

81,010

FILED

SID J. WHITE

JAN 4 1993

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
(ANTI-DISCRIMINATION) CASE NO.

JOINT PETITION TO AMEND RULES REGULATING THE FLORIDA BAR

The listed members in good standing of The Florida Bar and the board of governors of The Florida Bar hereby jointly petition the court, pursuant to rule 1-12.1, Rules Regulating The Florida Bar, for the entry of an order amending the Rules Regulating The Florida Bar and show the court:

1. Official notice of the filing of this petition was given to the members of the bar by publication of the entire text of the bar's proposed amendments in the December 1, 1992, edition of The Florida Bar News. A copy of the published notice is attached.

2. The board of governors of The Florida Bar approved the filing of these proposed amendments at its November, 1992, meeting.

3. This petition jointly presents the agreement of the listed members of the bar and the bar itself on the proposed amendment to rule 4-8.4(d).

This petition also independently presents rule 4-8.7 proposed by the bar and the listed members' alternative thereto, such alternative being 4-8.4(h). The parties disagree as to necessity of a provision requiring another agency to make a prior finding of improper discriminatory practices before the bar may take disciplinary action.

4. Independently, the parties, as a result of findings of groups such as the Florida Supreme Court Racial and Ethnic Bias Study Commission and the bar's Gender Bias Study Commission, recognized the need for amendment to the Rules Regulating The Florida Bar to add specific rules that state the prohibition against certain discriminatory practices by members of the bar.

The listed members of the bar concur in the need for the petition and rule amendments. As a courtesy, as well as to provoke bar action consistent with the pronouncements of the aforesaid commissions, the listed members presented a draft petition to the board of governors for its review. The board of governors added the issue of antidiscrimination to its annual retreat and invited representatives of the listed members to attend and participate in the retreat held July, 1992.

At the retreat, the participants concluded, and the bar agreed, that specific rules should be added to the Rules Regulating The Florida Bar clearly stating the prohibition against certain discriminatory practices.

5. The parties agree that rule 4-8.4(d) should be amended as stated below (added commentary is also presented, however, the commentary has not been expressly agreed to, nor rejected). The full text of 4-8.4 is attached.

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

* * *

(d) engage in conduct that is prejudicial to the administration of justice, including

to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age;

* * *

Comment

* * *

Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes, without limitation, the prohibition against certain discriminatory conduct committed by a lawyer while engaged in the practice of law. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, or age, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as traditional notions of equality. Accordingly, 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 matter that may lead to admissible evidence, discipline under the Rules Regulating The Florida Bar is appropriate.

Unlike rule 4-8.7 this rule does not require a prior finding by a court or an agency as a condition of enforcement by The Florida Bar.

Subdivision (d) of this rule does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct or impeaching the creditability of witnesses or challenging fitness in custody or adoption proceedings.

This proposed amendment applies to conduct of members of the bar when dealing with certain described categories of persons in the course of the members' representation of a client.

The companion proposals (4-8.4(h) and 4-8.7) apply to the other aspects of the practice of law, such as, but not necessarily limited to, employment action and assignment of matters within the firm.

6. As stated, the parties cannot agree on the language of 4-8.7.

The bar proposes as a new rule and related comment:

RULE 4-8.7 DISCRIMINATION

If a lawyer has been adjudicated or held to have committed, in the course of the practice of law, a prohibited discriminatory practice by a final order of an agency or court of competent jurisdiction, after all appellate rights have been exhausted, such conduct shall be subject to discipline under these Rules Regulating The Florida Bar.

The finding of the agency or court making the determination shall be filed by the lawyer subject thereof with the executive director of The Florida Bar within 60 days of the entry thereof, and shall be admissible as prima facie evidence of a violation of these rules.

Comment

If a lawyer has been adjudicated or held to have committed, in the course of the practice of law, a prohibited discriminatory practice by a final order of an agency or court of competent jurisdiction, after all appellate rights have been exhausted, such conduct shall be subject to discipline under these Rules Regulating The Florida Bar.

Lawyers as officers of the court enjoy certain privileges and accept corresponding

responsibilities. It is especially abhorrent whenever lawyers conduct themselves in a manner that denigrates the public respect and confidence in the legal system. Lawyers must set the example for others to follow.

A lawyer's conduct, when in the course of the practice of law, including conduct of a lawyer in the lawyer's work place, that constitutes a prohibited discriminatory practice on account of, without limitation, race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, or age is intolerable.

Agencies and courts constituted to make such findings are uniquely equipped to adjudicate the existence of discriminatory practices. Upon a finding by an appropriate agency or tribunal that such a discriminatory practice has occurred, the lawyer engaged in such practice will be subject to discipline under the Rules Regulating The Florida Bar.

The lawyer who has been adjudicated or held to have committed a prohibited discriminatory practice must file a copy of the final order with the executive director of The Florida Bar within 60 days of the entry thereof. The final order shall be admissible in a disciplinary proceeding by The Florida Bar against the lawyer, and shall be prima facie evidence of a violation of this rule. The failure of a lawyer to do so shall be an offense within the scope of rule 4-8.4(a) of the Rules Regulating The Florida Bar.

The rule, as proposed by the bar, requires a prior adjudication, in a final order of an authorized agency or tribunal, after all appeals have been exhausted, that a member of the bar in the course of the member's practice of law (as contrasted to private conduct) has engaged in a prohibited discriminatory practice. This rule is intended to cover such matters as decisions on the hiring of law office personnel, promotion of personnel and assignment of matters within the law office. In such areas, there

exist many agencies or tribunals that have developed the expertise and have been funded to address allegations of violations. The bar has no such expertise to, for example, engage in the investigation and prosecution of alleged systematic and protracted discriminatory hiring practices of a multi-state law firm or an intrastate law firm with multiple offices.

The bar submits that allowing the agency or tribunal with expertise to address the issue and render findings, allowing the lawyer(s) accused to assert appellate rights and then institute disciplinary proceedings based on the final determination of such agency or tribunal protects the public interest while balancing the interests of the profession and the lawyer(s) accused. It is significant to note that the rule, as proposed by the bar, deems the agency or tribunal finding to be a prima facie finding of prohibited discrimination. In this manner the bar submits that consistency of result may best be reached.

The listed members of the bar respectfully disagree and propose in the alternative:

RULE 4-8.4 MISCONDUCT

A lawyer shall not:

* * *

(h) discriminate in employment, partnership, or compensation decisions on the basis of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, or age.

* * *

Comment

* * *

The legal profession must eradicate the vestiges of racism, bigotry, and bias from the administration of justice. Discriminatory conduct violates the Oath of Admission, which requires every lawyer to "maintain the respect due to Courts of Justice and Judicial Officers." The country adheres to a national policy of non-discrimination. The legal profession should do no less than adhere to explicit principles of non-discrimination in matters of employment.

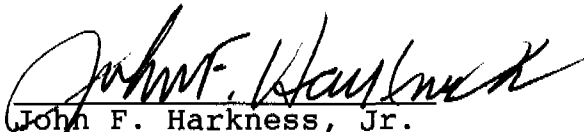
Discrimination is often insidious, making difficult the presentation of a successful claim. Grievance procedures require a searching inquiry for which the judicial branch must take responsibility. Discrimination brings the administration of justice into disrepute, particularly when practiced by lawyers in dealings with each other and with employees of lawyers.

The listed members reserve the option to file additional comment in support of proposed amendment 4-8.4(h).

REQUEST FOR ORAL ARGUMENT

Both the listed members of the bar and the bar request the court to grant oral argument concerning these proposed amendments to the Rules Regulating The Florida Bar.

Respectfully submitted,



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Executive Director
Alan T. Dimond
Florida Bar Number 111017
President
Patricia A. Seitz
Florida Bar Number 170617
President-elect

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Thomas R. Julin	Thornton Williams
Joseph P. Klock, Jr.	Harriet Williams
Henry Latimer	Robert Woolfork
Wendy S. Leavitt	Stephen N. Zack

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A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of rule 4-1.2(d) concerning a good faith challenge to

the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, or agent and officer, director, or manager of a corporation or other organization.

Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes, without limitation, the prohibition against certain discriminatory conduct committed by a lawyer while engaged in the practice of law. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, or age, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as traditional notions of equality. Accordingly, 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 matter that may lead to admissible evidence, discipline under the Rules Regulating The Florida Bar is appropriate.

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Board cancels 1993 All Bar Conference

There will be no Florida Bar All Bar Conference at the 1993 Midyear Meeting.

The Board of Governors at its November 19-20 meeting in Washington, D.C., agreed with the All Bar Conference Committee and President-elect Patricia Seitz to set the next conference for January 1994.

Seitz, who also chairs ABC Committee, said there wasn't enough time to fully develop debate topics before January 13, the scheduled date for the next conference.

"The subject matters that you recommended [for debate] are excellent, they are timely, they should be discussed at an All Bar Conference," Seitz said. "Unfortunately, between now and January 13, we cannot pull together enough material, hone it down, and refine it so we can have a meaningful calling together of 200 Bar members."

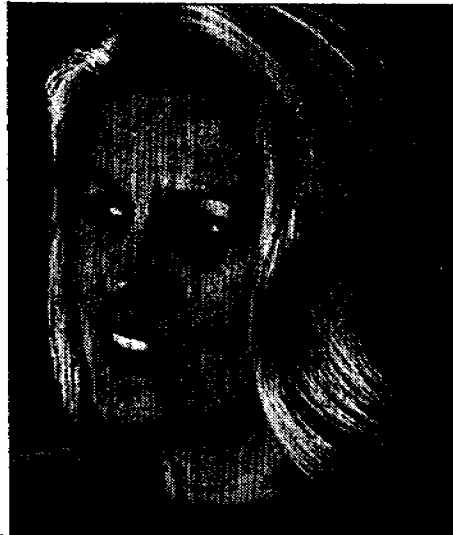
In September, the Bar had picked three topics for the conference. They were what the Bar can do for members instead of to them, how to improve the Bar's CLE operations, and how the Bar can be more helpful to voluntary bar associations.

"At this point, those questions can be best answered by surveys, which we are in the process of sending out," Seitz said. "Unless we could find various alternative [topics] it was a waste of time."

She said the three subjects should be sufficiently developed for debate at the 1994 conference.

No board member voiced any objection to canceling the 1993 conference. The Bar will also follow up, Seitz said, on the suggestion by Evett Simmons, head of the Florida Chapter of the National Bar Association, to contact voluntary bar associations to get their ideas for the next All Bar Conference.

Board member Fred Bosch suggested using the \$30,000 earmarked for the con-



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—Pat Seitz

ferred a \$90,000 two-year budget request to hire such a consultant.

(A complete report on the long-range plan debate will be in the December 15 News.)

The Bar has had All Bar Conferences for each of the past three years. Delegates have debated questions ranging from mandatory pro bono to Bar presidential election to the Clients' Security Fund to unlicensed legal technicians practicing law.

The conference was set up to give voluntary bar association officials more in-

Official Notice

Bar proposes anti-bias rules

The Board of Governors of The Florida Bar, pursuant to rule 1-12.1, Rules Regulating The Florida Bar, hereby gives notice of intent to file with the Supreme Court of Florida, on or about January 4, 1993, a petition to amend the Rules Regulating The Florida Bar.

The full text of the proposed amendments are printed below.

A copy of the petition may be requested by writing to Legal Division, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

Members who desire to comment on the proposed amendments may do so after filing of the petition, but no later than February 3, 1993. A copy of any comments must be served on the executive director of The Florida Bar.

RULE 4-8.4 MISCONDUCT

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- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
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- (e) state or imply an ability to influence improperly a government agency or official; or
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Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

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terence to help pay a consultant to assist the Bar in drawing up a long-range plan. The board earlier in the meeting had de-

put into board decisions, and to help give the board more information about critical issues.

Court adds to appellate rules

Yes, Virginia, when citing the *Southern Reporter, Second Series*, in all legal documents and court opinions, you do leave a space between the So. and the 2d.

And *Florida Law Weekly* and *Florida Law Weekly Federal* will now be abbreviated *Fla. L. Weekly* and *Fla. L. Weekly Fed.*, according to new Rules of Appellate Procedure adopted by the Supreme Court.

Of course, the new rules apply to more than citation style. The court approved an amendment to Rule 9.010, which eliminated the provision which said the appellate rules supersede all conflicting rules.

Rule 9.040(h) was amended so that the failure to attach conformed copies of orders in notices of appeal is not a jurisdictional defect. And Rule 9.110(m) was amended "to expressly allow a premature appeal to be perfected by filing of a final order prior to dismissal," the

court's opinion said.

Rule 9.145 was added to allow for appeals in juvenile cases and Rule 9.130 was amended to permit appeals from non-final orders over certification of a class and for appointing a receiver or terminating a receivership.

The court also approved several other changes, but for now rejected proposed amendments to rules governing review of nonfinal orders, appeals by the state, and on rehearing, clarification, or certification.

The rules package was prepared by the Bar's Appellate Rules Committee, and then reviewed and unanimously recommended by the Board of Governors.

The court acted in a unanimous per curiam opinion in *In Re: Amendments to the Florida Rules of Appellate Procedure*, case no. 79,619.

The Bar's Legal Publications office will have a pamphlet by late January detailing the changes.

Official Notice

Legislative action

Under Rule 2-9.3(b)-(e), Rules Regulating The Florida Bar, active members of the Bar may file a written objection to any legislative positions adopted by the Board.

Objections properly filed within 45 days of the *News* issue will be considered for a refund of that portion of mandatory dues applicable to the contested legislative position, within an additional 45 days. The Bar's governing board has the option to grant the appropriate refund to an objector or refer the matter to arbitration.

The arbitration process will determine solely whether the legislative position issue is within those acceptable activities for which compulsory dues may be used under applicable constitutional law. The objecting member's dues allocable to the uncontroverted legislative position will be escrowed promptly upon receipt of the objection and any refund will bear legal interest.

Any active member may provide written notice to the executive director of The Florida Bar, setting forth an objection to a particular legislative position. Failure to object within 45 days of this *News* issue shall constitute a waiver of any right to object to the particular legislative position.

The policy requires the Bar to publish adopted legislative positions in the *News* issue immediately following the meeting at which the action was taken.

Please be advised that the Board of Governors, at its most recent meeting held November 19 & 20, 1992, adopted the following legislative positions:

6. Supports adequate and full funding for state attorneys, public defenders and the

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, or agent and officer, director, or manager of a corporation or other organization.

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Unlike rule 4-7.8, this rule does not require a prior finding by a court or an agency as a condition of enforcement by The Florida Bar.

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