

FILED

SID J. WHITE

MAR 28 1996

IN THE SUPREME COURT OF FLORIDA

IN RE: THE FLORIDA BAR
 PETITION TO AMEND RULES
 REGULATING THE FLORIDA BAR

DOCKET NO. 87,132

CLERK, SUPREME COURT
 By
 Deputy Clerk

COMMENTS OF PETER B. DOLINGER IN OPPOSITION TO
THE PROPOSED ADOPTION OF AMENDMENTS
TO RULES REGULATING THE FLORIDA BAR

COMES NOW the undersigned, PETER B. DOLINGER, *pro se*, and pursuant to the order of this Honorable Court rendered March 26, 1996, hereby submits his written comments in opposition to the proposed adoption of amendments to portions of ch. 10 of the Rules Regulating the Florida Bar in the above-styled action.

Based on the objections and argument in support thereof set forth below, the undersigned respectfully requests that the Court deny the petition of the Florida Bar requesting adoption of the amended rule. Alternatively, the undersigned would request that the petition be denied without prejudice to the Bar re-filing same, setting forth a proper basis of authority to support the requested rule change. In support thereof, the undersigned would show:

1. The Florida Bar seeks to amend provisions of ch. 10 of the Rules regulating the Florida Bar for the purpose of providing a procedure to allow for the imposition of a restitutional penalty as part of the Court's final order in exercise of its powers to prohibit the unlicensed practice of law.

2. The Bar's petition follows the Court's announcement in

The Florida Bar v. Warren, 655 So.2d 304 (Fla. 1995) that:

[T]he Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law contained in chapter 10 of the Rules Regulating The Florida Bar contain no provision authorizing the ordering of restitution.

3. In its Petition, the Bar cites to no authority, constitutional, statutory, or otherwise, which would authorize the Supreme Court of Florida to impose restitution as part of its UPL regulatory scheme. Thus, while the Bar has advanced an emotional appeal as to why the proposed rule should be adopted, it has wholly failed to demonstrate a lawful, constitutional basis for the proposed rule.

4. This Court's authority to regulate UPL was first discussed and announced in the seminal decision of *State v. Sperry*, 140 So.2d 587 (Fla. 1962), reversed on other grounds, *Sperry v. State of Florida, The Florida Bar*, 373 U.S. 539, 83 S.Ct. 1322 (1963). Therein, the Court adopted the view that it had the authority to prevent the practice of law under its constitutional jurisdiction to regulate the practice of law. *Id.*, at 589; See also, Art. V, §23, Fla. Const. (1956).

Finding that it had the constitutional jurisdiction to regulate that activity, the Court next turned to the question of "whether this Court may enforce its authority in such matters by either or both contempt proceedings and injunctions." *Id.* Adopting the majority view of the [then] existing consensus in American jurisprudence on the issue, the Court found that the unauthorized practice of law was a contempt of the Court, and

thus, properly enjoined or subject to contempt. This result was further buttressed by the Court's constitutional grant of its "all-writs" jurisdiction, Article V, section 4(2), Fla. Const. (1956).

5. In *Sperry*, the Bar sought to invoke the Court's jurisdiction in these matters by a direct-filed petition. It was not until 1965 that this Court first adopted a formal method of processing such petitions. In *In re: The Florida Bar*, 175 So.2d 530 (Fla. 1965), the Court amended the Integration Rules, adding Article XVI, to provide a mechanism for processing UPL complaints, investigating same, and in seeking this Court's intervention.

6. Respectfully, the undersigned submits that this Court is without constitutional jurisdiction to require restitution as part of its UPL regulatory scheme. Neither sections 2, 3(b)(7), or 15 of Article V of the Florida Constitution expressly authorize such. As discussed in *Sperry, supra*, this Court's jurisdiction in UPL matters is simply contained to prohibiting such activity by means of injunction, and to punish a subsequent act as contempt. Accordingly, the Bar's effort is beyond adopting a procedure -- in actuality, it is requesting that the Court adopt a substantive interpretation of its own constitutional jurisdiction -- a matter which deserves ample consideration at a minimum.

¹ See, art. V, §3(b)(7), Fla. Const. (1980), for the present "all-writs" jurisdiction.

7. As noted by other commenters to this proceeding, Florida law provides a host of opportunities for a party who has suffered an injury as a result of UPL activity to recover damages they may have incurred. An action sounding in deceptive trade practices, fraud and misrepresentation, negligence, and/or civil theft, would clearly lie to restore a person from such damages.

8. The question of whether UPL activity resulted in actual damages, in and of itself, cautions against this Court replacing the adequate remedies set forth above. The Bar's position, taken to its logical extreme, would have absurd results. For instance, if a person committed UPL by drafting a complaint for a party in small claims, and the party prevailed in that action, the first party has committed UPL. Yet, despite the fact that the second party obtained access to the court and justice resulted in the award of monetary damages, the Bar's rule would allow restitution to be imposed against the first party, notwithstanding a lack of obvious injury.

9. In *Warren, supra*, this Court was presented with a narrow set of circumstances quite apart from those in the run-of-the-mill UPL case. Warren's commission of UPL also involved his fraudulent misrepresentations that he was a licensed attorney, etc. To now fashion a rule applicable to the general circumstances based on these narrow facts is not in the best interest of justice.

WHEREFORE, the undersigned respectfully requests that this Honorable Court enter an order denying the petition herein, or

alternatively, grant such further and other relief to which the public may be entitled thereto.



PETER B. DOLINGER
2053 Ranchara Trail
Holiday, Florida 34691
(813) 937-0452

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of the foregoing has been furnished by regular telefax to MARY ELLEN BATEMAN, UPL Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 23rd day of March, 1996.



PETER B. DOLINGER