay interest to the owners of the funds. Instead, the interest received could be used to provide legal services for low-income Floridians. Lawyer participation in this program became mandatory in 1989. *See Matter of Int. on Tr. Accounts: Petition to Amend Rules Regulating the Fla. Bar*, 538 So. 2d 448 (Fla. 1989). In 2001, Rule 5-1.1 was amended to include the requirement that an eligible institution would be one that offered the "highest interest rate or dividend generally available from the institution to its non-IOTA customers." *See Amendment to Rules Regulating the Fla. Bar--Rule 5-1.1(e)--IOTA*, 797 So. 2d 551, 555 (Fla. 2001).

But these original rules did not take into consideration the forces of the free market that were in play for these accounts. These rules did not establish an objective standard for lawyers to follow that could, when necessary, be enforced. Without such rules it proved impossible to achieve the goal of obtaining the highest interest rate available in the free market to fund the legal services programs.

The problems created by the forces of the free market prior to the recent amendment were at least three-fold. First individual

lawyers were opening IOTA trust accounts with banks that specialized in this service and often had large portfolios containing hundreds of trust accounts. An individual lawyer was a small player on an uneven playing field trying to bargain for the highest interest rate as the party essentially loaning capital to the bank. In some fashion, the Bar needed to help the lawyer have more power to establish a true fair market interest rate. The Bar needed to help level the playing field.

Second, it was up to individual lawyers to choose the banks in which the trust account capital was deposited even though they did not own the money and had no right to the interest received from loaning that capital. These lawyers not only had little bargaining power, they had no stake in the deal. Economically, they were no better off if the rate was high or low.

Third, the Bar had never created a workable enforcement method to incentivize lawyers to actually seek the highest rate. Eventually the Bar came to understand that lawyers needed an objective, measurable standard to fulfill, which could be positively recognized when achieved, and which could be enforced on those rare occasions when lawyers violated the standard.

Banks were the beneficiaries of these three factors. They were understandably quite content to allow these defects in the free market, which resulted in lower interest rates for IOTA trust accounts, to last forever. Now, at least some of those banks do not wish for the market to better emulate a classic free market.

Finally, these three problems drew the attention of one of the Bar's two nonlawyer members, Joseph D. Hudgins, who is a respected banker with extensive experience. He worked with other members of the Board of Governors to create the amendment with a floating minimum interest rate that is 3% (300 basis points) below the prime rate when that rate is less than 5%, and 40% below any rate that is higher than 5%. (*See, Appendix A).* The Bar maintains that this minimum rate is within the reasonable range of the fair market price to charge banks to receive the billions of dollars of capital in these lawyers' IOTA trust accounts.

This rule does not compel any bank to offer this interest rate. But by setting this objective standard, every lawyer has a goal that the Bar maintains is achievable. These lawyers will now negotiate more aggressively to achieve what the Bar maintains is the fair market price. When lawyers achieve this goal, they can be recognized

for this achievement. And the Foundation will have a larger, and a more consistent, fund from which to provide legal services to low-income Floridians.

When necessary, this definition of the minimum amount is also sufficiently precise to allow the Bar to enforce the rule when a lawyer knowingly and intentionally leaves IOTA funds in a low-interest account while another bank is willing to accept the lawyer's IOTA trust funds with an account paying the minimum rate or a rate that is higher.

The result of this is that lawyers who previously had no stake in seeking the highest available rate now will have a stake in achieving that goal. This means that they actually will negotiate to obtain the highest available interest rate in the free market.

This change does not set a mandatory interest rate in an otherwise free market. Instead, it sets what the Bar believes to be a reasonable rate to seek on these accounts. Mr. Hudgins maintains that this minimum rate is well within the price range that will create an adequate supply of willing bankers to offer trust accounts sufficient to cover the amounts held in those accounts by Florida's lawyers. The Bar is setting its asking price in this regulation and

understands there is some risk that the "buyers" on other side of the market might not be willing to pay this amount for some of the $6.5 billion[1] that the FBA explains is the capital for sale to banks at the interest rates established by this rule. But the Bar expects that there will be banks willing to compete at these levels.

To be clear, the Bar fully understands that it will take time to implement this rule after it goes into effect. It recognizes that some lawyers may need to close existing accounts and move those accounts to more competitive banks during the implementation of this rule. If the FBA is actually correct in its unsubstantiated, "sky-is-falling" threat that a shift to more competitive interest rates will produce a shortage of banks willing to provide these services, that is an issue that can be addressed if and when it actually occurs.

But the IOTA program remains a voluntary program for banks. Neither the Bar nor this Court can "punish" banks that do not chose to enter or remain in this market when the IOTA program is unwilling to loan its relatively modest share of the capital available to Florida

[1] *See,* "Foundation hopes to enhance IOTA rates," *Florida Bar News,* Nov. 10, 2020. That figure could be higher now. https://www.floridabar.org/the-florida-bar-news/foundation-hopes-to-enhance-iota-rates/ (last visited Apr. 13, 2023).

banks at interest rates the Board of Governors has determined to be a fair rate to demand on the open market. The free market does not "punish" or even "regulate" participants who do not or cannot meet the price of a willing seller or the counteroffer of a willing buyer; that market simply provides sales to those who can compete in the relevant market.

Understandably, the FBA and some of its members want to retain a flawed market system where the banks can create accounts with lawyers who have no stake in the bargain. When one half of the participants in a market, whether generically the "buyers" or the "sellers," have no stake in the deal, they have nothing to gain by reaching the intersection of the demand curve and the supply curve to establish the "fair market" price. Inevitably, the parties with a stake in the deal come out better in such a flawed market.

Even worse, if the seller of services who does have a stake in the deal can find some alternative incentive, financial or otherwise, to offer the person on the other side of the table–when that person has no financial stake in the deal–the buyer can do even better. For example, a corporate executive who buys airline tickets for business travel on a personal credit card, but is subsequently reimbursed by

the employer, has less incentive to buy the cheaper tickets if he or she personally is receiving the benefits of an airline miles incentive program. Lawyers have had no stake in the "sale" of the capital in their trust accounts to banks, but they have had a stake in their other accounts and sometimes also in their relationships with the banker. This change should largely eliminate the banks' ability to use outside factors to their benefit when interest rates are being set for trust accounts.

Simply put, the changes being made in Rule 5-1.1(g) are changes to repair the market in which interest rates for IOTA trust accounts are established in order to make that market closer to the theoretical model of the free market. The FBA has little or no standing to protest these changes.

A. <u>The FBA does not have a due process right to enter this rulemaking process at this late stage.</u>

The FBA makes a lengthy due process argument that is actually a mixture of arguments – none of which raise genuine due process concerns. Due process under Article 1, section 9 of the Florida Constitution protects legal rights to life, liberty, or property. The FBA

does not even attempt to describe a life or liberty interest that it or its members possess that is impacted by this rule change. It cannot claim that the IOTA funds deposited in its members' banks belong to the banks. It does not have a constitutional property right to compel customers to accept interest rates that are lower than the rates at which the customers wish to loan their funds.

As a result, the FBA argues broadly that it and its members did not get "meaningful" notice of the proposed amendment. The FBA seems to admit that the Bar provided all of the notices required by Rule 1-12.1(d). Under that rule, and as required by the Bar's Board of Governors pursuant to Standing Board Policy 1.60, the Board published its notice of intent to have first reading and final action on the proposed amendments to Rule 5-1.1(g) as follows:

- First reading publication on the Bar's website on December 11, 2020
- First reading publication in the print edition of the Florida Bar *News* on January 1, 2021
- Final action publication on the Bar's website on January 14, 2021
- Final action publication in the print edition of the Florida Bar *News* on February 1, 2021

- Final action publication on the Bar's website on February 22, 2021
- Final action publication in the print edition of the Florida Bar *News* on March 1, 2021

As required by Rule Regulating The Florida Bar 1-12.1(g), the Bar also published its notice of intent to file this petition in the September 1, 2022, print edition of the Florida Bar *News*, and on the Bar's website on August 25, 2022.[2]

Additionally, the Bar emailed all members in good standing a preview of significant items for Board of Governors action before the March 5, 2021, meeting and another email summarizing action taken at the March 5, 2021, meeting. The information contained in the Board of Governors preview and summary were also posted on the bar's website. (Appendix B).

Neither the FBA, nor any of its members, nor any lawyer representing any bank filed a response to any of these published notices. The FBA cannot claim that the Bar violated any procedural

[2] The notices, postings, and emails are attached to this motion as Appendix B.

notice requirement that this Court created exceeding the notice requirements of constitutional due process.

The FBA also does not claim that it lacked actual notice of the rule change proceeding. As explained earlier, this rule change was largely influenced by a nonlawyer board member, Joseph D. Hudgins, who has been in the banking industry in Florida for over 33 years. His affidavit with this filing explains the numerous members of the banking community that he personally notified of this proposed change. (Appendix A).

In addition to this deprivation of "meaningful' notice argument, the FBA points out that this Court can expand the time to provide comments. That is true; and thus this Court did not strike the FBA's unusual motion to appear as amicus curiae. But the FBA's suggestion that it had some need to file a comment because this Court removed a proposed minimum interest rate of 25 basis points for situations when the prime rate falls below 300 basis points makes very little sense. (FBA motion, p. 17). The FBA is not really suggesting that it wants this Court to mandate this particular 25-basis point minimum rate when it wants the Court to reject all of the

other rates. It is true that this Court sometimes adds an additional period for comment when it changes a rule in a significant manner in the final order without prior notice of that change. *See, e.g., In re Amendments to the Rules Regulating the Florida Bar – Rule5.1.1(e),* 692 So. 2d 181 (Fla. 1997). But this Court changed nothing about this amendment other than to eliminate the 25-basis point provision that the FBA certainly would have opposed had it filed a timely comment. No action by this Court itself creates a need for additional comment.

Finally, the FBA's comments filed as part of its motion do not demonstrate a need for any change warranting a delay in the implementation of the rule. The FBA simply wants to continue the flawed market system for as long as it can for the benefit of those of its membership who wish to keep the additional revenue for their banks rather than using it to fund legal services for low-income Floridians. The FBA and its members are not offering alternative methods to fix the defects in the market to make it better emulate a classic free market.

As explained earlier, the Bar is not so naïve that it thinks that all trust accounts will change to higher interest rates on May 15,

2023. It realizes that the process will take considerable time. Like any change in a market, those more willing to adapt to the change will likely change first. If the Bar is incorrect in its assessment that the market will find a sufficient supply of banks willing to receive the funds from these trust accounts by agreeing to a rate well below the prime rate, the Bar may eventually need to reconsider the language of this amendment. But for the first time, lawyers will actually have an objective, enforceable rule that will give them the incentive to seek out banks that do offer these rates. The Bar remains optimistic that it can achieve the goal set by this rule.

B. The "real world impact" is not a reason to allow the FBA to delay implementation of this rule.

The FBA claims that the aggregate $6.5 billion fund of IOTA accounts includes thousands of individual lawyer trust accounts. That is true, as reflected in the Florida Bar *News* article cited by the FBA.[3] Interestingly, the FBA relies on an article published online in November 2020, that discussed Mr. Hudgins' ideas about the

[3] https://www.floridabar.org/the-florida-bar-news/foundation-hopes-to-enhance-iota-rates/ (last visited Apr. 13, 2023).

proposal as a banker. The article explained: "[Mr. Hudgins] said the committee is trying to find a rate that is fair to the banking industry while still enhancing IOTA revenues, and that his colleagues in the banking industry have told him the proposed rate would be reasonable." Being "fair" to the banks does not mean that the Bar should accept an interest rate that it believes is below the market rate. That is especially true when the interest payments will not be profit for the individual lawyers, but will be funds used to provide legal services to low-income Floridians.

The FBA claims that these accounts have more transactions than other accounts and are intended to handle mostly short-term deposits. That is largely correct, but it overlooks the fact that the frequent deposits tend to offset the frequent withdrawals. As a result, a bank that develops a large group of these accounts creates a fairly stable net balance in these accounts that, from a banker's perspective, is an attractive funding source, as explained in Mr. Hudgin's affidavit accompanying this response. (Appendix A). The FBA does not actually support its argument that the marginal costs of handling a volume of standard deposits and withdrawals in these accounts–for a modern, computerized bank, especially one that has

sufficient trust account deposits to handle this business at a reasonable scale–are costs that prevent banks from competing at this level.

The FBA uses as, an example, the policy of some banks of providing free verbal verification for wire transfers. This Court has not prohibited banks from charging service fees for such special services. In fact, the rule has long recognized that banks are not expected to "discriminate between IOTA accounts and accounts of non-IOTA customer." *See* Rule 5-1.1(5)(C). If a client is engaged in a transaction that warrants such a secure transfer of funds, the fact that the funds are transferred from a trust account, and not from a client's private account, should not be a basis to shift the cost of this service to the IOTA account as compared to the specific client that required the special service. If anything, this "free" service for such wire transfers as described by the FBA may be a benefit to the lawyer for keeping the trust account at a bank that does not charge the lawyer the fees it would charge to other customers.

Finally, the FBA makes a "sky-is-falling" argument that the Bar's intention to seek the highest interest rate available in the free market for accounts in Florida totaling $6.5 billion could have

"unimaginable consequences." (FBA motion, p. 22). It implies that banks in Florida could collapse like the Silicon Valley Bank because this one group of customers, which controls an aggregate fund of more than $6.5 billion, is seeking a rate 3% below prime. The FBA does not discuss the total amount of all deposits in the banks of its members or even what percentage of its deposits are derived from this group of IOTA trust accounts. But it is virtually certain that the Bar's role in this free market is far from giving it any abnormal power in the marketplace that will disrupt the market---much less bring down the Florida banking industry.[4] The Bar realizes that some banks have recently had liquidity issues due to investment strategies based on the assumption that the prime rate would not go up as rapidly or as much as it has. The Bar is trying not to contribute to such problems by creating a floating rate that is always well below the current prime rate. Suffice it to say that the Silicon Valley Bank did not collapse because the California Bar already had an IOTA program similar to what Florida is trying to develop.

4 https://www.ibanknet.com/scripts/callreports/fiList.aspx?type=sodstatebanks&state=12 (last visited Apr. 12, 2023).

Finally, the "real world impact" includes the real world for the lawyers with IOTA accounts as well. Since the Bar began considering this option more than two years ago, the interest rates banks charge for loans have gone up nearly as fast as the prime rate. The interest rate that many banks pay to valued commercial customers on other accounts has also gone up substantially. But the IOTA accounts have not experienced similar increases in this period. Many of those accounts still earn less than 1%. The "real world impact" for the members of the Bar only emphasizes the need for these amendments in order for lawyers to bargain for fair market rates on their IOTA accounts.

C. <u>This rule regulating lawyers is not preempted by Federal banking law</u>.

The FBA makes an argument that the amendment to Rule 5-1.1(g) violates the Supremacy Clause of the U.S. Constitution because the rule conflicts with the National Banking Act. Rule 5-1.1(g)(2) has long required members of the Florida Bar to place

nominal and short-term funds belonging to clients or third persons into an IOTA account.

Subsection 5 of the rule defines an eligible account for such deposits. It has long told lawyers to put these funds into an available account with a high interest rate. Participation as a bank in this program is entirely voluntary. The change to this rule simply explains to the lawyer that an "eligible institution" has to be one that, at a minimum, offers rates about 3% below the prime rate. A bank that does not believe it can compete at that minimum rate is not compelled to participate. It is free to stay outside the market and allow other banks to participate in that market.

As this Court knows, more than 25 other states have similar, but not necessarily identical, requirements. (See, Appendix D to the Bar's Petition). Other large states like Texas, New York, and California have such requirements.[5] Our neighbor, Georgia, has a

[5] Those rates are not typically stated as 3% below the prime rate. They are often based on the Federal Funds Target Rate, which is normally very close to 3% below the prime rate. *See* https://www.esl.org/resources-tools/educational-resources/understanding-the-prime-rate#:~:text=The%20target%20federal%20funds%20rate,than%20the%20federal%20funds%20rate (last visited Apr. 12, 2023).

similar program. The FBA cites no example of a case holding that another state's IOTA program violates the Supremacy Clause.

Instead, the FBA relies on *McCulloch v. Maryland*, 17 U.S. 316, 327–28, 1819 WL 2135, at *4 (U.S.1819). The actual quotation, which is so often repeated as a shorter sound bite, states:

> An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation. A question of constitutional power can hardly be made to depend on a question of more or less. **If the states may tax, they have no limit but their discretion; and the bank, therefore, must depend on the discretion of the state governments for its existence**. This consequence is inevitable. The object in laying this tax, may have been revenue to the state. In the next case, the object may be to

Delaware, Georgia, North Carolina, Ohio, South Carolina, Texas all use rates that are 65% of the Federal Funds Target Rate. https://www.delawarebarfoundation.org/faq-for-banks https://www.gabar.org/aboutthebar/lawrelatedorganizations/iolta/iolta.cfm https://www.ncbar.gov/for-lawyers/governing-rules-of-the-state-bar/1317-comparability-requirements-for-iolta-accounts/ https://www.ohiojusticefoundation.org/lawyers/iolta-iota-financial-institutions/ https://scbarfoundation.org/iolta https://www.teajf.org/financial_institutions/docs/Financial%20Institution%20Guidebook%20-%202021.pdf (last visited Apr. 13, 2023).

> expel the bank from the state; but how is this object to be ascertained, or who is to judge of the motives of legislative acts?

Id. at 327–28, 1819 WL 2135, at *4 (U.S.,1819)(emphasis supplied).

Simply put, neither the Bar nor this Court is trying to "tax" national banks. We are not trying to retard or impede or burden national banks. The Bar is trying to facilitate its members to be competitive customers in the free market of banking. The free market itself naturally sets a "limit" on the ability to seek the minimum rates in this new rule. Respectfully, the United States Supreme Court did not prohibit participation in the free market as an act in violation of the Supremacy Clause.

D. <u>The judiciary has not encroached on the Executive Branch in this amendment.</u>

The Bar, of course, agrees that the Florida Constitution provides for three branches of government in Article II, section 3 of the constitution. It also agrees that since 1972, the Court has had express authority, indeed "exclusive jurisdiction," to regulate the discipline of lawyers, including requirements for trust accounts. It

agrees that the IOTA program has been voluntary for banks from the beginning of the program.

The FBA claims the Court has crossed the line into the Executive Branch merely because the rule finally explains to lawyers the minimum interest rates that they need to seek for an IOTA trust account. But this Court is not regulating banks; to the contrary, Rule 5-1.1(g) assures them they have no obligation to participate. This Court is regulating lawyers over whom it has exclusive jurisdiction.

The FBA claims these rates are "prohibitively high." Presumably, that would mean that the rate the rule is seeking will not provide any bankers willing to participate in the market at such rates. But then, the FBA states: "This will likely cause some banks–perhaps even a significant number–to withdraw from the IOTA program." Depending on your definition, a "significant number" of banks probably do not participate in the program today. The free-market issue is whether Rule 5-1.1(g) is setting a price at which a sufficient number of banks are willing to participate at a sufficient level to provide service for all the necessary accounts. There obviously is a disagreement between the Bar and the FBA as to

whether the rates in the rule are too high to hit the proper intersection on the supply and demand curve. The Bar believes that it is correct, and that incentivized lawyers can achieve this goal given some time.

But again, this is a rule regulating lawyers. A bank is free to offer services below these rates. A bank's free-market activity is not constrained by a rule regulating lawyers. If it turns out that a lawyer, despite reasonable efforts cannot locate a "participating" bank for his IOTA trust account, that lawyer will not be committing a knowing or intentional violation of the Bar Rules. Indeed, after a reasonable search, that lawyer would not be committing even a negligent violation of the rules.

If a bank is currently servicing IOTA trust accounts successfully at a higher rate, it is certainly free to continue to offer to do so. The lawyer will simply need to transition to a fully "participating" bank when such a "participating" bank becomes available to service that lawyer's trust account. There is no need for the banks to close the current accounts on May 15, 2023. The transition to participating banks can be done in an orderly fashion.

Nothing in this approach to the free market intrudes on the regulatory powers of the executive branch of government. Thus, none of the four arguments presented by the FBA warrant a rehearing of a case in which the FBA simply did not participate.

CONCLUSION

In closing, the Bar needs to comment on the FBA's insistence that the Bar should be chastised for seeking too much money for legal services for low-income Floridians. Since the major drop in interest rates years ago, the legal services providers have struggled to make do with the available IOTA funds. The needs of that program are never fully met. The Bar does not realistically expect the Foundation to receive $200,000,000 in interest in the upcoming year. Implementing this free-market approach will take time. It is also useful to remember the history of high interest rates in the early 1980s. When the prime rate went up, more and more clients began to seek ways to handle their funds outside IOTA accounts in order to keep even short-term payments of interest. If the prime rate stays high in Florida, we will see that same conduct occurring again.

Better funding for necessary legal services for low-income Floridians is a goal worth pursuing. The Bar is proud of the efforts

of its many lawyers who provide countless hours of pro bono services for the needy. But to provide services for all low-income Floridians–both to directly benefit those Floridians in need and to assist the courts that must serve the special needs of untrained, pro se litigants, the Bar is committed to do more. It will not apologize for pursuing this goal with zeal. It will not yield its advocacy for this goal merely because the banks today seem to believe that they have a better use for these funds than the use the free-market system will permit.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Bookman Old Style type.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April, 2023, the foregoing was filed and served via the State of Florida's E-Filing Portal to:

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