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~~FILED~~
SID J. WHITE
APR 15 1996
CLERK, SUPREME COURT
By ~~Chief Deputy Clerk~~
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CLERK, SUPREME COURT
By ~~Chief Deputy Clerk~~

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April 15, 1996

RECEIVED

APR 15 1996

CLERK OF COURT

VIA HAND-DELIVERY

Justices of The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: The Florida Bar, Petition To Amend Rules Regulating The Florida Bar, Case No. 87,589

Dear Justices of The Supreme Court:

In accordance with the procedures of the Court, The Florida Council of Associated General Contractors wishes to submit the following comments on the proposed changes to the Rules Regulating The Florida Bar.

More specifically, AGC wishes to comment on the proposed change to Rule 10-1.2 Duty of The Florida Bar. This rule addresses the responsibility of The Bar to regulate the unauthorized practice of law. AGC supports that objective. However, the language of the proposed rule change goes far beyond that appropriate objective. The proposed rule states in part:

However, no one has the right to represent another; it is a privilege to be granted and regulated by the court for the protection of the public.

This broad sweeping statement most likely invokes the law of unintended consequences and must be closely scrutinized by the Court. If the statement were restricted to representation in a legal proceeding or for the purpose of preparing legal documents, the objections to the rule would go away. As presently drafted, the rule seeks to regulate may activities that have nothing to do with the grant of jurisdiction under Article V, Section 15 of the Florida Constitution.

Consider the following unintended effects of this proposed language:

- Any non-lawyer trustee would be unable to carry out the duties granted in the trust document as those duties would be considered representing the beneficiaries of the trust.
- The rule appears to regulate the representation of an elderly parent by that parent's adult child in financial or property matters.
- The rule appears to prohibit a CPA from representing a client in a disputed tax matter.
- The rule appears to prohibit a professional engineer, an architect or a general contractor from practicing their professions if any activities involve matters of representation. It is common for architects, engineers and contractors to submit plans for permitting purposes and to represent the owner as the application moves through the permitting process.
- Presumably a stock broker could not place an order for the purchase of securities on behalf of his or her client.

At first impression, the intent of the drafters may not reach as far as AGC has suggested. However, the Court should be aware that there was a very explicit attempt to regulate activities that have not traditionally been considered the practice of law. A copy of a prior draft of the rules that defines the unauthorized practice of law is enclosed for the Court's reference.

The Board of Governors of The Florida Bar should be complemented for not submitting the prior draft of the proposed rule to the Court. But that action leads to the question, why is any change to Rule 10-1.2 necessary? It appears that the current rule is appropriately narrow and serves the legitimate objectives of The Bar in protecting the public.

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REQUESTED RELIEF

1. If the Court considers oral argument on the Petition, AGC would like time to be heard on its comments;


2. The Court should reject that portion of the Petition relating to changes to Rule 10-1.2; or

3. In the alternative, the rule should be rewritten to provide as follows:

The right of individuals to represent themselves in matters involving the practice of law is an inalienable right common to all natural persons. However, no one has the right to represent another if such representation involves the practice of law and the person is not regulated by the court. ~~it is a privilege to be granted and regulated by the court for the protection of the public.~~

AGC appreciates the opportunity to submit these comments and hopes that the Court will consider them favorably.

Sincerely yours,



Neil H. Butler

NHB/

cc: Jack Harkness, Executive Director
Florida AGC Council

...of the one qualified to render legal services, and payment or compensation to the legally disqualified shareholder, member or partner based on legal services rendered while the legally disqualified shareholder, member or partner is not personally qualified to render them. Mere characterization of continued compensation, which is the same or similar to that the legally disqualified shareholder, member or partner received when qualified to render legal services, is not sufficient to satisfy the requirements of this rule.

Profit sharing or pension plans

To the extent that applicable law requires continued payment to existing profit sharing or pension plans, nothing in this rule or the statute may abridge such payments. However, if permitted under applicable law the amount paid to the plan for a legally disqualified shareholder, member or partner shall not include payments based on legal services rendered while the legally disqualified shareholder, member or partner was not personally qualified to render legal services.

Interstate Practice

This rule permits members of The Florida Bar to engage in the practice of law with lawyers licensed to practice elsewhere in an authorized business entity organized under the laws of another jurisdiction and qualified under the laws of Florida (or vice-versa) but nothing herein is intended to affect the ability of non-members of The Florida Bar to practice law in Florida. See, e.g., The Florida Bar v. Savitt, 363 So. 2d 559 (Fla. 1978).

The terms qualified and legally disqualified are imported from the Professional Service Corporation Act (Chapter 621, Florida Statutes).

CHAPTER 10. RULES GOVERNING THE INVESTIGATION AND PROSECUTION OF THE UNLICENSED PRACTICE OF LAW

10-1. PREAMBLE

RULE 10-1.1 JURISDICTION

Pursuant to the provisions of article V, section 15, of the Florida Constitution, the Supreme Court of Florida has inherent jurisdiction to prohibit the unlicensed practice of law.

RULE 10-1.2 DUTY OF THE FLORIDA BAR

The right of individuals to represent themselves is an inalienable right common to all natural persons. However, no one has the right to represent another; it is a privilege to be granted and regulated by the court for the protection of the public.

The Florida Bar, as an official arm of the court, is charged with the duty of considering, investigating, and seeking the prohibition of matters pertaining to the unlicensed practice of law and the prosecution of alleged offenders. The court shall establish a standing committee on the unlicensed practice of law and at least 1 circuit committee on unlicensed practice of law in each judicial circuit.

10-2. DEFINITIONS

RULE 10-2.1 GENERALLY

Whenever used in these rules the following words or terms shall have the meaning herein set forth unless the use thereof shall clearly indicate a different meaning:

(a) Unlicensed Practice of Law. The unlicensed practice of law shall mean the practice of law, as prohibited by statute, court rule, and case law of the State of Florida. Except as provided in subdivision (b) of this section, the unlicensed practice of law is the rendering of legal services or legal advice to another, with or without compensation, by any nonlawyer. The activities that follow represent a nonexclusive list of types of practice that would constitute the unlicensed practice of law when performed by a nonlawyer for another:

(1) appearing for or on behalf of another at any stage of a state or federal proceeding pending in any court or pending before any magistrate or other judicial officer or pending before any federal, state, county or municipal governmental agency, quasi-judicial or quasi-governmental authority;

(2) preparing or drafting or assisting in the preparation or drafting of any pleading or any other paper at any stage of a state or federal proceeding for or on behalf of another person in any action brought in any court or before any magistrate or other judicial officer or before any federal, state, county or municipal governmental agency, quasi-judicial or quasi-governmental authority;

(3) preparing or drafting or assisting in the preparation or drafting of any deed, mortgage, assignment, discharge, lease, agreement of sale, or any other instrument affecting the title to real property or personal property;

(4) preparing or drafting or assisting in the preparation or drafting of any will, trust instrument or other document affecting the disposition of any property or the rights or status of any person while living or upon death, or preparing any instrument relating to the administration of a decedent's estate;

(5) preparing or drafting or assisting in the preparation or drafting of any pleading, paper, or other document which affects in any way the rights and responsibilities of any person in a matter involving marriage, premarital agreements, dissolution of marriage, divorce, separation, marital settlement agreements, custody, visitation, adoption, paternity, dependency, or delinquency of children;

(6) preparing or drafting or assisting in the preparation or drafting of any form or document that effects a change in immigration status or citizenship or that seeks to obtain permanent residency in the United States or temporary residency in the United States and/or holding oneself out as legally qualified to perform immigration services;

(7) preparing or drafting or assisting in the preparation or drafting of a petition, schedule or any other document, pleading or paper for a debtor in a United States bankruptcy court or a United States district court in connection with a case brought under the bankruptcy laws of the United States;

(8) preparing or drafting or assisting in the preparation or drafting of any documents necessary to the establishment of a corporation;

(9) appearing for or on behalf of another to commence, settle, compromise, adjust, or dispose of any civil, criminal, or administrative case or cause of action;

(10) preparing or drafting or assisting in the preparation or drafting of any legal instrument for another by which legal rights are either obtained, secured, or given away, although such matters may not then or ever be the subject of proceedings in court or before any tribunal;

(11) rendering legal advice or counsel as to one's rights, obligations, remedies, courses of action, or options under the law, or construing or interpreting the legal effect of laws or stat-

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(12) giving legal advice concerning the application, preparation, advisability or quality of any legal instrument, document, or form or having direct contact in the nature of consultation, explanation, recommendation, advice, or assistance in the provision, selection, or completion of any legal instrument, document, or form; or

(13) holding out of oneself to the public as qualified, licensed, or able to practice law in this state or pretending to be a lawyer or taking any name, title, addition, or description implying that one is qualified, licensed, able, or recognized by law as qualified, to act as a lawyer in this state.

(h) For purposes of this chapter, it shall not constitute the unlicensed practice of law for nonlawyers to engage a nonlawyer to:

(1) engage in any of the activities set forth in subdivision (a) of this section if the nonlawyer has been authorized to engage in the activity by court rule, case law, administrative rule, or the Rules Regulating The Florida Bar; or

(2) engage in any of the activities set forth in subdivision (a)(2)(A) and subdivision (a)(10) if the nonlawyer is acting for and under the direct supervision of a member of The Florida Bar in the rendition of the lawyer's professional services.

(3) engage in limited oral communications to assist a person in the completion of blanks on a legal form approved by the Supreme Court of Florida. Oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the blanks on the form and inform the person how to file the form.

The following language shall appear on any form completed pursuant to this rule and any individuals assisting in the completion of the form shall provide their name, business name, address, and telephone number on the form:

This form was completed with the assistance of:

Name of Individual

Name of Business

Address

Telephone Number

Before a nonlawyer assists a person in the completion of a form in the manner set forth in this rule, the nonlawyer shall provide the person with a copy of a disclosure. A copy of the disclosure, signed by both the nonlawyer and the person, shall be given to the person to retain and the nonlawyer shall keep a copy in the person's file. The disclosure does not act as or constitute a waiver, disclaimer, or limitation of liability. The disclosure shall contain the following provisions:

(Name) told me that he/she is not a lawyer and may not give legal advice or represent me in court.

(Name) told me that he/she may only help me fill out a form approved by the Supreme Court of Florida. (Name) may only help me by asking me factual questions to fill in the blanks on the form. (Name) may also tell me how to file the form.

(Name) told me that he/she is not an attorney a lawyer and cannot tell me what my rights or remedies are or how to testify in court.

___ I can read English

___ I cannot read English but this notice was read to me by (Name) in (Language) which I understand.

(b) (1) Nonlawyer or Nonattorney. For purposes of this chapter, a nonlawyer or nonattorney is an individual who is not a member of The Florida Bar. This includes, but is not limited to, attorneys lawyers admitted in other jurisdictions, law students, law graduates, applicants to The Florida Bar, disbarred attorneys lawyers, and suspended attorneys lawyers during the period of suspension.

(c) (1) This Court or the Court. This court or the court shall mean the Supreme Court of Florida.

(d) (1) Bar Counsel. Bar counsel is a member of The Florida Bar representing The Florida Bar in any proceeding under these rules. Any unlicensed practice of law staff counsel of The Florida Bar may serve as bar counsel or assistant bar counsel in a particular case.

(e) (1) Respondent. A respondent is a nonlawyer who is accused of engaging in the unlicensed practice of law or whose conduct is under investigation.

(f) (1) Referee. A referee is the judge or retired judge appointed to conduct proceedings as provided under these rules.

(g) (1) Standing Committee. The standing committee is the committee constituted according to the directives contained in these rules.

(h) (1) Circuit Committee. A circuit committee is a local unlicensed practice of law circuit committee.

(i) (1) UPL Staff Counsel. UPL staff counsel is an employee of The Florida Bar employed to perform such duties, as may be assigned, under the direction of the executive director. When used in this rule, the term may include assistant UPL staff counsel.

(j) (1) UPL. UPL is the unlicensed practice of law.

(k) (1) The Board or Board of Governors. The board or board of governors is the board of governors of The Florida Bar.

(l) Designated Reviewer. The designated reviewer is a member of the board of governors responsible for review and other specific duties as assigned by the board of governors with respect to a particular circuit committee or matter. If a designated reviewer refuses or is unavailable, any other board member may serve as designated reviewer in that matter. The designated reviewer will be selected, from time to time, by the board members from the circuit of such circuit committee. If circuits have an unequal number of circuit committees and board members, review responsibility will be reassigned, from time to time, to equalize workloads. On such reassignments responsibility for all pending cases from a particular committee passes to the new designated reviewer. UPL staff counsel will be given written notice of changes in the designated reviewing members for a particular committee.

(m) Executive Committee. The executive committee is the executive committee of the board of governors of The Florida Bar. All acts and discretion required by the board under these rules may be exercised by its executive committee between meetings of the board as may from time to time be authorized by standing policies of the board of governors.

10-3. STANDING COMMITTEE

RULE 10-3.1 GENERALLY

The standing committee shall be appointed by the court on advice of the board of governors of The Florida Bar and shall consist of at least 15 members, not less than 6 15 of whom shall be nonlawyers. The board of governors is delegated the authority to appoint a chair and at least 1 vice-chair of the standing committee, both of whom shall be members of The Florida Bar may be nonlawyers. A majority One-third of the members of the standing committee shall constitute a quorum. The members of the standing committee shall serve staggered terms. To accomplish this, the initial terms shall be staggered as follows: 2 members of The Florida Bar and 2 nonlawyer members to serve 1 year; 2 members of The Florida Bar and 2 nonlawyer members to serve 2 years; all remaining members to serve 3 years. After that, all appointments to the standing committee shall be for a term of 3 years. No member shall be appointed more than 2 consecutive full terms. The members of the standing committee shall not be subject to removal by the court during their terms of office except for cause. Cause shall include unexcused failures to attend scheduled meetings, the number of which shall be set forth

(4) joining with a circuit committee in a particular investigation;

(5) assigning staff investigators, UPL staff counsel, and voluntary bar counsel to conduct investigations on behalf of or in concert with the circuit committees; and

(6) suspending circuit committee members and chairs for cause and appointing a temporary circuit committee chair where there has been a suspension, resignation, or removal, pending the appointment of a permanent chair by the board of governors;

(c) the reporting of recommendations to the board of governors that litigation should be instituted in order to prevent the unlicensed practice of law;

(d) (1) the initiation and supervision of litigation authorized by the board of governors, including the delegation of responsibility to UPL staff counsel, assistant UPL staff counsel, or bar counsel to prosecute such litigation;

(e) (1) the giving of advice regarding the unlicensed practice of law policy to the office of board of governors, staff, sections, or committees of The Florida Bar as requested; and

(f) (1) furnishing any and all information, confidential records, and files regarding pending or closed investigations of unlicensed practice of law to any state or federal law enforcement regulatory agency, United States attorney, state attorney, the Florida Board of Bar Examinee and equivalent entities in other jurisdictions, and Florida bar grievance committees and equivalent entities in other jurisdictions where there is or may be a violation of state or federal law the Rules of Professional Conduct of The Florida Bar.

RULE 10-3.3 APPOINTMENT OF STAFF COUNSEL AND BAR COUNSEL

The board of governors shall employ 1 or more permanent UPL staff counsel and other necessary employees, including investigators, to assist the standing committee to carry out its responsibilities as prescribed elsewhere in these rules. Upon approving a recommendation of litigation under these rules, the board of governors shall appoint bar counsel to prosecute the cause before the referee.

10-4. CIRCUIT COMMITTEES

RULE 10-4.1 GENERALLY

(a) Appointment. Each circuit committee shall be appointed by the court on advice of the board of governors and shall consist of not fewer than 3 members, at least one-third of who shall be nonlawyers. A majority of the members of a circuit committee shall constitute a quorum. Three members of the circuit committee or a majority of the members, whichever is less shall constitute a quorum. The terms of the members of circuit committees shall begin on June 1 and shall end on the next succeeding June 30 or at such time as their successors are appointed and qualified. Continuous service of a member shall not exceed 3 years. A member shall not be reappointed for a period of 3 years after the end of the member's term, provided, however, if the expiration of the term of any member shall not disqualify that member from concluding any investigations pending before that member. Any member of a circuit committee may be removed from office by the board of governors.

(b) Committee Chair. For each circuit committee there shall be a chair designated by the board of governors and a vice-chair and secretary designated by the chair of each circuit committee. The chair shall be a member of The Florida Bar.

(c) Duties. It shall be the duty of each circuit committee to investigate, with dispatch, a reports of unlicensed practice of law and to make prompt written report of its investigation and findings to UPL staff counsel and the standing committee. In addition, the duties of the circuit committee shall include, but not be limited to:

(1) closing cases not deemed by the circuit committee to warrant further action by The Florida Bar;

(2) closing cases proposed to be resolved by cease and desist affidavit; and

(3) forwarding to UPL staff counsel recommendations for litigation to be reviewed by the standing committee.

(d) Circuit Committee Meetings. Circuit committees should meet at regularly scheduled times, not less frequently than quarterly each year. Either the chair or vice chair may call special meetings. Circuit committees should meet at least monthly during any period where the committee has 1 or more pending cases assigned for investigation and report. The time date and place of regular monthly meetings should be set in advance by agreement between each committee and UPL staff counsel.

10-5. COMPLAINT PROCESSING AND INITIAL INVESTIGATORY PROCEDURES

RULE 10-5.1 COMPLAINT PROCESSING

(a) Complaints. All complaints alleging unlicensed practice of law, except those initiated by The Florida Bar, shall be in writing and signed by the complainant. The complaint shall contain a statement providing that:

Under penalties of perjury, I declare that I have read the foregoing document and that to the best of my knowledge and belief the facts stated in it are true.

(b) Review by UPL Staff Counsel. UPL staff counsel shall review the complaint and determine whether the alleged conduct, if proven, would constitute a violation of the prohibition against engaging in the unlicensed practice of law. UPL staff counsel may conduct a preliminary, informal investigation to aid in this determination and, if necessary, may employ Florida bar staff investigator to aid in the preliminary investigation. If UPL staff counsel determines that the facts, if proven, would not constitute a violation, UPL staff counsel may decline to pursue the complaint. A decision by UPL staff counsel not to pursue a complaint shall not preclude further action or review under the Rules Regulating The Florida Bar. The complainant shall be notified of a decision not to pursue a complaint and shall be given the reasons therefor.

(c) Referral to Circuit Committee. If UPL staff counsel decides to pursue a complaint a UPL file will be opened and the matter referred to the appropriate circuit committee for investigation as authorized elsewhere in these rules.

(d) Closing by UPL Staff Counsel and Committee Chair. If UPL staff counsel and circuit committee chair concur in a finding that the case should be closed without a finding of unlicensed practice of law, the complaint may be closed on such finding without reference to the circuit committee or standing committee.

(e) Referral to UPL Staff Counsel for Opening. A complaint received by a circuit committee or standing committee member direct from a complainant shall be reported to UPL staff counsel for docketing and assignment of a case number. Should the circuit committee or standing committee member decide that the facts, if proven, would not constitute a violation of the unlicensed practice of law, the circuit committee or standing committee member shall forward this finding to UPL staff counsel along with the complaint for notification to the complainant as outlined above. Formal investigation by a circuit committee may proceed after the matter has been referred to UPL staff counsel for docketing.

10-6. PROCEDURES FOR INVESTIGATION

RULE 10-6.1 HEARINGS

(a) Conduct of Proceedings. The proceedings of circuit committees and the standing committee when hearings are held may be informal in nature and the committees shall not be bound by the rules of evidence.