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FILED

SID J. WHITE

OCT 15 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

AMENDMENTS TO RULES REGULATING)
THE FLORIDA BAR - 1-3.1(a) AND)
RULES OF JUDICIAL ADMINISTRATION)
- 2.065 (LEGAL AID))
_____)

CASE NO. 74,538

RESPONSE BY FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.
IN OPPOSITION TO COMMITTEE REPORT

I. Statement of Interest.

The Florida Public Defender Association, Inc. is comprised of the elected Public Defenders of the twenty judicial circuits of Florida, their Assistant Public Defenders in excess of eight hundred and fifty and non-attorney support staffs. All Public Defenders and Assistant Public Defenders are members of The Florida Bar and subject to the Rules Regulating The Florida Bar. Constitutional provision for Public Defenders is found in Article V of the Constitution of the State of Florida. Statutory authority is provided by Florida Statutes at Chapter 27.

The Florida Public Defender Association, Inc. provides training and coordinating functions for the various Public Defender offices. The Public Defender of the Tenth Judicial Circuit is a member of the Florida Public Defender Association, Inc. and submits these objections at the request of and on behalf of the Florida Public Defender Association, Inc.

II. Objections to and comments on proposed amendments.

A. 4-6.2 Pro Bono Legal Service to the poor.

While agreeing with the responsibility of members of The Florida Bar to provide pro bono service, the Florida Public Defender Association, Inc. argues that the proposed rule has particular impact on Public Defenders and Assistant Public Defenders. The argument could be made that every Assistant Public Defender

working more hours per week than presupposed by his or her salary is providing direct free legal services to the poor. As the various Public Defenders of the State represent only the indigent or partially indigent, it would be difficult to claim that these members of The Florida Bar were not presently doing more than their fair share of pro bono work.

The manner in which the mandatory twenty hours of pro bono legal service could be discharged is particularly onerous to elected Public Defenders and their assistants.

1. Public Defenders are prohibited by statute from the practice of law other than in the performance of their constitutional and statutory functions. Section 27.51 (3), Fla. Stat. (1991).

In 1989, an Attorney General Opinion as to whether Public Defenders can lawfully provide pro bono services was requested by the Honorable Jack Behr, Public Defender, First Judicial Circuit of Florida. The Honorable Robert Butterworth, Attorney General answered in the negative:

Section 27.51 (3), F.S. provides:

Each public defender shall serve on a full time basis and is prohibited from engaging in the private practice of law while holding office...

Section 27.51 (3), F.S., makes no distinction between compensated and uncompensated work; nor does it provide an exception for either. It would appear, therefore, that any legal assistance which a public defender might provide outside the duties of the public defender's office would be prohibited. Accordingly, it is my opinion that the prohibition in 27.51 (3), F.S., precludes a public defender from providing pro bono legal assistance so long as he or she is in office.

1989, Op. Atty. Gen. Fla. 89-88 (December 13, 1989). As the Public Defenders are prohibited by law from providing pro bono legal services, they would be singled out from other Bar members as having only the option of the \$350.00 "buy-out."

Since the mandatory reporting provisions of this "voluntary" program will be a matter of public record, Public Defenders who chose to comply with the rule will be listed among those lawyers not willing to provide direct legal service to the poor and preferring to "buy out" of their responsibility. As Public Defenders are elected political officials, the proposed rule and the statutory prohibition could have a uniquely negative impact on Public Defenders as their choices of options in meeting the rule would be limited to no choice at all.

2. The requirement that the Assistant Public Defenders participate in the "voluntary" program is particularly onerous.

a. Assistant Public Defenders are unique in that they are members of The Florida Bar who have chosen to serve only the poor. To put them in the same reporting status as partners of law firms making salaries in excess of \$100,000.00 is particularly irksome and professionally insulting. In effect, the proposed rule tells Assistant Public Defenders that their decision to serve the poor for salaries lower than available in private practice is somehow lacking in value to the profession.

b. The fact that many Assistant Public Defenders lack expertise beyond the only area of law specifically exempted from the provisions, that is, criminal matters in which representation of the indigent is mandated, is burdensome and, again, has a particularly negative effect on Assistant Public Defenders. They are prohibited from practicing the very type of law which they know best.

c. The vast majority of Assistant Public Defenders are full time state employees. As such, they do not have private offices with secretarial staff. Assistant Public Defenders would not have malpractice insurance even though most would be required to render legal service in areas of the law strange to them.

d. The "buy-off" amount of \$350.00 is excessive. There should be a graduated amount based either upon income or number of years experience as a practicing attorney.

The worst aspect of the program is its failure to realize that attorneys in Public Defender, State Attorney and Attorney General offices are tremendously overloaded. These attorneys do not have the luxury of simply limiting their intake of new cases in order to allow them to do pro bono cases.

It has been authoritatively recognized that Florida's Public Defender system is overloaded with clients and underfunded. A special committee of the Florida Judicial Council concluded that

the problem of the criminal workload within the judicial system of the State of Florida is a problem of volume that can not be regulated, but must be dealt with as it occurs. Not only does the problem exist now in crisis proportion, but it appears that the workload in regard to all parts of the criminal justice system is likely to increase.

Report of the Judicial Council Special Committee on Criminal Appeal Structure Relating to Indigent Defendants at 9 (March 30, 1989). The current situation has been exacerbated by increased caseload and budget reductions over the past three fiscal years.

Most Assistant Public Defenders have been denied raises and many actually had their salaries reduced through furloughs without pay in the past three years. Hiring freezes have prevented the addition of needed assistants. Caseloads have increased while the legislature has funded no appropriation for workload increases.

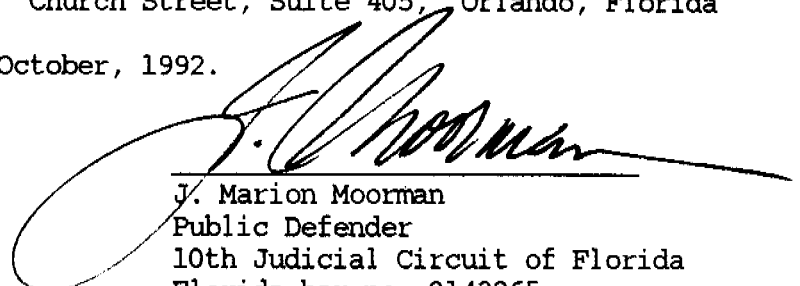
For Assistant Public Defenders, the fulfillment of the requirement presents a limited number of unpleasant choices.

(1) Report no pro bono work and run the risk of the media publishing this information to the attorney's detriment.

(2) Pay the \$350.00 "buy-off" amount, an amount which many assistants could not afford to pay in addition to other obligations. Those attorneys "buying-off" also run the risk of unfair media treatment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to William A. VanNortwick, Jr., Chair, Joint Commission, Martin, Ade, Birchfield & Mickler, 3000 Independent Square, One Independent Drive, Jacksonville, Florida 32202 and Paul C. Doyle, Staff Director, Joint Commission, The Florida Bar Foundation, ~~109~~ East Church Street, Suite 405, Orlando, Florida 32801 by U.S. Mail this 14th day of October, 1992.


J. Marion Moorman
Public Defender
10th Judicial Circuit of Florida
Florida bar no. 0143265

(3) Handle pro bono matters in addition to regular caseload, running the risk of ineffective assistance of counsel in either or both situations. See Escambia County v. Behr, 384 So.2d 147 (Fla. 1980); Fla. Bar Rules of Discipline, Comments, Rule 4-1.3 and 4-6.2.

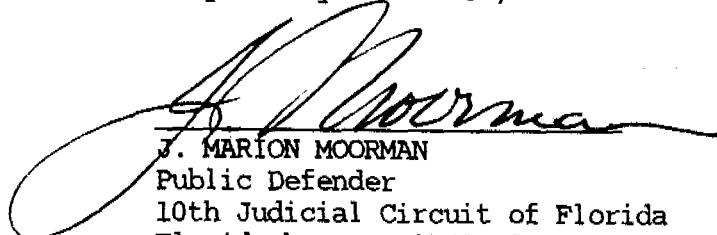
B. Rule 4-6.3, 4-6.4, 4-6.5

The Florida Public Defender Association, Inc. has no objection to these rules and endorses their spirit.

III. Conclusion

The committee report on pro bono legal services creates a uniquely negative impact on Public Defenders and Assistant Public Defenders. For Public Defenders and Assistant Public Defenders to have choices in the manner in which they discharge their responsibility under the proposed rules, legislative action would be required over which the affected attorneys would have no control. This Court should recognize the unique contribution of public defender work as a manner of compliance or exempt Public Defenders and Assistant Public Defenders from the rule.

Respectfully submitted,


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Florida bar no. 0143265

ON BEHALF OF THE FLORIDA PUBLIC
DEFENDER ASSOCIATION, INC.