THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
Petition to Amend Rules Regulating
The Florida Bar (Anti-Discrimination)

Case No. 81,010

BRIEF IN SUPPORT OF PROPOSED RULES 4-8.4 AND 4-8.7

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ARGUMENT[1]

I.

PROPOSED RULE 4-8.4 IS A LIMITED RESTRICTION REASONABLY RELATED TO AN ATTORNEY'S FUNCTION AS AN OFFICER OF THE COURT.

Proposed rule 4-8.4 is, as the opposing comments correctly state, a restriction on pure expression. As such, it would ordinarily be entitled to First Amendment protection. However, the proposed rule falls into one of the established exceptions and is constitutionally valid.

It is well recognized that a state has a broader range of discretion to regulate speech which is directly related to an employment function than it has with respect to speech in general. Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) ["* * * it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of citizenry in general. Id at U.S. 568]; McMullen v. Carson, 754 F.2d 936 (11th Cir. 1985); Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982) [last two citations involving statements by law enforcement officers] The United States Supreme Court has also recognized that the free speech rights of

[1]The proposed rules are directed at both conduct and expression. There is little question that the conduct aspects of the proposed rules are constitutional. See, e.g., New York State Club Association, Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). Consequently, this brief addresses only the free speech issues.

participants in judicial proceedings are subordinated to the State's interest in the fair administration of justice. **Seattle Times Co. v. Rhinehart**, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984); **Gulf Oil Co. v. Bernard**, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981) ["in the conduct of a case, a court often finds it necessary to restrict the free expression of participants, including counsel, witnesses, and jurors."] **Rinehart** at U.S. 32, **Gulf** at U.S. 104].

In light of the foregoing, it is not surprising that speech of lawyers in connection with pending litigation has been held to a significantly lower standard of First Amendment review than the same speech in other circumstances. The special role of an attorney within the judicial process was described by the United States Supreme Court in **In Re: Snyder**, 472 U.S. 634, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985). The case did not involve a First Amendment issue. However, the Court's discussion of the special role of attorneys in our system of justice has application to First Amendment analysis.[2] The Court stated:

> The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. [citation omitted] Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed: "'membership in the bar is a privilege burdened with conditions.' An attorney is received into the ancient fellowship for something more than private gain. He becomes an officer of

[2] Like the case at bar, however, it was argued that a disciplinary rule was unduly vague.

> the court, and, like the court itself, an instrument or agency to advance the ends of justice." [citation omitted; internal brackets omitted]
>
> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Id. at U.S. 644, 645. The Court again addressed the standard applicable to an attorney's First Amendment rights in **Gentile v. State Bar of Nevada**, ___ U.S. ___, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). The Court was divided as to the appropriate standard applicable to review of an attorneys' speech in connection with litigation. However, the Court was in agreement that the standard was less stringent than under non-judicial circumstances. The opinion of the Court stated:

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed * * *. Even outside the courtroom, a majority of the Court in two separate opinions in the case of In Re: Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.

* * * * *

> Even in an area far from the court and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. [Citations omitted] In each of these cases, we engaged in a balancing process, weighing the state's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue. These cases recognize the long-established principle stated in In Re: Cohen, 7 N.Y.2d 488, 495, 199 N.Y.S.2d 658, 661, 166 N.E. 2d 672, 675 (1960): 'Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was 'an officer of the court, and, like the court itself, an instrument . . . of justice. . . .'"
>
> We think that the quoted statements from our opinions in In Re: Sawyer, 360 U.S. 622, 79 S.Ct. 1376, 3 L.Ed.2d 1473 (1959), and Sheppard v. Maxwell, supra, rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in **Nebraska Press Assn. v. Stuart**, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); and in the cases which preceded.

Id. at U.S. 2744. [emphasis supplied]

As the Court stated in Gentile, the Court should weigh "the State's interest * * • against a lawyer's First Amendment interest" in the kind of speech at issue. Such a balancing test clearly weighs in favor of the validity of the challenged rules. The rules reflect a substantial State interest. No judicial system can

survive without public confidence in its even-handed administration of justice. As officers of the court, attorneys involved in that process have a significant impact upon the public's perception of the system's objectivity. In addition, a system of justice which tolerates expressions by its officers of bias against "race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age" can certainly not maintain public confidence in its fairness. On the other hand, while even such biased speech is entitled to First Amendment protection, its complete lack of social value affords it little weight in the balancing test.

The rules are narrowly drawn to serve the state's objective. They apply only to the extent that they are "prejudicial to the administration of justice", and the comment explains that they are applicable to a lawyer only "while engaged in the practice of law" and only "where such conduct is not otherwise protected or authorized by applicable law or rules of evidence, such as when a lawyer is examining a witness or adducing admissible evidence or a matter that may lead to admissible evidence * * *."

An attorney doesn't waive his or her First Amendment rights upon admission to practice, but it doesn't follow that he or she is free to engage in any type of expressive conduct within the scope of his or her practice. An attitude of fairness and respect for all persons who become involved with our system of justice is an essential qualification of practice. Expressions of bias against such persons based upon factors listed in the proposed rule are

highly destructive to the system and reflect adversely upon the attorney's fitness to practice. An attorney cannot be prohibited from engaging in such expression, but he or she can be removed from the judicial setting which suffers from such expression if he or she chooses to do so.

II.
THE PROPOSED RULES ARE VALID TIME, PLACE OR MANNER RESTRICTIONS.

As an independent basis of validity, the proposed rules fall within that class of regulations upheld as valid time, place or manner restrictions on free expression. Even political and idealogical speech, the most highly protected form, is subject to such restrictions under appropriate circumstances:

> Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Clark v. Community for Creative Non-violance, 468 U.S. 288, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984). As noted above, the proposed rules are narrowly tailored to serve a significant governmental interest. They leave open ample alternative channels for communication since they only restrict a lawyer's speech "while engaged in the practice of law." The only remaining question is whether they are "content-neutral".

There is no question that reference to the content of a given statement would have to be made in order to determine whether it fell within the class of expression subject to the rules. However, the necessity alone for such reference does not automatically remove the rules from the content-neutral category. The question is not whether reference to content is necessary to determine

applicability, but whether the regulation is "justified without reference to the content of the regulated speech." Id. [emphasis supplied]

In Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986), the Supreme Court reviewed a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone. The term "adult motion picture theater" was defined as a theater, "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' * * *." Reference to the content of the films obviously would be necessary in order to determine whether or not a theater was subject to the regulation. Nevertheless, the Supreme Court found the ordinance to be constitutional as a content-neutral time, place, or manner regulation. The Court stated:

> To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at "adult motion picture theaters," but rather at the secondary effects of such theaters on the surrounding community. The District Court found that the City Council's "predominant concerns" were with the secondary effects of adult theaters, and not with the content of adult films themselves.

Id. at U.S. 47. The Court concluded:

> The ordinance does not contravene the fundamental principle that underlies our concern about "content-based" speech regulations: that "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to

> express less favored or more controversial views."

Id. at U.S. 49.

As in <u>Renton</u>, the proposed regulations are content-neutral because they are aimed not at the expressions themselves, which are permitted outside the judicial forum, but at the secondary effects that such expressions have on our system of justice when made by officers of the court in connection with ongoing litigation.

III.

THE PROPOSED REGULATIONS ARE NOT UNDULY OVERBROAD OR VAGUE.

The opposing comments complain that the proposed rules are overbroad and vague. In order to prevail on an overbreadth claim, a challenger has a heavy burden:

> The overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort." [citation omitted] A law is constitutional unless it is "substantially overbroad". [citation omitted] To succeed in its challenge, appellant must demonstrate that the text of [the statute] and from actual fact that a substantial number of instances exist in which the law cannot be applied constitutionally.

New York State Club Association, Inc. v. City of New York, supra at U.S. 14. [upholding New York ordinance prohibiting discrimination by private clubs] With respect to the claim of vagueness, a regulatory provision will not be stricken as unduly vague so long as it is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." **Howell v. State Bar of Texas**, 843 F.2d 205, 208, (5th Cir. 1988). **Howell** found that the phrase "engage in conduct that is prejudicial to the administration of justice", which was adopted from the ABA model disciplinary rule, was not unconstitutionally vague. Proposed rule 4-8.4 simply adds additional language to the same model provision, providing more detailed guidance as to certain conduct which would be prohibited by the rule. The proposed rules are reasonably limited in application and are written in plain and ordinary

language easily understood by the average attorney. The language is neither vague nor overbroad.

CONCLUSION

The Court is respectfully urged to approve proposed rule 4-8.4 in one of the two versions submitted, and to approve proposed Rule 4-8.7 as submitted.

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