Original

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
IN RE: PETITION TO AMEND
THE RULES REGULATING THE
FLORIDA BAR - PERJURED
TESTIMONY

CASE NO.: 74,699

REPLY TO PETITION TO AMEND RULE 4-3.3 OF THE RULES OF PROFESSIONAL CONDUCT

The undersigned Respondent admits all of the allegations of the Petition, subject, however, to the following qualifications which are for the purpose of citing perceived deficiencies in the present rule which are carried forward into the proposed new rule:

1. Respondent suggests that the last full sentence of Rule 4-3.3(a)(4) would better serve the purpose of the rule if the phrase:

"comes to know"

were deleted and the following phrase were inserted in lieu thereof:

"learns or reasonably should have learned."

ARGUMENT FOR THE PROPOSED CHANGE

2. It is too easy for lawyers **NOT** to learn anything

about anything if they simply ignore assertions by responsible persons that the evidence which they submitted during the trial was erroneous, This "stonewall" or "cover up" attitude provides lawyers with a perfect defense or means of evading his or her duty of candor to the court.

3. The proposed language already appears in Rule 4-1.2(d), which says:

"knows or reasonably should know".

4. The idea that lawyers (who represent Personal Representatives) should be required to take affirmative action and not ignore known facts or facts which reasonably should have been known was recently incorporated in Section 733.212(4)(a) of the Florida Probate Code, Chapter 89-340, Laws of Florida, Volume 8, Wests Florida Session Law Service, 1989 Laws. (Personal Representatives should make diligent search to determine the names and addresses of creditors of the decedent who are reasonably ascertainable.) That statute incorporates the language of the U.S. Supreme Court in Tulsa Professional Collection Services, Inc. v. Pope, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

ARGUMENT AGAINST THE CHANGE HERE PROPOSED

5. The addition of the words

"reasonably should have learned"

places an unreasonable burden upon lawyers to conduct exhaustive, perhaps extraneous, after the fact (or before the fact)

investigation in respect to evidence to be submitted or theretofore submitted.

THERE IS A NEED FOR COMPLETELY NEW RULES

6. Rule 4-3.3, as presently constituted, jumbles together various situations and classes of person which should be made the subject of separate rules. A distinction should be made in the rule which separates (on the first hand) conduct of clients who are represented by lawyers when they testify and the conduct of lay witnesses whom lawyers induce to come to Court and testify and (on the other hand) expert witness testimony prepared under the supervision of lawyers and summations or other evidence prepared by lawyers. It is one thing for a lawyer to rely on the voracity of a witness whom he interviews before the commencement of the trial. It is an entirely different matter for a lawyer to himself prepare summations (such as complicated calculations) or to induce expert witnesses to prepare calculations or summations for use in the trial. In the latter case, the lawyer has a much higher duty of candor. There should be a separate rule on each of the foregoing subjects.

7. The present Rule 4-3.3 relates almost entirely to proceedings before the trial court. *An* entirely separate rule in respect to appellate proceedings should be promulgated. Many appellate lawyers indulge in the practice of making factual representations in their briefs which are not supported by the

record and citing cases for a given proposition of law when those cases do not constitute any such authority. Much, if not most, of that type of misrepresentation is not mentioned in the briefs of responding parties because they are confronted with the necessity of gaining the Court's attention as to the principal points on appeal. If the lawyer who drafts the responsive brief is confronted with the necessity of refuting numerous misrepresentations of fact not supported by the record or the use of improper case citations, the space consumed distracts the Court from the real problem with which the Court is confronted. Consequently, the responding lawyer is forced to choose between (i) the necessity of numerous, not highly relevant refutations of fact or law and (ii) an ungarbled brief which addresses the real issue before the Court. By this means, the offending lawyer gains an unfair advantage; many, if not all, of his unfair misrepresentations of fact or law remain unrefuted throughout the entire appellate process. For example, In Re Estate of Barrett, 137 So.2d 587 (Fla. 1st DCA 1962), where the appellee's brief recited facts which were not supported by evidence in the record, the offending lawyer in that case apparently got of "scot free".

8. Other examples of conduct by lawyers before appellate courts which lack candor are represented in the following cases:

Bowman v. Bowman, 318 So.2d 186 (Fla. 4th DCA 1975)...failure to file brief.

Title & Trust Co. of Fla. v. Salameh, 407 So.2d 1035 (Fla. 1st DCA 1981)...failure to file brief places undo burden on appellate court.

State v. A.D.H., 429 So.2d 1316 (Fla. 5th DCA 1983)...citation of legal authority which is not authority for the proposition.

Imperial Point Co. v. Freedom Prop. Intern., 349 So.2d 1194 (Fla. 4th DCA 1977)...failure to file brief is a distinct disservice to the court and "is a practice which should be soundly condemned by The Bar".

Mitchell v. Mitchell, 433 So. 2d 633 (Fla. 1st DCA 1983)...lawyer failed to file brief; placed on culpa list maintained by 1st DCA which contains names of lawyers who are in the habit of flaunting appellate rules.

Winstead v. Adams, 363 So.2d 807 (Fla. 1st DCA 1978)...contempt for failure to comply with appellate rules.

Thornber v. City of Fort Walton Beach, 534 So.2d 754 (Fla. 1st DCA 1988)...lawyer's attempt to induce the 1st DCA to improperly introduce entirely new evidence into the record pursuant to Fla. R. Appl P. 9.410.

Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1983)...lawyer improperly reported "facts" which were not supported by the record but which were relied upon by the appellate court in its decision.

9. Lawyers, as advocates, may easily become over zealous when drafting an appellate brief. A rule of candor should be adopted by this Court which places lawyers who file briefs in any court of appeal under the affirmative duty to truthfully represent the facts with "references to the appropriate pages of the record) (Fla. R. App. P. 9.210(b) (3)). A rule of professional conduct should be adopted to "put teeth into" that appellate rule.

10. When confronted with a brief that lacks candor, appellate courts are ill equipped to discipline the offending attorney. Similarly, when the offending attorney wins, the losing attorney who used perfect candor toward the court, is understandably reluctant to initiate a grievance complaint under

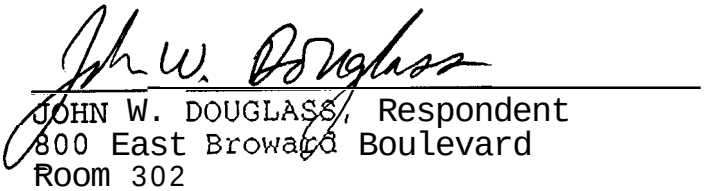
the existing Rules of Professional Conduct for fear that he would be accused of "sour grapes". If the attorney who misrepresents facts or law in his brief loses, the winning attorney is naturally reluctant to file a grievance complaint against the offending lawyer because he won the case and: "What more does he want?" In either case, lawyers generally are reluctant to file grievance complaints against other lawyers. It is much more rewarding to spend time on the business of other clients in other matters. This is especially so when, as now, there is no specific rule of professional conduct on the subject and grievance committees are easily induced to find no probable cause because there is no specific rule on the subject. The result is that a high percentage of lawyers, as a matter of habit, distort facts and law in appellate proceedings with impunity and without fear of punitive action. Appellate courts should not have to maintain "black lists" or "culpa" lists of lawyers who habitually misrepresent facts to the court (Mitchell, supra.). The Florida Bar should police its own ranks without imposing that duty upon appellate courts which could more profitably devote their time to the court's normal business.

11. Can it be that attorneys owe a duty of candor to the trial courts only and that appellate courts are not entitled to truth and candor?

12. It may well be that the above mentioned distinction or categories will not prove appropriate when considered by a committee of lawyers or judges authorized to address the problem.

The point of this response is to emphasize the need for a much more explicit and definitive Rule that the one which is submitted with the Petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the above Reply to Petition to Amend Rule 4-3.3 of the Rules of Professional Conduct was served by U.S. Mail on the following persons this October 9, 1989:

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