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SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

DEC 5 1994

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

No. 84,390

IN RE: RULES REGULATING THE
FLORIDA BAR -- WILLFUL NONPAYMENT
OF CHILD SUPPORT

RESPONSE TO PROPOSED RULE CHANGE

John Hume, a member in good standing of The Florida Bar, respectfully submits the following comments for consideration by this Honorable Court:

I. A NEW RULE IS REQUIRED.

The Rules Regulating The Florida Bar (the "Rules") contain no provision regarding nonpayment of child support. The Florida Bar, through its Board of Governors (the "Bar") has taken the position that no new Rule is necessary because a lawyer who is held in contempt of court for failure to pay child support will be in violation of the general provisions of the Rules. The Bar is asking that this Court "discover" that such conduct has always been prohibited by the Rules. This facile argument avoids the need for the Bar to propose another new rule but sacrifices the dignity of the rule of law. A lawyer should be able to understand what conduct is proscribed by the Rules and should be able to predict the outcome of an alleged ethical violation. A fair reading would not show nonpayment of child support as a violation of the Rules.

II. THE PROPOSED RULE IS SUSCEPTIBLE TO MISINTERPRETATION.

When the proposed rule was discussed at the Board of Governor's meeting on November 10, 1994, there was disagreement as to whether the "determination" by a court of competent jurisdiction referred only to the determination of the amount of child support or whether it referred to the willful refusal.

If the proposed rule is to parallel Section 61.13015 Florida Statutes (1993) (the "Statute"), a copy of which is attached, the determination of willfulness should be made by the court of competent jurisdiction. Under the Statute, it is the court which entered the support order which makes the determination of whether or not to suspend or deny the license. Likewise, it should be that same court which determines the willfulness of the nonpayment by a lawyer. Such a determination would not necessarily require a finding of contempt of court.

The clarification of this point could be included in the Comment as follows:

"The court which entered the support order must first make a finding of willful refusal to pay before a grievance may be filed or grievance procedures initiated under this subsection."

III. THE PROTECTIONS OF THE STATUTE ARE NOT AFFORDED AN ACCUSED ATTORNEY UNDER THE PROPOSED RULE.

Subsection three of the Statute requires a two step process: notice to the obligor and a determination by the court. Only if the court of competent jurisdiction determines willfulness after notice and a full and fair hearing, will an accused attorney have equivalent protections.

Further, that subsection specifies certain conditions under which the court may find it inappropriate to deny or suspend a license. Those same considerations should be made applicable to the interpretation of the proposed rule in the Comment such as:

"The court of competent jurisdiction may decline to find a willful refusal to pay if: (a) denial or suspension would result in irreparable harm to the obligor or the employees of the obligor or would not accomplish the objective of collecting the delinquency; or (b) the obligor demonstrates that he has made a good faith effort to reach an agreement with the obligee."

IV. THE PROPOSED RULE MAKES NO PROVISION FOR SUSPENDED LAWYERS REGAINING THEIR LICENSES.

Subsection four of the Statute provides a mechanism for non-attorney professionals to purge themselves of their failure to pay and thereby regain their licenses.

The Comment to the proposed rule could incorporate by reference the procedures for reinstatement set forth in the Statute.

Further, the court should consider stating in the Comment that case law under the Statute would be relevant to cases decided under the proposed rule.

V. THE PROPOSED RULE SHOULD CARRY NO MORE MORAL OR ETHICAL OPPROBRIUM THAN THE STATUTE.

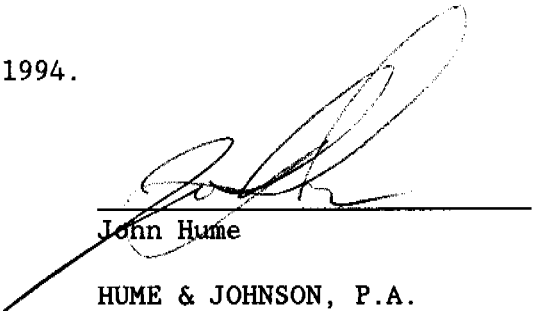
It should be clarified that the purpose and public policy of the proposed rule is to assist in the collection of delinquent child support. Traditionally, the Rules Regulating The Florida Bar have focused on

proscriptions based on morality. The Statute is clearly directed to its mission of enforcing child support orders and makes no pretense of declaring such conduct unethical or immoral. To be fair to lawyers, this Court must observe that same distinction.

CONCLUSION

In attempting to make the treatment of attorneys who fail to pay child support consistent with the treatment of other professionals, this Honorable Court must insure that it is being fair and evenhanded and that it does not treat attorneys more severely because they are regulated by the Florida Supreme Court rather than the Department of Professional and Business Regulation.

Respectfully submitted, December 1, 1994.



John Hume

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s. 61.181 shall accept the interstate income deduction documents or affidavit and shall establish an account for the receipt and disbursement of alimony payments or child support payments in accordance with s. 61.181 and advise the IV-D agency of the account number in writing within 2 days after receipt of the documents or affidavit.

(i) Certified copies of payment records maintained by a depository shall, without further proof, be admitted into evidence in any legal proceeding in this state.

(j)1. A person may not discharge, refuse to employ, or take disciplinary action against an employee because of the enforcement of an income deduction order. An employer who violates this subsection is subject to a civil penalty not to exceed \$250 for the first violation or \$500 for any subsequent violation. Penalties shall be paid to the obligee or the IV-D agency, whichever is enforcing the income deduction order, if any alimony or child support is owing. If no alimony or child support is owing, the penalty shall be paid to the obligor.

2. An employee may bring a civil action in the courts of this state against an employer who refuses to employ, discharges, or otherwise disciplines an employee because of an income deduction order. The employee is entitled to reinstatement and all wages and benefits lost plus reasonable attorney's fees and costs incurred.

(k) When a payor no longer provides income to an obligor, he shall notify the obligee and, if the obligee is a IV-D applicant, the IV-D agency and shall also provide the obligor's last known address and the name and address of the obligor's new payor, if known. A payor who violates this subsection is subject to a civil penalty not to exceed \$250 for the first violation or \$500 for a subsequent violation. Penalties shall be paid to the obligee or the IV-D agency, whichever is enforcing the income deduction order.

(3) It is the intent of the Legislature that this section may be used to collect arrearages in child support payments or in alimony payments which have been accrued against an obligor.

History.—s. 3, ch. 84-110; s. 4, ch. 85-178; ss. 119, 120, ch. 86-220; s. 2, ch. 87-95; s. 5, ch. 88-176; s. 2, ch. 89-183; s. 13, ch. 91-45; s. 3, ch. 92-138; s. 1, ch. 93-69; s. 5, ch. 93-188; s. 19, ch. 93-208.

Note.—Section 8, ch. 93-188, provides that "[t]his act does not apply to proceedings pending on October 1, 1993, but those proceedings remain governed by the law in effect on September 30, 1993."

61.13015 Petition for suspension or denial of professional licenses and certificates.—

(1) An obligee may petition the court which entered the support order or the court which is enforcing the support order for an order to suspend or deny the license or certificate issued pursuant to chapters 231, 409, 455, and 559 of any obligor with a delinquent child support obligation. However, no petition may be filed until the obligee has exhausted all other available remedies. The purpose of this section is to promote the public policy of s. 409.2551.

(2) The obligee shall give notice to any obligor when a delinquency exists in the support obligation. The notice shall specify that the obligor has 30 days from the date on which service of the notice is complete to pay the delinquency or to reach an agreement with the obligee to pay the delinquency. The notice shall specify

that, if payment is not made or an agreement cannot be reached, the license or certificate may be denied or suspended pursuant to a court order.

(3) If a delinquency exists and the obligor fails to pay the delinquency or to reach an agreement to pay the delinquency within 30 days following completion of service of the notice of the delinquency, the obligee shall send a second notice to the obligor stating that the obligor has 30 days to pay the delinquency or reach an agreement with the obligee to pay the delinquency. If the obligor fails to respond to either notice from the obligee or if the obligor fails to pay the delinquency or to reach an agreement to pay the delinquency after the second notice, the obligee may petition the court to deny the application for the license or certificate or to suspend the license or certificate of the obligor. The court may find that it would be inappropriate to deny or suspend a license or certificate if:

(a) Denial or suspension would result in irreparable harm to the obligor or employees of the obligor or would not accomplish the objective of collecting the delinquency; or

(b) The obligor demonstrates that he has made a good faith effort to reach an agreement with the obligee.

The court may not deny or suspend a license or certificate if the court determines that an alternative remedy is available to the obligee which is likely to accomplish the objective of collecting the delinquency. If the obligor fails in the defense of a petition for denial or suspension, the court which entered the support order or the court which is enforcing the support order shall enter an order to deny the application for the license or certificate or to suspend the license or certificate of the obligor. In the case of suspension, the court shall order the obligor to surrender the certificate or license to the department or to the licensing board which issued the license or certificate. In the case of denial, the court shall order the appropriate department or licensing board to deny the application.

(4) If the court denies or suspends a license or certificate and the obligor subsequently pays the delinquency or reaches an agreement with the obligee to settle the delinquency and makes the first payment required by the agreement, the license or certificate shall be issued or reinstated upon written proof to the court that the obligor has complied with the court order. Proof of payment shall consist of a certified copy of the payment record issued by the depository. The court shall order the appropriate department or licensing board to issue or reinstate the license or certificate without additional charge to the obligor.

(5) Notice shall be served under this section by mailing it by certified mail, return receipt requested, to the obligor at his last address of record with the local depository. If the obligor has no address of record with the local depository, or if the last address of record with the local depository is incorrect, service shall be by publication as provided in chapter 49. When service of the notice is made by mail, service is complete upon the receipt of the notice by the obligor.

History.—s. 2, ch. 93-208.

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CLERK, SUPREME COURT

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Chief Deputy Clerk

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Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Case No. 84,390

Dear Mr. White:

Having never before filed a response to a proposed rule, I am uncertain as to the correct format and procedure.

The enclosed response utilizes the style of the case used by the Supreme Court and adopts a memorandum format.

Should this not be acceptable, I would request your guidance in formulating this response correctly.

Sincerely,

HUME & JOHNSON, P.A.


John Hume

JH/cs
Enclosure