IN THE SUPREME COURT OF FLORIDA

The Florida Bar
In re: Petition to Amend Case No. SC03-705
Rules Regulating The Florida Bar
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COMMENTS IN OPPOSITION TO THE FLORIDA BAR'S PETITION TO AMEND RULES REGULATING THE FLORIDA BAR

The undersigned members of The Florida Bar, all of whom are former Bar Counsel or Grievance Committee Chairs, pursuant to the notice of Annual Bar rules proposals published in The Florida Bar News, file comments in opposition to The Florida Bar's Petition to Amend the Rules Regulating The Florida Bar, specifically relating to Rules 3-6.1, 3-7.11, 4-8.6, 14-5.1 and 14-5.2, and state:

RULE 3-6 EMPLOYMENT OF CERTAIN ATTORNEYS OR FORMER ATTORNEYS

Rule 3-6.1 Generally

The proposed amendment to Rule 3-6.1 prohibits suspended attorneys, disbarred attorneys, and attorneys whose disciplinary resignations have been allowed, from either employment or supervision by an attorney who they supervised at the time of or subsequent to the acts giving rise to their suspension, disbarment or disciplinary resignation. This prohibition is for a period of three years from the effective date of the potential employees suspension, disbarment or disciplinary resignation.[1]

[1]It is noted that there is a discrepancy in the applicable time period involving supervision by the suspended or former attorney. The Explanation in the Petition states that the three-year prohibition pertains to supervision that occurred "at the time of their

The proposed amendment to Rule 3-6.1 is unwarranted, unreasonable, and draconian in its effect for reasons set forth below.

The Bar's justification for this amendment is based upon "several instances" in which the Bar has observed that suspended lawyers hire a new associate to continue their law practice during a short-term suspension and a presumption by the Bar of "potential and real abuse" when the suspended lawyer influences the judgment of the associate.[2] However, the Bar's premise regarding paralegal "influence" is flawed. Any paralegal (whether a non-lawyer, suspended attorney or former attorney) may properly communicate an opinion for appropriate consideration by any attorney where the paralegal is employed. The status of the paralegal (i.e., non-lawyer, suspended attorney or former attorney) does not render the opinion improper; the act of the paralegal in communicating the opinion is not improper; and consideration of the paralegal's opinion by the attorney is not improper. If acting upon a paralegal's opinion by an attorney was deemed an "improper influence," then accepting documents and pleadings drafted by a paralegal would likewise be improper, thereby making performance by paralegal of their usual and customary functions impermissible.

Rather than prohibiting employment of suspended or former attorneys for a specific period of time, regulatory concern should be directed to the conduct of the suspended or

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[the suspended or former attorney's] discipline" whereas the proposed rule states that the three-year prohibition pertains to supervision occurring "at the time of or subsequent to the acts giving rise to the [disciplinary] order."

[2]Petition to Amend The Rules Regulating The Florida Bar at 6.

former attorneys that occurs during the course of their employment and compliance with the Rules Regulating The Florida Bar. The rules currently in effect provide reasonable safeguards in the hiring and employment of suspended or former attorneys, to wit:

- Prior to commencement of employment, the employer is required to provide The Florida Bar with a notice of employment and a detailed description of the intended services to be provided by the suspended or former attorney/employee. See Rule 3-6.1(c).

- Subsequent to commencement of employment, the employer and suspended or former attorney/employee are required to submit quarterly sworn information reports to The Florida Bar and these reports must include the following statements: no aspect of the employee's work involved the unlicensed practice of law; the employee had no direct client contact; and the employee did not receive, disburse, or otherwise handle trust funds or property. See Rule 3-6.1(e).

- The suspended or former attorney/employee is prohibited from having direct client contact and may only participate as an observer at any meeting, hearing, or interaction between the suspended or former attorney's supervising attorney and a client. See Rule 3-6.1(d)

It is apparent that the current rules allow The Florida Bar to regulate the employment activities of suspended or former attorneys and precludes them from engaging in the unlicensed practice of law. Violations can result in contempt proceedings and the imposition of severe sanctions, such as:

- additional term of suspension or disbarment can be imposed if the employee is a suspended attorney;

- conversion of the disciplinary resignation to disbarment can be imposed if the employee is a disciplinarily resigned attorney;.

- enhancement of the term of disbarment or conversion of the disbarment to a permanent disbarment can be imposed if the employee is a disbarred attorney.

It is regulatory overkill for The Florida Bar to respond to presumed "abuses" through blanket prohibitions, rather than to enforce existing rules by investigating and prosecuting allegations of actual abuse.

In determining whether to adopt the Bar's proposed change to Rule 3-6.1 which substantially restricts employment opportunities of suspended or former attorneys over a span of three years, consideration also should be given to The Florida Bar v. Thomson, 310 So.2d 300 (Fla. 1975). Thomson was a suspended attorney who obtained employment as a law clerk with a law firm where he performed services for other attorneys which included research, taking witness statements consistent with initial investigation of a case, and assembling information for review.

After learning about Thomson's employment, The Florida Bar maintained that Thompson's employment arrangement was unethical and so informed Thomson's attorney/employer. The Florida Bar also informed Thompson's attorney/employer that a grievance would be filed against him unless he terminated Thomson or requested an opinion from the Bar's Professional Ethics Committee. Thomson then filed a petition for clarification with the Court in which he stated that:

- Prior to suspension, his entire income was generated from the practice of law.
- Upon suspension, his income ceased.
- Non-attorney potential employers were discouraged from hiring him because of the short term nature of the prospective employment and the natural suspicion arising from a disciplinary suspension.

P The activities of a law clerk do not constitute the practice of law when limited to work of a preparatory nature such as research and investigation of details, assembly of data and similar work to enable an attorney-employer to conclude a matter through his own examination, approval or additional effort.

Thomson took the position that the services performed and other like work "would enable the attorney-employer to carry a given matter to a conclusion through his own examination, approval, or additional effort" and while performing all services under the direct supervision of the attorney-employer he "has not held himself out to be an attorney, has not signed any pleadings or letters in behalf of any attorney, has made no court appearances, has had no direct contact with any client or given any legal advice to any client and has conducted himself in the role of research investigator for his employer."

The Florida Bar took the position that permitting Thomson's employment as a law clerk or investigator "would be detrimental to the integrity and reputation of the Bar by inviting the public's misunderstanding of the disciplinary action taken against him" and "to allow such employment leaves too much room for abuse of this Court's previous order [of suspension] herein."

The Court held that to adopt the Bar's position would be unduly harsh. In rejecting the Bar's argument, the Court stated that:

> [T]homson should not be prohibited from the employment herein described as a law clerk or investigator for members in good standing of The Florida Bar inasmuch as such employment is clearly beneficial to him, his family, his attorney-employers, the public, and the Bar as a whole upon his eventual reinstatement to good standing. **Employment of Thomson in a supervised status within the profession seems to us to be an almost ideal manner in which he may demonstrate during his suspension his potential for**

> **rehabilitation and maintain his competency to practice law upon reinstatement**. What better way is there for him to keep abreast of the law, particularly in view of the fact that the Bar now requires, in certain circumstances, as a condition precedent to termination of suspension or disbarment satisfactory passage of the Bar examination to show familiarity with the law and present ability to resume practice. **If at any time during his suspension Thomson oversteps his employment and engages in unethical professional conduct or the unauthorized practice of law, he risks further disciplinary proceedings on specific charges. We find this course preferable to the Bar's suggestion of a blanket prohibition against Thomson's law clerking in order to avoid potential harm.** [Emphasis added]

The Bar's attempt to revert to, in essence, a "blanket prohibition" should be rejected based upon the philosophy articulated by this Court in Thompson. A "blanket prohibition" is likely to eliminate viable opportunities for gainful employment in the legal field with the concomitant benefits of demonstrating potential for rehabilitation and competency to practice law upon reinstatement.

It is further submitted that the proposed rule change will have a particularly draconian effect upon the law practice of an attorney who has been ordered to serve a short-term suspension (less than 91 days) with automatic reinstatement. In such instance, there may be an associate attorney in the suspended attorney's law firm who is capable of managing the law practice of the suspended attorney and protecting the interests of those clients who, after receiving a copy of the suspension order as required by Rule 3-5.1(g)(1), decide to remain with the law firm and intend to have the suspended attorney continue with their representation after automatic reinstatement. Under these circumstances, employment of the

suspended attorney by the law firm in accordance with procedures set forth in Rule 3-6.1 will not have any adverse impact and, in fact, will provide the following benefits:

- The clients of the suspended attorney will not experience the disruption of retaining new counsel to handle their matter during the period of the short-term suspension;
- Client matters, including any pending litigation, will not be delayed;
- The suspended attorney will have an opportunity to keep abreast of changes in the status of the pending cases so that there is a seamless transition in resuming representation when reinstated.
- The suspended attorney has the ability to generate some income during the term of the suspension while engaging in permissible activities.

The extremely restrictive regulatory scheme proposed by the Bar is unnecessary. This is because, as recognized in Thompson, a suspended or former attorney risks "further disciplinary proceedings on specific charges" for any improper conduct which occurs during the course of employment.

RULE 3-7.11 GENERAL RULE OF PROCEDURE[3]

Rule 3-7.11(j) Administrative Fees

Background

In 1979, the Supreme Court of Florida acted upon amendments to The Florida Bar Integration Rule proposed by the Supreme Court Special Committee for Lawyer Disciplinary Procedures. In Petition of Supreme Court Special Committee for Lawyer Disciplinary

[3]Also incorporated by reference are Rules 3-7.6(p)(1)(I) and 3-7.10(m)(1)(I).

Procedures to Amend Integration Rule, Article II and Article XI, 373 So.2d 1 (Fla. 1979), The Florida Bar Integration Rule, article XI, was readopted. Rule 11.06(9)(a) [Referee's Report, Contents of Report] provided as follows:

> The costs shall include court reporters' fees, copy costs, witness fees and traveling expenses, and reasonable traveling and out-of-pocket expenses of the referee and bar counsel, if any. Costs shall also include a $50 charge for administrative costs at the grievance committee level and a $50 charge for administrative costs at the referee level. Costs taxed shall be payable to The Florida Bar.

In 1981, Florida Bar Integration Rule, article XI, rule 11.06(9)(a), was amended and administrative costs at grievance committee level and referee level were each increased to $150.00. In approving the proposed amendment, this Court stated that "[W]e consider it appropriate that attorneys found guilty of misconduct justifying disciplinary action bear a higher contribution to the administrative costs of disciplinary actions." See The Florida Bar; Re: Amendment to Integration Rule, Article XI, Rule 11.06(9)(a) (Contents of Referee Reports-Administrative Costs), 402 So.2d 401,402 (Fla. 1981).

In 1989, the separate administrative cost of $150.00 at grievance committee level and referee level was replaced with a flat assessment of $500.00. The stated justification was "to more accurately reflect the Bar's administrative expenses." See The Florida Bar. In re Amendment to Rules Regulating The Florida Bar, Rule 3-7.5(k)(1) Cost of Proceedings, 542 So.2d 982 (Fla. 1989).

In 1994, the term "administrative costs" was changed to "administrative fee", moved to the section on taxable costs under Procedures Before a Referee, and increased to $750.00 when costs are assessed in favor of The Florida Bar. In addition, an administrative fee of $750.00 was added under reinstatement procedures when costs are assessed in favor of The Florida Bar. See The Florida Bar; Re: Amendments to Rules Regulating The Florida Bar, 644 So.2d 282 (Fla. 1994).

The Bar proposes to eliminate the administrative fee of $750.00 in referee level proceedings that is set forth in Rule 3-7.6(o)(1)(I) and the administrative fee of $750.00 in reinstatement proceedings that is set forth in Rule 3-7.10(m)(1)(I). Instead, when costs are assessed in favor of The Florida Bar, administrative fees are imposed as set forth elsewhere in the Rules Regulating The Florida Bar. The Bar proposes a new Rule 3-7.11(j) which creates a sliding scale of administrative fees for disciplinary cases and reinstatement proceedings based upon the level at which the proceedings are resolved, to wit:

- $1,000.00 (without appointment of judicial referee);
- $1,500.00 (after appointment of judicial referee, but before final hearing is held);
- $2,000.00 (after final hearing held, but before report of referee entered);
- $2,500.00 (report of referee entered without agreement of the parties and no appeal taken);
- $5,000.00 (after appeal taken).

Argument

The existing Rules Regulating The Florida Bar allow the Bar to recover all of its out of pocket expenses in disciplinary proceedings (when it is successful, in whole or in part)[4] and in reinstatement proceedings,[5] unless such costs were unnecessary, excessive, or improperly authenticated. The existing Rules Regulating The Florida Bar also allow the Bar to recover a flat fee of $750.00 as an "administrative fee" which is not reflective of any actual cost or level of proceedings and does not require either authentication or a showing of reasonableness and necessity. Although this Court has granted referees discretion in awarding costs,[6] no such discretion is permitted in assessing administrative fees. Accordingly, unlike costs, administrative fees are imposed without discretionary review by the referee.

While the terms "administrative costs" or "administrative fees" have never been defined, it is apparent from the historical progression of increases which have been approved by this Court that these costs or fees were envisioned as a means by which a disciplined attorney contributes to payment of some of the Bar's administrative expenses in proceedings which result in discipline; administrative costs or fees were never envisioned as a means to

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[4]See current Rule 3-7.6(o)(1)(I) renumbered as proposed Rule 3-7.6(p)(1)(I).

[5]See current Rule 3-7.10(m)(1)(I).

[6]See The Florida Bar v. Davis, 419 So.2d 325, 328 (Fla. 1982).

finance the discipline system. The proposed amendment eviscerates this concept and, in essence, seeks funding for the Bar's entire lawyer regulatory system by creating a system of escalating fines to be levied against respondents in disciplinary proceedings or petitioners in reinstatement proceedings who avail themselves of their right to proceedings before a referee or appellate review by this Court.

As justification for the proposed increases based upon a sliding scale, the Bar states:

> These proposals would delete the current administrative fee of $750.00 in all circumstances, and replace it with a minimum fee of $1,000.00, and a sliding scaled fee for varying levels of case processing. The amendment is designed to more accurately reflect the costs of maintaining the discipline system, and to place a larger responsibility for those costs directly on the members who necessitate such expenses. In fiscal year 2001-02, a total of 414 final orders of this court were entered which imposed sanctions. The average cost of each such order was $21,482.00. These proposed amendments do not attempt to put all the expense burden of the lawyer regulatory system on our disciplinary respondents, but these changes would place a more proportional share on those individuals.[7]

Although the Bar claims that its proposed changes will "place a more proportional share on those [disciplined] individuals" the Bar does not disclose the costs of maintaining the disciplinary system, the percentage of these costs which the Bar believes should be borne by disciplined attorneys, or the manner in which the Bar calculated the specific amounts listed in its sliding scale. Instead, the Bar merely asserts a sliding fee scale which presumably will appear reasonable when considering the Bar's stated "average cost" figure of $21,482.00 per disciplinary order in fiscal year 2001-02. However, the Bar's financial

[7]Petition to Amend The Rules Regulating The Florida Bar at 10.

analysis in determining the "average cost" is flawed and, significantly, evidences an intention by the Bar to recover the overhead costs of Lawyer Regulation, including salary of Bar staff attorneys, under the guise of undefined "administrative fees."

Multiplying the Bar's stated number of final orders (414) by the Bar's stated "average cost" per order ($21,482.00) establishes that the Bar has used $8,893,548.00 as the total cost for all orders entered during fiscal year 2001-02. It is submitted that $8,893,548.00 approximates the amount budgeted for Lawyer Regulation in fiscal year 2001-02. Thus, the Bar's "average cost" per case of $21,482.00 is valid as an average case cost only if all or most of the 2001-02 Lawyer Regulation budget was attributed to the cases involving the 414 attorneys who received discipline during 2001-02. The Bar's position is specious because:

- Not all cases that are investigated or prosecuted by The Florida Bar result in discipline. In fact, most grievances that are filed are either dismissed or result in a finding of no probable cause; only a small percentage results in a finding of probable cause. In this regard it should be noted that the Bar's Disciplinary Statistics confirm: [8]

    - During fiscal year 2001-02, in which there was a total of 414 final orders of discipline, the Bar opened 8,691 files;

    - During the last reported five-year fiscal period (1997-98 through 2001-02), the Bar opened a total of 45,880 files and there was a total of 2,091 final orders of discipline.

[8]Reported in Lawyer Regulation, Disciplinary Statistics, at The Florida Bar's website, www.flabar.org.

- During the last reported five-year fiscal period (1997-98 through 2001-02), the Bar opened a total of 43,789 files which did not result in discipline.

- During the last reported five-year fiscal period (1997-98 through 2001-02), the percentage of cases resulting in discipline averaged less than 5%

- The Florida Bar's budget for Lawyer Regulation includes overhead costs, such as maintaining the local branch offices as well the salaries of its staff, including Bar Counsel who are paid an annual fixed salary to investigate and prosecute all complaints filed with or opened by The Florida Bar.

- The salaries of Bar Counsel are not dependent upon hours spent, level of proceedings, or results obtained.

- Disciplined attorneys should not carry the financial burden for investigating and prosecuting those cases which do not result in discipline. These expenses should be viewed as a regulatory cost which should be funded by the members of The Florida Bar through annual fees.

Significantly, the Rules Regulating The Florida Bar do not recognize attorney's fees as a taxable cost and this Court has held that attorney's fees cannot be awarded to either the Bar or a respondent. The Florida Bar. v. Chilton, 616 So.2d 449 (Fla. 1993). Given the magnitude of the proposed increase in administrative fees, it is apparent that the Bar's proposal is a thinly disguised effort to evade this Court's holding in Chilton by allowing the Bar to subsidize salaries paid to Bar Counsel through attorney's fees which are masked as administrative fees and are assessed against respondents in all cases which result in discipline. Further, since the Rules Regulating The Florida Bar do not permit respondents to recover an "administrative fee", there is no opportunity for a respondent to recover

attorney's fees from the Bar in cases which do not result in discipline. Therefore, this Court should reject efforts by The Florida Bar to circumvent the existing prohibition against an attorney's fee award and not allow the Bar to recover attorney's fees under the guise of "administrative fees."[9]

Moreover, establishing a system which allows the Bar an opportunity to reap a substantial financial benefit through administrative fees that increase with the levels of involvement in the disciplinary system creates a financial incentive for the Bar to continue to pursue disciplinary proceedings rather than to consider the merits of their case and negotiate a fair resolution. Disciplinary proceedings may also result when the Bar is driven by noble motives, emotions, or misguided belief in the "true facts" and asserts an erroneous or unsupported position. In either instance, the Bar could reject a respondent's offer for a consent judgment and insist on a case proceeding to final hearing before a referee which results in a disciplinary recommendation that is the same as or less than the discipline that was offered by respondent prior to trial. Regardless of motive, the respondent would still be required to pay an administrative fee of $2,500.00 after final hearing in **addition** to taxable

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[9]Using the Bar's logic that those responsible for the cost of disciplinary proceedings should be the ones who fund it, if the Bar is responsible for a respondent having to expend funds in attorney's fees to successfully defend the respondent's reputation and protect the respondent's livelihood, the Bar should be responsible for the cost of the respondent's defense. Accordingly, in the event that this Court approves the proposed rule change, there should be a provision which would require "administrative fees" (i.e, attorney's fees) to be assessed against the Bar in all cases in which probable cause is found and discipline is not imposed.

costs, merely because the Bar was intransigent and forced the proceedings to continue.[10] Further, under the Bar's proposed rule, the Bar would be entitled to recover $5,000.00 as an administrative fee, **in addition** to taxable costs, if the case was presented to this Court for review by either the Bar or respondent and resulted in any disciplinary order -- even if the Bar did not prevail in its appellate position.[11]

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[10]See, e.g., Supreme Court Case No. SC-96,334 wherein the Bar rejected a consent judgment for a 10-day suspension and insisted on a 91-day suspension; the matter proceeded to trial before a referee which resulted in a recommendation, approved by this Court, for a public reprimand. Under the Bar's proposed rule, Respondent would have been assessed $2,500.00 in administrative fees, rather than $750.00.

[11]Under the Bar's proposed rule, a respondent would be obligated to pay a $5,000.00 administrative fee even in instances in which a referee's recommendation of discipline is the subject of Supreme Court review and the Bar does not fully prevail in that the discipline sought by the Bar is not approved by this Court. See, for example:

- Supreme Court Case No. SC01-114 wherein the referee's recommendation of a one-year suspension was the subject of Supreme Court review: The Florida Bar filed a Petition for Review, seeking a three-year suspension; Respondent filed a Cross Petition for Review. This Court rejected the Bar's position and entered an order suspending respondent for one-year and assessed costs against the respondent in the amount of $8,482.15, which included the current $750.00 administrative fee. Under the Bar's proposed rule, the costs assessed against Respondent would have increased to $12,732.15, including the proposed $5,000.00 administrative fee.
- Supreme Court Case No. SC00-2219 wherein the referee's recommendation of a two-year suspension was the subject of Supreme Court review: Respondent filed a Petition for Review; The Florida Bar filed a Cross Petition for Review, seeking disbarment. The Court entered an order suspending the Respondent for 91 days and entered judgment for costs in the amount of $2,044.92, which included a $750.00 administrative fee. Under the Bar's proposed rule, the costs assessed against Respondent would have increased to $6,294.92, including the proposed $5,000.00 administrative fee.

These examples demonstrate the inherent inequity in the Bar's proposed rule: a

In addition to creating a financial windfall for the Bar, the Bar's proposed rule creates a financial disincentive for a respondent to exercise rights provided by the Rules of Discipline. This is because respondents who face some discipline may not have the financial ability to participate in the disciplinary system and will be forced to "give up" early in the proceedings. In so doing, these respondents may agree to accept discipline demanded by the Bar that is not justified but is, instead, affordable based upon the sliding scale. Although the Bar may view this as efficiency in resolution; it is simply not consistent with one of the stated purposes of discipline set forth in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1971):

> [T]he judgment must be fair to the respondent, being sufficient to punish a breach and at the same time encourage reformation and rehabilitation.

This Court should not countenance a discipline system which is unfair to respondents because it imposes a penalty upon them for exercising their right to a trial before a referee or appellate review. The scales of justice should not slide and neither should the cost. Accordingly, this Court should reject The Florida Bar's proposed amendment on administrative fees.

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respondent facing discipline which may involve a loss of livelihood incurs a significantly greater increase in costs merely because issues which include appropriate discipline were presented to and determined by this Court, while the Bar automatically reaps a significant financial benefit by such presentation.

RULE 4-8.6 AUTHORIZED BUSINESS ENTITIES

Pursuant to existing Rule 4-8.6(e) (disqualification of shareholder, member or partner; severance of financial interests), "legally disqualified" does not include suspension from the practice of law for less than 91 days. The comment to this rule states the reasoning for this exclusion:

> Practical application of the statute and this rule to the requirements of the practice of law mandates exclusion of short term, temporary removal of qualifications to render legal services. Hence, any suspension of less than 91 days, including membership fees delinquency suspensions, is excluded from the definition of the term. These temporary impediments to the practice of law are such that with the passage of time or the completion of ministerial acts, the member of the bar is automatically qualified to render legal services. Severe tax consequences would result from forced severance and subsequent reestablishment (upon reinstatement of qualifications) of all financial interests in these instances.

Although the Bar proposes no change to the comment to the rule, the Bar proposes an amendment which changes "legally disqualified" to exclude suspensions from the practice of law for a period of time less than 91 days "unless the legally disqualified lawyer is the sole shareholder, member, proprietor, or partner of the authorized business entity." The proposed change to the rule appears inconsistent with the comment in that if a business entity of the disqualified lawyer employed one or more associates (regardless of date of hire), upon the effective date of any short term suspension (less than 91 days) the business entity would no longer be authorized to exist and would be required to cease operation. In so doing, an attorney who is the sole shareholder, member, proprietor, or partner will effectively have

their practice destroyed notwithstanding only receiving a short term suspension. The far better approach would be to permit the continued existence of the entity and aggressively prosecute any attorney suspended for less than 91 days who engages in the practice of law while suspended.

RULE 14-5 EFFECT OF AGREEMENT TO MEDIATE OR ARBITRATE AND FAILURE TO COMPLY

Rule 14-5.1 Effect of Referral to Mediation and Failure to Comply

Proposed Rules 14-5.1(a) and (b) provides that the underlying disciplinary file **shall** be closed without the entry of a sanction and shall remain closed unless the respondent fails to attend mediation or fully comply with the written terms of a mediation agreement, without good cause. However, proposed Rule 14-5.1(c) provides that if a file referred to mediation is not fully resolved due to the complainant's failure to attend without good cause, the underlying disciplinary file **may** remain closed [Emphasis added]. In order to be consistent, if the complainant fails to attend mediation, the continued status of the file as closed should not be discretionary. Accordingly, the word "shall" should be substituted for the word "may" in proposed Rule 14-5.1(c).

Rule 14-5.2 Effect of Agreement to Arbitrate and Failure to Comply

Proposed Rule 14-5.2(a) provides a disciplinary file only involving fee issues **shall** be closed without the entry of a sanction upon entry of an agreement to arbitrate. However, proposed Rule 14-5.2(c) provides that if a file referred to arbitration is not fully resolved due

to the complainant's or other opposing party's failure to attend without good cause, the underlying disciplinary file **may** remain closed. [Emphasis added]. In order to be consistent, if the respondent agrees to arbitrate a disciplinary file involving fee issues and attends the arbitration conference, the continued status of the file as closed should not be discretionary. Accordingly, the word "shall" should be substituted for the word "may" in proposed Rule 14-5.2(c).

CONCLUSION

Based upon the foregoing comments, it is respectfully requested that this Court do the following:

1. Reject proposed Rule 3-6.1(c).
2. Reject proposed Rule 3-7.6(p)(1)(I) and retain the current language of Rule 3-7.6(o)(1)(I) [an administrative fee in the amount of $750.00 when costs are assessed in favor of the bar] in renumbered Rule 3-7.6(p)(1)(I).
3. Reject proposed Rule 3-7.10(m)(1)(I) and retain its current language [an administrative fee in the amount of $750.00 when costs are assessed in favor of the bar].
4. Reject proposed Rule 3-7.11(j).
5. Reject that portion of proposed Rule 4-8.6(e) that states "unless the legally disqualified lawyer is the sole shareholder, member, proprietor, or partner of the authorized business entity."
6. Modify proposed Rule 14-5.1(c) so that it states: "If a file referred for mediation is not fully resolved by reason of a complainant's failure to attend without good cause, the disciplinary file based thereon shall remain closed."

7. Modify proposed Rule 14-5.2(c) so that it states: "If a file referred for arbitration is not fully resolved by reason of a complainant's or other opposing party's failure to attend without good cause, the disciplinary file based thereon shall remain closed."

Respectfully submitted,

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JOHN A. WEISS
The Florida Bar No. 0185229
WEISS AND ETKIN
2937 Kerry Forest Parkway
Tallahassee, FL 32308
851-893-5854

PATRICIA S. ETKIN
The Florida Bar No. 290742
WEISS AND ETKIN
150 South Pine Island Rd, Suite 320
Plantation, FL 33324
954-424-9272

RICHARD B. LISS
The Florida Bar No. 200751
WEISS AND ETKIN
150 South Pine Island Rd, Suite 320
Plantation, FL 33324
954-424-9272

RANDOLPH BRACCIALARGHE
The Florida Bar No. 236403
Professor of Law
NSU LAW CENTER
3305 College Avenue
Davie, FL 33314
(954- 262-6169

CHARLES L. CURTIS
The Florida Bar No. 190368
CHARLES L. CURTIS, P.A.
1119 SE 3rd Avenue
Ft. Lauderdale, FL 33315
954-763-1716

RONNA FRIEDMAN YOUNG
The Florida Bar No. 0563129
SACHS SAX KLEIN P.A.
301 Yamato Rd., Suite 4150
Boca Raton, Florida 33431
561-994-4499

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Comments in Opposition to The Florida Bar's Petition to Amend Rules Regulating The Florida Bar was hand-delivered to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399 and that a copy was hand-delivered to John F. Harkness, Jr., Executive Director, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida, 32399-2300, this 14th day of May, 2003.

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JOHN A. WEISS