Supreme Court of Florida

AMENDMENTS TO **RULE** 4-6.1
OF THE RULES REGULATING
THE FLORIDA BAR - PRO BONO
PUBLIC SERVICE.

No. 88,646

[May 22, 1997]
CORRECTED OPINION

PER CURIAM.

The Florida Bar (the Bar) petitions this Court for entry of an order amending rule 4-6.1 of the Rules Regulating the Florida Bar. We have jurisdiction. Art. V, § 15, Fla. Const. We deny the petition.

The Bar seeks to amend rule 4-6.1 to eliminate the mandatory annual reporting provision that currently requires all members of the Bar to report whether and how they have satisfied their professional responsibility of providing pro bono legal services to the poor. The proposed amendment would make slight, but crucial, changes to wording in the reporting requirements in section 4-6.1(d). It would replace the "shalls" with "shoulds" and would eliminate the last sentence, which currently reads: "The failure to report this information shall constitute a disciplinary offense under these rules." In short, the proposed amendment would substitute a voluntary annual reporting process for the current mandatory one.

Proponents of the amendment argue the following: The public interest is not served by the mandatory reporting requirement; enforcement of the mandatory reporting requirement would infringe upon rights guaranteed by the state and federal constitutions; the current rule violates the separation of powers principle because it is a legislative undertaking; the current rule is an avoidance technique to prevent federal review of political activity; and finally, the Florida Supreme Court should not operate as a bully pulpit for public relations and encouraging charitable activity. We disagree with these assessments.

At the time this Court adopted the pro bono rules in 1993, we explained our authority and reason for so doing:

> The authority and responsibility of this Court to adopt rules on the issue of pro bono legal services to the poor under our constitutional rule-making and administrative authority has been fully addressed in prior opinions. We need not readdress that issue here. We do reiterate, however, that this Court, as the administrative head of the judicial branch, has the responsibility to ensure that access to the courts is provided for all segments of our society. Given the number of reports presented to this Court that document the legal needs of the poor, we find it necessary to implement the attached rules. Justice is not truly justice if only the rich can afford counsel and gain access to the courts. Consequently,

> these rules are being implemented in the hopes that they will act as a motivating force for the provision of legal services to the poor by the members of this state's legal profession.

Amendments to Rules Regulating The Florida Bar 1.3.1(a), 630 So. 2d 501, 502 (Fla. 1993).

We explained the need for the mandatory reporting requirement:

> [W]e do expect members of the Bar, through the simplified report form that will be made a part of the annual dues statement, to report how they have assisted in addressing the legal needs of the poor. We believe that accurate reporting is essential for evaluating this program and for determining what services are being provided under the program. This, in turn, will allow us to determine the areas in which the legal needs of the poor are or are not being met. Because we find that reporting is essential, failure to report will constitute an offense subject to discipline.

Id. at 502-03.

As the opponents of the amendment point out, there have been no fundamental changes in the circumstances surrounding this issue since the Court first determined that accurate reporting is essential for evaluating the delivery of legal services to the poor and for determining where such services are not being provided. There is no more effective way to gauge the success of lawyers in meeting their obligation to represent the poor--an obligation every member of the Bar swears to undertake.

Lawyers have been granted a special boon by the State of Florida--they in effect have a monopoly on the public justice system. In return, lawyers are ethically bound to help the State's poor gain access to that system. The mandatory reporting requirement is essential to guaranteeing that lawyers do their part to provide equal justice.

Based on the foregoing, we deny the petition.

It is so ordered.

KOGAN, C.J., and SHAW and ANSTEAD, JJ., concur.

OVERTON, J., concurs with an opinion, in which HARDING and ANSTEAD, JJ., concur.

HARDING, J., concurs in part and dissents in part with an opinion.

WELLS, J., concurs in part and dissents in part with an opinion.

GRIMES, J., dissents with an opinion.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring.

I concur. I write separately to emphasize two distinct points. First, the rule has been effective. Second, there are no material changes in circumstances that would justify the abandonment of this relatively new reporting requirement. In 1993, we developed our pro bono rule in response to the glaring deficiency in the availability of legal services to the poor. The result reached in 1993 was a compromise solution to a debate between proponents of two extreme positions. Some people argued that the Court had no authority to establish pro bono guidelines. At the same time, others believed that the rule should be mandatory rather than aspirational. This Court approved a carefully crafted compromise that kept the pro bono rule aspirational while creating a

mechanism with which to gauge the amount of pro bono work actually being provided in Florida. I concur today both because the current rule has been effective and because I see no compelling reason to disturb the compromise solution reached less than five years ago.

There can be no doubt that the reporting requirement has been effective. Accurate statistics are now available as to the number of pro bono legal hours being provided in Florida each year. These statistics can be used by this Court to analyze the extent to which the constitutional mandate of court access is being met. Additional resources can then be directed intelligently to areas of need. Without the reporting requirement, such evaluations would be made with incomplete information. Further, a positive side effect of our pro bono rule is that both pro bono legal services and contributions to legal services have increased. While the rule was not developed to force attorneys to provide pro bono legal services, the fact that the rule has raised consciousness and thereby increased the performance of such services does not disturb me.

Second, the very reasons forwarded in this case for abolishing the reporting requirement were addressed in our 1993 opinion. There we stated:

> Some responses we have received argue that a reporting requirement makes this program mandatory rather than aspirational. We reject that contention. Granted, some peer pressure may exist as a result of the reporting requirement. However, given that the reporting requirement is the only true way to evaluate how the legal needs of the poor are being met, we find that the merits of the reporting requirement greatly outweigh any perceived pressure to participate. Indeed, if peer pressure motivates lawyers to participate, WC find that such pressure may be beneficial in this instance.

Amendments to Rules Regulating the Fla. Bar, 630 So. 2d 501, 505 (Fla. 1993). The rule neither requires lawyers to provide pro bono legal services nor requires them to contribute $350. The rule is clearly aspirational. The sole requirement is that a lawyer report what he or she does. The oath that each of us takes as a lawyer in this state includes the words, "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." Some people have asserted that this language should be used to mandate the provision of pro bono legal services. The compromise crafted in 1993 stops short of that measure. The reporting requirement, when viewed in light of the cited section of the oath, is a minimal (and thoroughly reasonable) imposition on the professionals of the bar. The reporting requirement is an important part of the solution to the challenge of making the law accessible to all Floridians. The elimination of this reporting requirement would create a public perception throughout Florida that the courts are only for the rich and that the profession is restricting its pro bono efforts. It would also be perceived as a giant step backwards in the effort to make real the constitutional mandate that all Floridians, regardless of financial resources, are guaranteed access to their courts. While some people might argue that such would only be a perception, I believe that it would most certainly be a fact.

HARDING and ANSTEAD, JJ., concur.

HARDING, J., concurring in part and dissenting in part.

I realize that the issue confronting the Court in this case is complex and a subject on which persons of good will and sound judgment differ. However, I must concur with the majority opinion that the reporting requirement of Rule Regulating the Florida Bar 4-6.1 should remain mandatory.

The proponents of the rule change argue that lawyers themselves, in the exercise of their honor and good will, are the primary control on the profession. Thus, they urge the Court to remove the mandatory reporting provision of the rule.

There seems to be little dispute that the Court should set aspirational goals for pro bono service by members of the Bar. If it is necessary and good for the Court to set such aspirational standards for pro bono service, then it is equally necessary and good for Bar members to report whether they have performed this service and, if so, how much service.

In wrestling with this issue, I was reminded of the words of Alexander Hamilton in The Federalist:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the Government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the Government; but experience has taught mankind the necessity of auxiliary precautions.

The Federalist No. 51, at 286 (Alexander Hamilton) (E.H. Scott ed., 1898).

While most lawyers are honorable and full of good will, few of us would fall within the ranks of "angels." Accordingly, in Hamilton's words, "experience has taught the necessity of auxiliary precautions." I conclude that the mandatory pro bono service reporting requirement is a necessary auxiliary precaution.

However, I share Justice Wells' concern that the Bar and its members should know what will be expected in regard to enforcement of this rule. Thus, I suggest that any disciplinary action related to mandatory reporting be deferred until a procedure for enforcement is established. The Court should request the Bar to submit a procedure for enforcement and afford Bar members an opportunity to comment on the proposed procedure. Then this Court can determine the appropriate manner in which to proceed.

WELLS, J., concurring in part and dissenting in part.

I concur with all that is said in the majority and concurring opinions concerning a lawyer's obligation to provide pro bono services. However, I dissent from the decision rejecting The Florida Bar's petition because the majority's opinion is without any specifics as to how the Bar is to enforce this rule.

I was a member of the voluntary Orange County Bar Association for my twenty-nine years of practice. A condition of membership in this association is that its members provide the services or contributions required by Rule Regulating the Florida Bar 4-6.1. My experience is that the association's rule

worked to the benefit of the association, the community, and the individual lawyer. I know that the legal work I did in the guardian ad litem program was to me so personally rewarding that I count it at the very top of my professional experiences. I urge every lawyer to share that experience. I also urge every voluntary bar association to adopt a condition of membership similar to that of the Orange County Bar Association.

Unlike membership in the Orange County Bar Association, membership in The Florida Bar (the regulatory enforcement arm of this Court) is distinctly different because it is mandatory. Consequently, when this Court enacts a rule stating that the failure to report whether the pro bono goals have been met shall constitute a disciplinary offense, this rule must be read to mean that The Florida Bar will prosecute through the disciplinary process lawyers who fail to report. I certainly read it that way. To do otherwise and not enforce this rule will relegate what is adopted as a disciplinary rule to a mere charade which regulates only those who by their good faith and loyalty to the law choose to comply. The ultimate discipline is, of course, not the loss of membership in a voluntary association but is the loss of the privilege to be a lawyer in Florida.

In its petition, The Florida Bar asserts that in the 1995-1996 reporting year, nearly 6,700 lawyers declined to report their pro bono involvement on the dues form. It is probable that many of these lawyers failed to report because of the moratorium on reporting[1] or because of oversight. However, The Florida Bar maintains that if a substantial number of those lawyers continue not to report in violation of rule 4-6.1, prosecuting these attorneys will require the diversion of scarce bar resources from other programs such as professionalism, unauthorized practice, the client security fund, and Continuing legal education.

The majority should **not** just dismiss The Florida Bar's concerns about the grievance process without even addressing the problem. Attorney discipline is uniquely the province of this Court. See art. V, § 15, Fla. Const. This Court should not just ignore the admonitions of those to whom we have delegated disciplinary enforcement responsibility and leave it to them to shoulder the problems they forecast the rule will cause. If we are not going to follow the Bar's leadership's advice and replace the rule's "shalls" with "shoulds," then I would continue the moratorium on the mandatory part of the rule until the **impact** on the disciplinary function of The Florida Bar is understood and addressed. As part of addressing this issue, I believe this Court has an obligation to tell lawyers exactly what the discipline will be if the lawyer fails to report.

In 1993, we adopted what Justice Overton refers to in his concurring opinion **in this** case as a "compromise **solution":** making the violation of the reporting requirement a punishable offense. At that time, however, the practical ramifications of this solution were not addressed. Although not noted by the majority, there has been a moratorium on the enforcement of the rule almost entirely since that time. At the very least, proper regulation of The Florida Bar requires that we state when enforcement is to begin, what is to be done to make lawyers aware that this reporting requirement is now in fact mandatory, and what the sanction will be for failing to report.

[1] There has been a moratorium on reporting during the pendency of a federal lawsuit challenging the rule's constitutionality. In August 1996, the federal district court upheld the constitutionality of the mandatory reporting rule. Schwarz v. Kogan, TCA 94-40422 (N.D. Fla., Aug. 9, 1996) (Order Directing Entry of Judgment).

Though I support the aspirational goal, I cannot support imposing this as a rule of discipline on members of The Florida Bar against the advice of the leadership of The Florida Bar without addressing the practical ramifications and working out enforcement procedures. It is only after these practical ramifications are confronted and enforcement procedures are evaluated that a fair weighing can be made of whether the violation of a reporting requirement to foster an aspirational goal should be an offense subject to discipline. Imposing disciplinary sanctions for such a violation is uncharted waters into which I am unwilling to sail without a better compass.

GRIMES, J., dissenting.

I fully agree that a lawyer should provide pro bono legal services to those who cannot afford them. Therefore, I applaud the aspirational goals of rule 4-6.1 of the Rules Regulating The Florida Bar. However, I believe the coercion which is implicit in the mandatory reporting requirement is inappropriate if not counterproductive for the reasons set forth in my opinion in In re Amendments to Rules Regulating The Florida Bar, 598 So. 2d 41, 54 (Fla. 1992) (Grimes, J., concurring in part, dissenting in part). I would grant the petition of The Florida Bar.

Original Proceeding - Rules Regulating The Florida Bar

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for Petitioner

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in Opposition to the Petition