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CLERK, SUPREME COURT

By

Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
AMENDMENT TO RULES
REGULATING THE FLORIDA
BAR

CASE NO. 87,589

REPLY TO COMMENTS OF MICHAEL A. CATALANO

THE FLORIDA BAR hereby replies to the comments of member,
Michael A. Catalano and says:

1. The amendment is about a difference in the intent of the bar in originally proposing the rule as written (effective March 17, 1990, 558 So. 2d 1008) and this court's interpretation thereof.

2. There are 3 concepts at issue here.

First, is what type and number of members are necessary to properly appoint or constitute a particular grievance committee.

Prior to and after the 1990 amendments, grievance committees are required to be composed of at least 3 members. At least one-third of the members must be public members. 3-3.4(c), R. Regulating Fla. Bar. Another subdivision requires designation of a chair and vice-chair, both of whom must be lawyers. 3-3.4(e), R. Regulating Fla. Bar. While the rules require only 2 lawyer members on any grievance committee, by custom the bar has

attempted to maintain a one-third public-member to two-thirds lawyer-member ratio. The 1990 amendments allowed the division of grievance committees into panels of not fewer than 3 members. Two of any panel are required to be lawyers. 3-7.4(f) (now (g)), R. Regulating Fla. Bar.

Second, and after properly appointing a grievance committee, is the issue of how many and what types of members are necessary for a meeting of a grievance committee to conduct business on particular matters. Said another way, whether a quorum of a properly constituted grievance committee has gathered for business.

The rules define a quorum as 3 members of a grievance committee, 2 of whom must be lawyers. 3-7.4(g), R. Regulating Fla. Bar.

The **third** issue is, assuming a properly appointed committee and a quorum present, how many votes and by what types of members are required to constitute official committee action.

A majority vote of 2 members of the committee constitutes an affirmative committee action. Lawyer members who function as the investigating committee member may not vote on that particular matter, in all instances. 3-7.4(g), R. Regulating Fla. Bar.

3. Background:

The 1990 amendments created 3-7.4(f) as follows:

(f) Quorum, Vote. Three members of the committee, 2 of whom must be lawyers, shall constitute a quorum. The grievance committee may consider cases in panels of nNot fewer than 3 members, one of whom must be the chairperson or vice-chairperson and another two (2) of whom must be a lawyer_s. shall constitute a quorum. Consideration of matters by a panel of three (3) members shall only be conducted upon concurrence of the designated reviewer and the chairperson of the grievance committee. The three (3) member panel shall elect one of its lawyer members to preside over the panel's actions. If the chairperson or vice-chairperson is a member of a 3-member panel, the chairperson or vice-chairperson shall be the presiding officer. All findings of probable cause and recommendations of guilt of minor misconduct shall be made by affirmative vote of a majority of the committee members present, which majority must number at least two (2) members. The number of committee members voting for or against the committee report shall be reflected in the transcript. Minority reports may be filed. A lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigating member of the committee.

Intent of the bar:

The plain language of the amendment illustrated an intent to require as a quorum 3 members, 2 of whom were lawyers and to allow panels of 3, with 2 lawyers, but in all instances to

disqualify a lawyer investigating member from voting. Thus in the instance of a 3 person panel with 2 lawyers and 1 public member, a lawyer investigating member would, by operation of the rule leave 2 voting members, only 1 of whom is a lawyer. That was understood and intended by the bar. What the bar never intended is that a judicial referee would find, and this court agree that:

. . . the word "consider" means "to judge." Thus, the referee concluded that the misconduct charge against Catalano was only considered by one lawyer, in violation of the procedures outlined by rule 3-7.4(g).

We agree with the referee's interpretation of the rule

4. 3-7.4(f) was renumbered (g) and style changes were made thereto July 23, 1992 (605 So. 2d 252), but the substance as quoted above was unchanged. No other changes have been made leaving the subdivision currently as:

(g) Quorum, Vote. Three members of the committee, 2 of whom must be lawyers, shall constitute a quorum. The grievance committee may consider cases in panels of not fewer than 3 members, 2 of whom must be lawyers. Consideration of matters by a panel of 3 members shall only be conducted upon concurrence of the designated reviewer and the chair of the grievance committee. The 3-member panel shall elect 1 of its lawyer members to preside over the panel's actions. If the chair or vice-chair is a member of a 3-member panel, the chair or vice-chair shall

be the presiding officer. All findings of probable cause and recommendations of guilt of minor misconduct shall be made by affirmative vote of a majority of the committee members present, which majority must number at least 2 members. The number of committee members voting for or against the committee report shall be reflected in the transcript. Minority reports may be filed. A lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigating member of the committee.

The proposed amendment is:

(g) Quorum, Panels, Vote.

(1) Quorum. Three members of the committee, 2 of whom must be lawyers shall constitute a quorum.

(2) Panels. The grievance committee may ~~consider cases in be divided into~~ panels of not fewer than 3 members, 2 of whom must be lawyers. ~~Consideration of matters by a Division of the grievance committee into panels of 3 members~~ shall only be conducted upon concurrence of the designated reviewer and the chair of the grievance committee. The 3-member panel shall elect 1 of its lawyer members to preside over the panel's actions. If the chair or vice-chair is a member of a 3-member panel, the chair or vice-chair shall be the presiding officer.

(3) Vote. All findings of probable cause and recommendations of guilt of minor misconduct shall be made by affirmative vote of a majority of the committee members present, which majority must number at least 2 members. There shall be no required minimum number of lawyer members voting in order to satisfy the requirements of this rule. The number of committee members voting for or against the committee report

shall be reflected in the transcript. Minority reports may be filed. A lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigating member of the committee.

5. The proposed amendment continues the bar's original intent. Such intent is that a quorum, to have a proper meeting of a grievance committee (or panel), is 3 members, 2 of whom must be lawyers; that if a panel of 3 is employed, the panel must be composed of at least 2 lawyers; that an affirmative vote of only 2 committee (or panel) members is required to constitute committee (or panel) action; and that a lawyer investigating member of a committee (or panel) may not vote on that case, but does not affect the quorum of the committee (or panel).

6. The comment of Mr. Catalano suggests that at least 2 lawyers should screen all disciplinary cases. Such comment does not consider that bar counsel (a lawyer) screens all cases, not once, but twice. First, as an inquiry (3-7.3(a), R. Regulating Fla. Bar) and then as a disciplinary complaint (3-7.3(b), R. Regulating Fla. Bar). Then, the file is reviewed by the chair of the committee to determine assignment. In the case of a matter assigned to a lawyer investigating member of a committee (or panel) such lawyer screens the file in determining what action

(hearing or dismissal) to recommend to the full committee (or panel). Lastly, in all cases the remaining 1 lawyer (on panels or to establish the minimum quorum) is involved in the final committee (or panel) screening or determination. At a minimum 3 lawyers screen, in some fashion, all disciplinary files.

7. Finally, it also must be kept in mind that these screenings are not findings of guilt, but a determination if evidence exists to establish probable cause to believe that the respondent has committed an ethics violation that warrants the imposition of discipline.

This is a grand jury-type function and, by way of comparison, accepted public policy has placed no requirement on criminal grand juries for any number of lawyers to review and screen allegations of violations of the law. In such matters liberty and even life itself is potentially in the balance. Also in criminal matters the state attorney alone may decide to bring most charges.

The lawyer disciplinary process provides greater rule and procedural due process by the balanced review and involvement of lawyers and public members in decisions to institute formal disciplinary proceedings.

WHEREFORE, THE FLORIDA BAR prays the court will amend the rule as requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this response has been mailed this 28th day of March, 1996 to:

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John Anthony Boggs

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