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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
(ANTI DISCRIMINATION)

Case No: 80,010

Fla. Bar No: 167853

BRIEF IN OPPOSITION TO JOINT PETITION TO AMEND RULES REGULATING THE FLORIDA BAR

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I

PROPOSED RULE 4-8.4 RESTS ON A PREMISE THAT IS SERIOUSLY FLAWED

The fundamental justification for the adoption of specific anti-discrimination rules is a proposition most succinctly stated in the comments to proposed Rule 4-8.4. Discrimination, one reads, is "abhorrent" and "especially" so when engaged in by an attorney in the course of his or her professional practice.

As attractive as it may be to subscribe to that premise, to do so is to mask the very problem the Proposed Rules are designed to address. While segregating restrooms or high school locker rooms on the basis of race is certainly "abhorrent", there are few who would draw the same conclusion because the identical facilities are segregated on the basis of sex. No one would seriously argue that it is improper age discrimination for this Court to refuse to allow ten year olds to practice law. In those and any number of similar cases, the premise on which the Proposed Rule rests is simply wrong.

Even in situations in which discriminatory conduct is unquestionably "abhorrent", it may nonetheless be Constitutionally protected. The First Amendment allows the advocacy of racism and anti-semitism just as it protects the preaching of tolerance. One does not forfeit a right to belong to the Ku Klux Klan, the Nazi party, or, for that matter, to "private clubs" that would not allow certain members of this Court through the door merely because one is a member of the Bar. In short, where

Constitutional issues are involved, characterizing discrimination as "abhorrent" is simplistic to the point of irrelevance.

Proposed Rule 4-8.4 is a blanket prohibition. It allows no exceptions. Neither the Proposed Rule, nor the comments, set forth any principled basis on which conduct which is, by definition, "especially abhorrent" should be tolerated merely because it is "authorized by applicable law" as segregation once was. Actions deemed "especially abhorrent" are no less so merely because they are undertaken while "impeaching the credibility of witnesses".

As the language of the comment implicitly recognizes, Rule 4-8.4 cannot be applied as the "strict rule" it purports to be without seriously conflicting with the right to a fair trial. Effective cross examination of a rape victim is very likely to disparage and humiliate on the basis of gender. An attempt to apply Rule 4-8.4 in those circumstances would run afoul of several sections of Chapter Four of the Rules of Professional Conduct[1] and the right to effective assistance of counsel

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[1] As stated in the commentary to Rule 4-1.3:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Further, Rule 4-3.1 provides, in pertinent part:

> A lawyer for the Defendant in a criminal proceeding ... may ... defend the proceeding as to require that every element of the case be established.

guaranteed by the Sixth Amendment.

While perhaps the worst case, the cross examination of a rape victim is not the only situation in which the application of Rule 4-8.4 would be unwise if not unconstitutional. An older witness may very well find it humiliating to have his or her credibility questioned on cross examination or in final argument because they are hard of hearing or have failing eyesight. In any number of such circumstances, effective assistance of counsel may require doing precisely what Rule 4-8.4 prohibits. The remedy for those situations in which the conduct of trial counsel genuinely gets out of hand is not an after the fact disciplinary proceeding. It is an exercise of firm Judicial control in the first place.

Taking refuge in the language of the comment[2] is no solution to the problems to which the inflexibility of the Proposed Rule give rise. "Representing a client as permitted by applicable law" covers the proverbial multitude of sins. The only things that readily come to mind that would not be exempt are exploitation of one's own personal characteristics or those of another and gratuitous insults. Rule 4-8.4 would specifically prohibit not only a white lawyer making his opponent's race an issue, but a minority lawyer playing on that fact when appearing

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2 The preamble to the Rules of Professional Conduct provides in part:

> The comments are intended only as guides to interpretation, whereas the text of each Rule is authoritative (emphasis added).

before a Judge of the same racial or ethnic background. It forbids both sexual harassment directed at women attorneys and the latter's use of a big smile or tears in an attempt to influence a male Judge or opponent. It covers both the situation in which an able bodied attorney demeans his or her wheelchair bound opponent and the latter's turning that handicap into an advantage before a jury in a personal injury case.

As the last example in particular suggests, attempting to disparage or humiliate an opponent on the basis of any of the characteristics described in Rule 4-8.4 is something that can backfire badly. It demeans minority and women lawyers to suggest that they are any less astute than their while male colleagues in devising ways to turn questionable behavior into a tactical advantage. The self corrective nature of the adversary system itself, supplemented, in extreme cases, by the contempt power, is the most effective means for dealing with the only type of misconduct the comments to Rule 4-8.4 suggest is actually covered.

While seemingly concerned primarily with the conduct of trial counsel, neither the language of Proposed Rule 4-8.4, nor the comments, so much as suggest any such limitation was intended. Recalling that the Proposed Rule rests on the premise that discrimination is "abhorrent", does it subject an attorney to disbarment if he or she prepares a Will for a client that leaves money to the Ku Klux Klan? May a lawyer be sanctioned if the Will discriminates on the basis of religion by distributing property to a school operated solely for members of a single

denomination? Is it improper to set up a trust to fund the education of black students exclusively? Could an attorney include any of the foregoing provisions in his or her own Will without violating Proposed Rule 4-8.4? May a minority lawyer take advantage of the R.T.C.'s set-aside program without risking Bar discipline? Must a firm refuse to represent a client whose employees sexually harass the firm's associates or staff?

The administration of justice with which Proposed Rule 4-8.4 is concerned may also be affected by the activities of lawyers that, strictly speaking, do not even involve the practice of law. For example, the March 1st, 1993 issue of the Florida Bar News reported that the Trial Lawyers Section sought permission from the Board of Governors to file a brief in a Federal Voting Rights Act case involving a dispute about the way in which Judges are selected. The Trial Lawyers' request was opposed by several African American Bar Associations. The latter, to quote the News article, argued that, allowing the Trial Lawyers to file a brief as requested "would be seen as supporting a racist system [of Judicial selection]" (Fla. Bar News, 3/1/93, p.11, col.1). In a split decision, the Board of Governors ultimately allowed the Trial Lawyers Section to file a brief as requested. Had Rule 4-8.4 been in effect, one can only wonder whether or not the members of the Board of Governors would have found their votes subject to appellate review by a grievance committee.

In summary, and, particularly as it relates to the activities of the legal profession, discrimination is a far more

complex subject than the proponents of Proposed Rule 4-8.4 are prepared to admit. This Court would do better to adopt no Rule at all as opposed to one that ignores the very problems it purports to address. As an alternative, this Court should instruct the Bar and request the petitioning members to bite the Constitutional bullet and submit a Rule that says what it means and means what it says. Local grievance committees are not the place to hash out the Constitutional ramifications or practical problems that are virtually certain to follow the adoption of any Rule similar to Proposed 4-8.4.

II.

EMPLOYMENT DISCRIMINATION LAW IS NOT
A MATTER WITHIN THE BAR'S EXPERTISE

Proposed Rules 4-8.7 and 4-8.4(h) ask this Court to expand the Bar's disciplinary authority to embrace employment discrimination matters. Under the current Rule 4-8.4, even a violation of the criminal law, no matter what the personal consequences may be, does not expose a lawyer to bar discipline unless the conduct involved had a "special connection to fitness for the practice of law." (Rule 4-8.4, Comment). Were either of the Proposed Rules enacted, an attorney could be disciplined for conduct which is purely civil in nature and which, in some instances, may amount to little more than a breach of contract. Technical violations of the Equal Pay Act have little, if any, specific connection with one's fitness to practice law. Adopting either of the proposed rules effectively removes the traditional limitation that an attorney can be disciplined only for conduct

directly related to fitness to practice.

Even were the Court prepared to extend the Bar's grasp to that extent, it should not do so. Proposed Rules 4-8.7 and 4-8.4(h) suffer the same difficulties as Proposed Rule 4-8.4. If anything, the problems are exacerbated because of issues unique to employment law.

While there are numerous Federal laws dealing with discrimination, the ones most generally applicable are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(a), et.seq., the Age Discrimination in Employment Act (the "A.D.E.A."), 29 U.S.C. 623, et. seq., and the Americans with Disabilities Act of 1990 (the "A.D.A."), P.L. No: 101-336. Collectively, those laws prohibit discrimination in employment on the basis of race, color, religion, sex, national origin, age, and handicap. No Federal Statute, however, prohibits discrimination on the basis of "sexual orientation" however that may be defined. In general, employers with fewer than fifteen workers are exempt from coverage under all three laws, 42 U.S.C. 2000e(b). While other Federal laws, such as the Civil Rights Act of 1866, 42 U.S.C. 1981, or the Equal Pay Act, 29 U.S.C. 206, may reach smaller employers, the scope of such laws is generally far narrower. Section 1981, for example, applies only to discrimination based on race or alienage. E.g., Jett v. Dallas Independent School District, 798 F.2d 748, 762 (5th Cir. 1987). The Equal Pay Act deals with compensating employees differently for similar work on the basis of sex.

At the State level, the Florida Civil Rights Act of 1992, F.S.A. 760.01, et. seq., covers the same ground as Title VII, the A.D.E.A. and the A.D.A. It also prohibits discrimination on the basis of marital status. F.S.A. 760.10(1)(a). Like it's Federal counterparts, the Florida Civil Rights Act contains the same small employer exception, F.S.A. 760.02(7). It does not prohibit discrimination on the basis of sexual orientation.

In addition to Federal and State Statutes of general applicability, various counties and municipalities have adopted their own local ordinances on the subject. On rare occasions, discrimination on the basis of sexual orientation is prohibited. Local ordinances may also exempt small employers. E.g., Broward County Human Rights Act, Chapter 83-380, Laws of Florida, 3(13).

Under Rule 4-8.7, an attorney can be found to have violated the Proposed Rule only if there has been a prior administrative or Judicial finding that a "prohibited or discriminatory practice" has occurred. If it is true as the Bar's president elect recently stated that sixty (60%) percent of the membership are sole practitioners or are employed in small firms (Fla. Bar News, 2/15/93, p.1), that same sixty (60%) percent of the membership would fall within the small employer exceptions to Title VII, the Florida Civil Rights Act, and any similarly drafted local ordinances. Even allowing for the situation in which Federal law or local ordinances may reach smaller employers, over half the membership of the Bar is automatically exempted from the Proposed Rule by virtue of the prior adjudica-

tion requirement. If one makes allowance for government lawyers and excludes all firms with fewer than fifteen employees, the percentage of the membership to whom Rule 4-8.7 would even theoretically apply may well be far less than the forty (40%) percent figure Patricia Sietz's numbers would otherwise indicate. The ban on discrimination on the basis of sexual orientation has no application at all unless the offense happens to occur within one of the few municipalities having ordinances on that subject.

Depending on the speaker's point of view, the Florida Bar is either self regulating or self protecting. Particularly in matters of attorney discipline, it behooves the Bar not only to conduct it's activities in a manner that is above reproach but to appear to do so as well. The current Petition is a good faith effort to deal with a serious problem. To adopt a Rule that, on one hand, prohibits discrimination across the board and, on the other exempts at least sixty (60%) percent of the membership from compliance, exposes all concerned to charges of the worst kind of hypocrisy. While it has other problems, the alternative Proposed Rule 4-8.4(h) at least avoids that one.

Proposed Rules 4-8.7 and 4-8.4(h) are both seriously deficient in defining what conduct is, in fact, prohibited. As was discussed in connection with Proposed Rule 4-8.4, the use of the word "discrimination" does nothing to define what conduct is prohibited no matter how many adjectives may modify the word. Adoption of either of the employment discrimination rules eliminates the requirement that misconduct be specifically re-

lated to fitness to practice.

Unlike federal, state, and local laws on the subject, Proposed Rules 4-8.7 and 4-8.4(h) treat discrimination as an either/or proposition. There are no shades of gray. There is no provision for de minimis violations. The language of the Proposed Rules, and the premise on which those Proposed Rules rest, allows no exceptions, period.

Perhaps the most obvious question with respect to the Bar's Proposed Rule is whether it prohibits lawfirms from adopting affirmative action programs or providing other specialized assistance to women and minority lawyers that is not available to anyone. While the literal language of Proposed Rule 4-8.4(h), would also support a ban on affirmative action, the comment to that Proposed Rule indicates that the intention was to affirmatively require it. While it may not be desirable to ban all minority assistance programs, were Proposed Rule 4-8.4(h) adopted, it would impose an affirmative action requirement on lawyers that goes far beyond what can be lawfully required of other employers. Particularly with respect to matters of sexual orientation, the adoption of Proposed Rule 4-8.4(h) would elevate what is otherwise little more than the private political morality of a segment of the American Left to the status of law. Any rule this Court may adopt should specifically deal with the question of affirmative action one way or the other.

Under any of the various laws prohibiting employment discrimination, a partner in a law firm may be held vicariously

liable for discriminatory conduct committed by another partner, an associate, or even the mail room clerk. Under the Bar's proposal, such vicarious liability would constitute a prima facie case of an ethical violation. If Proposed Rule 4-8.4(h) is considered as imposing affirmative action type duties on the membership, the innocent partner's exposure to Bar sanction would be even greater than under Proposed Rule 4-8.7. Any rule ultimately adopted should answer that question one way or the other.

Like Proposed Rule 4-8.4, Proposed Rules 4-8.7 and 4-8.4(h) may reach any number of activities only tangentially related to the practice of law. Again by way of example, is the dean of one of this State's law schools subject to being disciplined for promotion an affirmative action plan aimed at recruiting minority faculty? Does a female lawyer create a hostile work environment by displaying Cosmopolitan or similar publications in the reception room? See, Robinson v. Jacksonville Shipyards, Inc., 760 F.Supp. 1486 (MD Fla. 1991).

The enforcement mechanisms that would be in effect under Proposed Rules 4-8.7 and 4-8.4(h) create more problems than they would ever solve. Freely admitting to a "lack of expertise" in the area (Joint Petition, at 6), The Bar would rely on a prior administrative or judicial finding of discrimination to establish a prima facie case. It is one thing to discipline an attorney on the basis of the findings and conclusions of a state or federal court. It is quite another to utilize the findings of some county

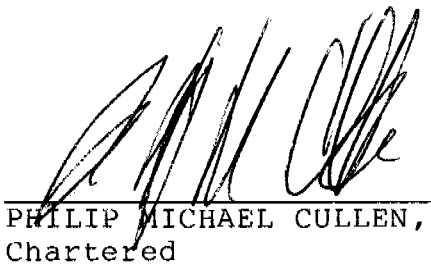
or municipal board for the same purpose.

Further, under the Bar's proposal, a finding of discrimination, even if made by this Court or the United States Supreme Court constitutes nothing other than a prima facie case. Presumably, an attorney charges with discrimination would be entitled to present evidence to the effect that the prior determination was wrong. In short, the main difference between the Bar's proposal and the alternative is that, under the former, a complaining party must go through years of administrative and judicial proceedings before a grievance can be filed. Under both Proposed Rules, local grievance committees will ultimately be left to decide matters in which the Bar, itself, concedes it has no expertise or, for that matter, money to conduct the "searching [judicial] inquiry" the proponents of Proposed Rule 8-8.4(h) recognize as necessary to investigate an employment discrimination matter properly (Joint Petition, at 7).

As is the case with any number of specialized areas of practice, determining what is, or is not, a violation of the law prohibiting discrimination in employment can be a complicated business in all but the most obvious situations. In addition to the statutes and ordinances themselves, there are typically regulations, compliance manuals, and hundreds of Judicial opinions defining the law. Making that determination can be particularly troublesome with respect to what is covered by newer laws such as the A.D.A.. Grievance committees are not the proper forum in which to decide such issues.

Proposed Rules 4-8.7 and 4-8.8(h) are severely flawed with respect to who is covered, what is prohibited, and how suspected violations are to be addressed. Last but not least, how will the "searching inquiry" be financed? The only benefit to be gained from the adoption of either Proposed Rule is an appearance of political correctness. Even that benefit, for whatever it may be worth, will promptly vanish once local grievance committees begin attempting to resolve issues of employment law on which even experts differ. Should the Court believe some rule is necessary, the proponents should be requested to submit a specific, enforceable rule and state, specifically, how high bar dues are to be raised to pay for enforcement. Particularly in the area of employment discrimination, there is no point in enacting a rule without the ways and means to enforce it.

Respectfully submitted,



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