

Supreme Court of Florida

THURSDAY, MARCH 5, 1992

ORIGINAL

THE FLORIDA BAR RE:
AMENDMENTS TO THE RULES
REGULATING THE FLORIDA BAR
1-3.7; 3-5.1(g); 3-5.2; 14-1.1
AND CHAPTER 15

CASE NO. 75,716

ON PETITION FOR CLARIFICATION

The petition of The Florida Bar to clarify the appendix of this opinion is granted. The Bar correctly calls to this Court's attention the fact that our opinion in this cause numbered a portion of Rule Regulating The Florida Bar 1-3.7 in a manner inconsistent with another recent opinion of this Court. See The Florida Bar Re Amendments to Rules Regulating The Florida Bar, 587 So.2d 1121 (Fla. 1991). By order of clarification, we correct this oversight and add a caption to new rule 1-3.7(f), rendering it consistent with the form and style of the modified

rule. Our rule changes originally issued in this cause on November 14, 1991, shall be deemed effective from January 1, 1992, as previously ordered, and the clarification in the appendix below shall be effective upon the release of the clarified opinion.

It is so ordered.

A True Copy

JB

TEST:

cc: John F. Harkness, Jr., Esq.
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[November 14, 1991]

PER CURIAM.

The Florida Bar petitions this Court to amend the Rules Regulating The Florida Bar. We have jurisdiction. Art. V, § 2(a), Fla. Const.

In January 1990, the Board of Governors of The Florida Bar approved the proposed amendments now before us. They involve two groups of issues. The first and most controversial involves the use of out-of-state counsel by corporations operating in Florida. The second involves certain issues regarding "temporary" suspensions from The Florida Bar.

As to the first group, we have reviewed the proposal submitted by The Florida Bar regarding out-of-state corporate counsel. We also have reviewed the numerous comments in opposition filed by several large corporations.

For example, Walt Disney World Co., one of Florida's larger employers, has filed comments arguing that the proposed Chapter 15 submitted by The Florida Bar would be a strong disincentive for large corporations to base their operations in Florida. Disney notes that it might not have placed its worldwide construction and real estate groups in this state had Chapter 15 been in effect when the decision was made to locate them here.

Similarly, the Florida Department of Commerce--the state agency responsible for tourism and economic development--has opposed the proposal. DOC argues that proposed Chapter 15 is "one more barrier faced by the department in the promotion of Florida to national corporations."

These comments and many others like them show this Court that the proposed Chapter 15 has not been drafted to meet the legitimate needs of business in a modern economy. We commend The Florida Bar for its effort to safeguard against the unlicensed practice of law. However, this Court is troubled by the concerns raised by the opponents of this proposal. We agree that less burdensome alternatives exist that can provide solutions to this problem.

Accordingly, this Court denies the petition to the extent it requests us to adopt proposed Chapter 15. If the Board of Governors wishes, it may formulate a new proposal that more adequately addresses the concerns raised by the comments in opposition. We urge the Board of Governors to meet with the parties that have opposed this petition in developing a new proposal to be presented to this Court.

In particular, we ask The Florida Bar to precisely define what is to be considered an authorized house counsel. This should include a requirement that attorneys employed as house counsel submit to the continuing legal education requirement, register with The Florida Bar, and submit both to the Rules Regulating The Florida Bar and the disciplinary jurisdiction of this Court under article V, section 15 of the Florida Constitution. The Bar should develop rules prescribing how, and for what reasons, authorized house counsel may be temporarily suspended or prohibited from the practice of law in Florida for disciplinary violations.

Authorized house counsel should be required to pay dues to compensate The Bar for overseeing these registration and discipline requirements. We believe there also must be a specific requirement that authorized counsel be a member in good standing of one of the jurisdictions of the United States, including any state, territory, commonwealth, or the District of Columbia.

Finally, the proposal developed by The Bar should not contain a limit on the period of time one may practice as authorized house counsel without becoming a full member of The Florida Bar. This requirement clearly is a hindrance to commerce and of doubtful usefulness. The Bar also should eliminate any requirement that authorized counsel must have practiced law a minimum period of time in another jurisdiction before coming to Florida. This, too, is a hindrance to commerce and a disincentive for corporations to hire young attorneys fresh out of law school.

As to the second part of the petition, we adopt the proposal submitted by The Florida Bar, but modify it to reflect some of the concerns raised by Henry Trawick, Jr. We also have renamed this section as "emergency suspension and probation," which more accurately describes its function. Many of the other changes reflected in the appendix are technical. Several, however, are substantive and are necessary, we believe, to make this rule meet the requirement of due process.

First, we agree with Mr. Trawick that affidavits should not become a basis for depriving attorneys of their livelihoods if in fact these affidavits are meritless. Thus, we have heightened the standard by which such affidavits will be reviewed in this Court upon a motion to dissolve an emergency order. Under this new standard, the affidavit or affidavits must allege facts that, if true, would demonstrate clearly and convincingly that an attorney appears to be causing great public harm.

We also have specified that, in the hearing on a motion to dissolve or modify an emergency order, The Florida Bar will bear the burden of demonstrating a likelihood of succeeding on the merits of the underlying complaint. Although emergency suspension and probation are not entirely like a temporary injunction, we agree with Mr. Trawick that the two are sufficiently similar to require that a somewhat similar burden be placed on The Florida Bar. See, e.g., Department of Business Regulation v. Provende, Inc., 399 So.2d 1038 (Fla. 3d DCA 1981). These requirements help conform these procedures to the requirements of due process.

We have modified some of the procedures reflected in The Bar proposal because we believe it failed to address some of the possible procedural problems that might arise in cases of this type. The Bar rule, for example, appears to presume that an attorney always will move to dissolve the emergency order. While this may be true in the vast majority of cases, we must recognize the possibility that such a motion might not be filed in some conceivable cases. The Bar proposal at best is ambiguous as to what further procedures apply in such instances. In addition, The Bar proposal does not appear to differentiate between those instances in which a motion for dissolution is filed before a referee is appointed and those in which the motion is filed after a referee is appointed. This oversight could create confusion. The Bar rule also fails to address the problem of successive motions for dissolution.

We have attempted to rectify these problems. Thus, the attached rule specifies that The Bar must file a formal complaint within sixty days of the emergency order and proceed to trial, whether or not it appears that a motion for dissolution later may be filed in some stage of the proceedings. However, this time limitation is suspended if, prior to the filing of the formal complaint, the attorney in question exercises the right to move for dissolution of the order. If a complaint already has been filed, the motion operates as a stay of any further proceedings and suspends the time limitations imposed on The Bar.

Successive motions for dissolution will summarily be dismissed by the Court without being referred to a referee to the extent that they raise issues that were or with due diligence could have been raised in a prior motion. In such instances, the motion operates as a stay only until dismissed, thus extending any applicable time limitations for an amount of time equal to the duration of the stay.

Once a valid motion for dissolution is filed that states good cause, the chief justice will appoint a referee to hear the motion, and the hearing must occur within the time limits specified. The Court then will review the referee's findings and recommendation.

If the Court determines that an emergency order imposing a suspension should be continued to any extent, the following conditions apply. First, The Bar must file a formal complaint within sixty days of the continuance if a formal complaint has

not already been filed; and the referee must hear the case and issue a report within ninety days of the formal complaint. If, however, a formal complaint was filed before the motion for continuance, then the previously appointed referee must hear the case and issue a report within ninety days of the Court's order of continuance. In the event a formal complaint had been filed but a referee had not yet been appointed when the motion for dissolution was filed, then the time limit will be computed from the date on which the referee is appointed or the date of the continuance, whichever is later.

We stress that the time limits specified in the preceding paragraph do not apply if the emergency order only imposes emergency conditions of probation. These time limits are intended to apply only to orders one element of which is an emergency suspension.

Finally, we wish to commend The Florida Bar for submitting to this Court a rules proposal that complies with the recommendations of the Report of the Florida Supreme Court Gender Bias Commission 239 (March 1990). The proposed rules reflect a conscious effort to eliminate gender-specific language, which was one of the Gender Bias Report's key recommendations.

For the foregoing reasons, we decline to adopt proposed Chapter 15. We adopt the rules changes reflected in the attached appendix, effective at 12:01 a.m. on January 1, 1992.

It is so ordered.

SHAW, C.J. and OVERTON, BARKETT, GRIMES and KOGAN, JJ., concur.

MCDONALD, J., concurs specially with an opinion.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE
EFFECTIVE DATE OF THESE RULES.

McDONALD, J., specially concurring.

I concur, but in doing so do not necessarily agree with the implication that we can or should require house counsel to be subject to any regulation by this Court or The Florida Bar so long as such counsel is providing services solely for a corporate employer and is not involved in any court proceeding.

APPENDIX

[Additions are underlined; deletions are ~~struck through~~, except as otherwise noted below.]

1-3.7 REINSTATEMENT TO MEMBERSHIP

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(f) Members Delinquent 60 days or less. Reinstatement from dues delinquency accomplished within 60 days from the date of delinquency shall be deemed to relate back to the date before the delinquency. Any member reinstated within the 60-day period shall not be subject to disciplinary sanction for practicing law in Florida during that time.

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~~3-5.1(g).~~ [Entire subsection renumbered as section 3-5.2, as amended below. Subsection 3-5.1(h) is hereby renumbered as subsection 3-5.1(g).]

3-5.2 EMERGENCY SUSPENSION AND PROBATION

~~(g) Temporary suspension and probation.~~ (a) Initial Petition.--On petition of The Florida Bar, authorized by its president, president-elect, or executive director, supported by

an one or more affidavits demonstrating facts personally known to the affiants showing that, if unrebutted, would establish clearly and convincingly that an attorney appears to be causing great public harm ~~by misappropriating funds to his own use, or for other reasons,~~ the Supreme Court of Florida may issue an order ~~with such notice as the Court may prescribe~~ imposing temporary emergency conditions of probation on said attorney or ~~temporarily~~ suspending said attorney on an emergency basis.

(b) Trust Accounts.--Any order of temporary emergency suspension or probation ~~which that~~ restricts the attorney in maintaining a trust account shall, when served on any bank or other financial institution maintaining an account against which said attorney may make withdrawals, serve as an injunction to prevent said bank or financial institution from making further payment from such account or accounts on any obligation except in accordance with restrictions imposed by the Court.

(c) New cases & existing clients.--Any order of temporary emergency suspension issued under this rule shall immediately preclude the attorney from accepting any new cases and ~~may~~ preclude unless otherwise ordered permit the attorney to ~~from~~ continuing continue to represent existing clients during for only the first ~~thirty~~ (30) days after issuance of such temporary emergency order. Any fees ~~tendered~~ paid to such the suspended attorney during ~~such the thirty-day~~ 30-day period shall be deposited in a trust ~~fund~~ account from which withdrawals may be made only in accordance with restrictions imposed by the Court.

(d) Filing of Formal Complaints.--The Florida Bar shall file a formal complaint within 60 days of the emergency order and proceed to trial of the underlying issues, without the necessity of a finding of probable cause by either a grievance committee or the board of governors.

(e) Motions for Dissolution.--

(1) The attorney may, ~~for good cause, request move at any time for dissolution or amendment of an emergency any such temporary order by petition motion~~ filed with the Supreme Court of Florida, a copy of which will be served on ~~the executive director bar counsel~~. Such ~~petition for dissolution motion~~ shall operate as a stay of any other proceedings and applicable time limitations in the case and, unless the motion fails to state good cause or is procedurally barred as an invalid successive motion, shall immediately be set for immediate hearing before assigned to a referee designated by the chief justice.

(2) The ~~designated~~ referee shall hear such motion ~~petition forthwith~~ within 7 days of assignment, or a shorter time if practicable, and submit his a report and recommendation to the Supreme Court of Florida with the utmost speed consistent with due process within 7 days of the date of the hearing, or a shorter time if practicable. The referee shall recommend dissolution or amendment, whichever is appropriate, to the extent that bar counsel cannot demonstrate a likelihood of prevailing on the merits on any element of the underlying complaint.

(3) Successive motions for dissolution shall be summarily dismissed by the Supreme Court to the extent that they raise issues that were or with due diligence could have been raised in a prior motion.

(4) Upon receipt of the referee's ~~report~~ recommended order on the motion for dissolution or amendment, the Supreme Court of Florida shall ~~modify its order if appropriate and continue such provision of the order as may be appropriate until final disposition of all pending disciplinary charges against said attorney~~ review and act upon the referee's findings and recommendations. If the court continues the order of emergency suspension or probation in any manner, The Florida Bar shall file a formal complaint, if one has not yet been filed, within 60 days of the continuance and proceed to trial of the underlying issues, without the necessity of a finding of probable cause by either a grievance committee or the board of governors. A continuance of the emergency suspension or probation dissolves the stay of other proceedings.

(f) Hearings on Formal Complaints.--Upon the filing of a formal complaint based on charges supporting an emergency order, the chief justice shall appoint a referee to hear the matter in the same manner as provided in rule 3-7.5, except that the referee shall hear the matter and issue a report and recommendation within 90 days of appointment or, if the attorney has filed an unsuccessful motion for dissolution or amendment after the appointment of the referee, within 90 days of the

Supreme Court's continuance of the emergency order. This time limit shall apply only to trials on complaints in connection with which a temporary suspension is in effect. If the time limit specified in this paragraph is not met, that portion of an emergency order imposing a suspension shall be automatically dissolved, except upon order of the Supreme Court upon showing of good cause, provided that any other appropriate disciplinary action on the underlying conduct still may be taken.

(g) Proceedings in the Supreme Court.--Consideration of the referee's report and recommendation shall be expedited in the Supreme Court. If oral argument is granted, the Chief Justice shall schedule oral argument as soon as practicable.

(h) Waiver of Time Limits.--Respondent may at any time waive the time requirements set forth in this rule by written request made to and approved by the referee assigned to hear the matter.

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14-1.1 JURISDICTION

(a) Circuit arbitration committees shall have jurisdiction to resolve disputes over a fee paid, charged, or claimed for legal services rendered by a member of The Florida Bar when the parties to the dispute agree to arbitrate, ~~either by written contract or~~ a request for arbitration signed by all parties after a dispute has arisen.

Original Proceeding - Rules Regulating The Florida Bar

Benjamin H. Hill III, President, Tampa, Florida; Alan T. Dimond, President-elect, Miami, Florida; John F. Harkness, Jr., Executive Director, John A. Boggs, Director of Lawyer Regulation, and Lori S. Holcomb, Assistant UPL Counsel, The Florida Bar, Tallahassee, Florida; and Scott L. Baena, Chairman, Special Study Committee on Corporate Counsel, Strook & Strook & Lavine, Miami, Florida,

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Henry P. Trawick, Jr., of Trawick, Hammersley & Valentine, P.A.,
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Responding.