047

IN THE SUPREME COURT OF FLORIDA
CASE NO:81,010

IN RE: AMENDMENT TO THE RULES
REGULATING THE FLORIDA BAR

COMMENT ON PROPOSED ANTI-BIAS RULE

The undersigned member in good standing of the Florida Bar submits this comment on the proposed anti-bias rule and respectfully requests this Court strike from the proposed amendments all references to "sexual orientation" and as argument in support thereof submits the following:

1. Membership in the Florida Bar is mandatory for attorneys who practice law in the state of Florida. By coercing attorneys to accommodate all types of sexual behavior, regardless of the activity's legality, as a condition to practicing law, the enacted rule would require attorneys to choose between their First Amendment right to exercise the moral convictions of their religious and philosophical faith and their right to practice law.

A government cannot make the exercise of a right or the receipt of a benefit conditional upon association with a particular ideology. Wooley v. Maynard, 430 U.S. 705 (1977). These First Amendment associational rights also extend to the practice of law. As the Supreme Court said in Baird v. State Bar of Arizona, 401 U.S. 1, 8 (1971), "the practice of law is not a matter of grace, but of right for one who is qualified by his learning and moral character."

2. Because membership in the Florida Bar is compelled, the government does not have a concomitant right to coerce attorneys to adopt a morality or ideology which conflicts

with their religious and philosophical beliefs. The Supreme Court has repeatedly held that compelled association with, or fee payments to, a group with which the dissenter does not wish to support or associate, implicates core First Amendment liberties. In the present case, a proposed rule compels attorneys to comply with the requirement to accommodate all forms of "sexual orientation", no matter how religiously and philosophically abhorent that "sexual orientation" may be to the attorney-employer.

3. The free exercise clause provides that "Congress shall make no law ... prohibiting the free exercise of (religion)." The Fourteenth Amendment applies this prohibition to the states. Cantwell v. Connecticut, 310 U.S. 296 (1940).

In interpreting the free exercise clause, the Supreme Court has repeatedly stated that the clause provides absolute protection from government regulation for religious beliefs. Sherbert v. Verner, 374 U.S. 398 (1963).

4. The proposed rules are overbroad and void for vagueness. Proposed rule 4-8.4 (d) provides that "A lawyer shall not engage in conduct that is prejudicial to the administration of justice." The comment goes on to say that the prohibition is against certain discriminatory conduct committed by a lawyer while engaged in the practice of law. This phrase could be read very narrowly to apply only to conduct in a court room or somewhat more broadly to all litigation activities, or most broadly to hiring, firing, and retention policies and practices in the law offices. The comment further provides that unlike Rule 4-7.8, this Rule (Rule 4-8.4), does not require a prior finding by a court or an agency as a condition of enforcement by the Florida Bar. In other words, the Florida Bar is uniquely in the position to determine, without

specifically defined standards, what constitutes prohibited conduct committed by a lawyer while engaged in the practice of law and is therefore an impermissible delegation of authority. It would permit the Florida Bar unbridled discretion in the enforcement of the proposed rule and constitutes an infringement on First Amendment rights as well as an abridgment of the due process clauses of the Fifth and Fourteenth Amendments.

5. The term sexual orientation is not defined in proposed Rule 4-8.4 or Rule 4-8.7. Without any specific definition, "sexual orientation" could mean everything from bestiality to necrophilia. If the definition of "sexual orientation" encompasses activities such as pedophilia, adultery, bestiality, necrophilia, and sodomy, then a further dilemma presents itself. Each of the enumerated activities constitute crimes in the state of Florida. The ability to declare that certain acts constitute a crime is uniquely within the power of the legislature and pursuant to Florida's constitutional separation of powers is not permitted to the Courts. See Article II, Section 3, Constitution of the State of Florida. It would therefore be a violation of the separation of powers doctrine of the Florida Constitution for the Supreme Court to enact a Bar rule regulating the ethical conduct of attorneys which would require participation in, or a knowing acknowledgement of, the criminal activities of those the attorneys come in contact with while in the "practice of law."

6. There is no state or federal law prohibiting discrimination on the basis of conduct (i.e. sexual orientation). Unlike race, the United States Supreme Court has specifically rejected the notion that homosexuality, an aspect of sexual orientation, falls within a suspect classification resulting in a heightened category of constitutional protection. The Court in

Bowers v. Hardwick, 478 U.S. 186 (1986) specifically declined to find any fundamental right to engage in homosexual sodomy.

7. The Florida Bar, and ultimately the Florida Supreme Court, must show a compelling state interest when infringing upon the religious exercise rights of attorneys in passing the proposed rule 4-8.4 and rule 4-8.7. Together, the rules constitute an imposition upon freedom of speech, free exercise of religion and freedom of association. Pursuant to the holding of the Supreme Court in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990), a hybrid constitutional claim may not be infringed absent a compelling state interest.

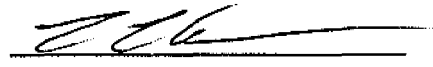
8. To the extent that proposed rule 4-8.4 (d) attempts to regulate speech and not conduct, the rule is unconstitutional in light of the Supreme Court's holding in R.A.V. v. St. Paul, 120 L. Ed. 2d 305 (1992). The Court held that, even as to otherwise unprotected speech, a statute could not be directed at particular content without violating the First Amendment. The Court reiterated that "the First Amendment generally prevents government from proscribing speech, (citation ommitted) or even expressive conduct, see, e.g., Texas v. Johnson, 491 U.S. 397, 406 (1989) because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. " (citation omitted). Because proposed rule 4-8.4 (d) seeks to prohibit certain types of speech on the basis of their content, it is facially invalid.

Conclusion

Because membership in the Florida Bar is mandatory in order to practice law in the state of Florida, the government cannot coercively require an attorney to subscribe to a particular

ideology. The proposed rules violate freedom of speech, free exercise of religion and freedom of association, all guarantees provided by the United States Constitution. Because the phrases "engages in the practice of law" and "sexual orientation" are not defined, the proposed rules are unconstitutionally vague and overbroad. The passage of these rules would constitute an ultra vires act and an attempt to circumvent the Legislature's determination that certain types of sexual activity constitute crimes and are prohibited. Finally, to the extent the rules are content-based restrictions on speech, they are facially invalid. For these reasons, the undersigned respectfully requests this Court strike the amendments proposed to rule 4-8.4 (d) and all references to sexual orientation in proposed rule 4-8.7.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that an original and seven copies of the foregoing have been furnished by Airborne Express on this 2nd day of February, 1993 to: Sid J. White, Clerk of the

Supreme Court, Supreme Court Building, 500 S Duval Street, Tallahassee, FL 32307 and a copy by U.S. Mail to John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

LEE L. HAAS, ESQUIRE

w/ like to argue