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In The Supreme Court of Florida

The Florida Bar Re:
Petition to Amend Rules
Regulating the Florida Bar (Anti-Discrimination)

Case No. 81,010

Response of Joseph W. Little

1. Respondent, Joseph W. Little, is a member in good standing of the Florida Bar.

2. Respondent urges the Court to deny the motion and reject the petition as presented, and specifically to reject the proposed additions to Rule 4-8.4 and proposed comments thereto. Although in the mild exercise of toleration that all presumably profess, Respondent would much prefer that the Court and petitioners assume this to be true, he yields to the de rigueur mores of the day to pronounce that he opposes invidious discrimination on the bases of personal traits and characteristics such as those named in the proposed rule.

Respondent readily acknowledges that intentional (reckless, wanton, etc.) discrimination on the bases of the stated criteria and others could be prejudicial to the administration of justice. For that reason, Respondent does not object to adding language to

the commentary to acknowledge that behavior of this type may have that consequence. A model is proposed below. Moreover, Respondent believes this Court might appropriately exhort all courts to be vigilant to caution advocates, litigants and others against behavior that is prejudicial to the administration of justice and to invoke appropriate sanctions against abusive prejudicial behavior.

Nevertheless, the proposed rule has equal capacity to create prejudice to the administration of justice as to interdict it. After its adoption, peevish advocates, litigants, witnesses, court functionaries and others would thereafter have a threat to dangle over the head of every advocate whose line of inquiry or proof must delve into matters of gender, race, ethnicity, etc., as so frequently occurs in the disputes of life. For example, Respondent recently defended a criminal prosecution in which the defense required extensive examination of the "sexual orientation" of the chief prosecuting witness. In prosecuting the defendant, the State sought to exclude all evidence pertaining to this on the grounds of "inappropriateness," despite the fact that it was central to defendant's theory that the prosecuting witness had spitefully fabricated the alleged crime to retaliate against the defendant's disdain of her "sexual orientation." The underlying episode was ugly on the part of both of them, but it involved no crime by the defendant. Proof of that required direct and pointed inquiries into matters pertaining to sexual orientation.

The point is this. Amending the rules regulating The Florida

Bar will not stop non-lawyer members of society from suing and being sued in disputes in which all the protected characteristics were, or may seem to have been, true determinants of behavior. The lawyers that take these cases will often be required to ferret out these biases to prosecute or to defend zealously and properly. Opposing counsel, parties or witnesses may use the grievance process or threat of the grievance process to interfere with proper representation in these cases. Worse, advocates may persuade judges to exclude probative evidence or to withhold a proper line of inquiry in the erroneous belief that following the doctrinaire line of appropriate behavior set forth in the rules is more important than truth and justice. This would subvert the right of the individual to have the complete truth revealed to the doctrinaire preferences of the State, which is flatly contradictory to the basic premises of American constitutionalism.

Petitioners may answer these objections with the reply that grievance committees will exonerate lawyers and appellate judges will reverse miscarriages of justice. With respect, while Respondent asserts that his concerns are not fanciful, he must also assert that the premise that everything will work out right in the end is fanciful. Defending against wrong headed grievances is costly and problematic, and so is winning appeals (if they are taken).

In short, this Court and the inferior courts of Florida are not without authority to supervise court proceedings and to interdict invidious discrimination that is prejudicial to the

administration of justice. This Court should not create an atmosphere in which threats against lawyers based on charges of invidious discrimination can become a threat in itself to the proper administration of justice. Respondent respectfully asserts that the proposed rule has easy potential to cause more harm than it would avoid.

3. If the Court believes it should to make some statement about this subject in these rules, Respondent proposes that it do so, not by amending the text of Rule 4-8.4 or by adopting the proposed commentary, but by adding the following paragraph to the existing commentary.

> The determination of what conduct is prejudicial to the administration of justice is highly fact bound and depends upon the intended and probable interference with the timely and proper conduction of legal proceedings and with the search for truth and justice under the law. Examples would be representations to the Court made in violation of subsection (b) and discrimination or disparagement of any person in connection with legal proceedings on invidious grounds such as race, ethnicity, gender, religion, national origin, disability, mental status, sexual orientation, or age, when the lawyer's behavior is not relevant to the proof of any legal or factual issue in dispute. Lawyers may exercise peremptory challenges of jurors except as otherwise restricted by law without invoking the application of this rule.

4. Respondent concurs himself with the Response of Henry P. Trawick, Jr., in regard to the Constitutional and prudential limits on the power of the Court to dictate or regulate correct modes of thought of lawyers or anyone else.

5. Respondent objects to proposed Rule 4-8.7, "Discrimination", and comments thereto in their entirety, and urges the Court to reject them. Proposed rule 4-8.7 seeks to give the weight of

"prima facie evidence of a violation of these rules" to a final determination of any "agency or court of competent jurisdiction" that determines a lawyer "discriminated" under some other law. If "of these rules" refers to proposed amended Rule 4-8.4 (d) as its antecedent, then the effect of proposed Rule 4-8.7 is to shift to the accused lawyer the burden to prove that the "discrimination" was not prejudicial to the administration of justice. To shift the burden of proof on the elements of a quasi-criminal charge from the State to the accused individual is plainly an abhorrent aberration of the fundamental premises of our laws. The Court ought to reject it summarily.

Furthermore, the second paragraph of proposed Rule 4-8.7 imposes an obligation of the lawyer not only to become a self-accuser in disciplinary proceedings, but also to come forward with evidence that purports to establish a prima facie case against the forced self-accusation. This plainly violates the spirit of the guarantees against self-incrimination of Article I §9 Florida Constitution and of the Fifth and Fourteenth amendments to the United States Constitution. At the very least, it is an example of oppressive State coercion of the individual of the sort that this Court has often condemned.

Finally, the Court should not be mislead to believe that unless lawyers are made to become self-accusers those who have been adjudged guilty in other fora will "go free" of disciplinary charges under the rules regulating The Florida Bar. In every case, the underlying proceedings will involve opposing lawyers, parties

or witnesses, and members of tribunals who will be possessed of the knowledge that grievances may be filed against the accused. Moreover, given the underlying nature of the proceedings in these other fora (i.e. discrimination charges against the accused lawyer), the many temporizing factors that often inhibit the filing of grievances in ordinary legal proceedings would be removed.

Conclusion

For the reasons stated above, Respondent respectively prays this Court to deny the Petition amending Rule 4-8.4 and adding comments thereto. Instead, if the Court deems it necessary, Respondent urges the Court to adopt the comment proposed in paragraph 4 herein.

For reasons stated above, Respondent respectively prays this Court to deny the petition to adopt Rule 4-8.7 and comments thereto.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this response was mailed to John Harkness, Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL. 32399-2300 this 27th day of January, 1993.

Joseph W. Little

w/argue