IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE: PETITION TO AMEND RULES REGULATING THE FLORIDA BAR and THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

CASE NO: SC04-135

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COMMENTS OF THE RULES OF JUDICIAL ADMINISTRATION COMMITTEE REGARDING PROPOSED AMENDMENTS TO RULE OF JUDICIAL ADMINISTRATION 2.061

The Rules of Judicial Administration Committee ("**RJAC**") hereby files the following comments regarding the Petition to Amend the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration ("**Petition**"), filed by the Florida Bar Board of Governors ("**Board**") to amend Florida Rule of Judicial Administration 2.061. The RJAC believes that the Board has not followed the appropriate procedures for proposing this amendment to Rule 2.061. Moreover, the provision eliminating discretion of the judge to permit more than three appearances per year in Florida is not well considered, may cause inequitable results and may violate the Sixth Amendment.

A. The Proposed Amendment Violates Rule 2.130(b)(3).

According to the Notice published by the Board on January 1, 2004, in The Florida Bar News at 14, and attached to the Petition as Exhibit "A," the Board is petitioning this Court "to amend the Rules Regulating the Florida Bar. Rule 1-

12.1, Rules Regulating the Florida Bar, governs such matters." Rule 1-12.1, however, provides authority and procedures for the Board to propose amendments to the Rules Regulating the Florida Bar. It provides no authority for the Board to propose amendments to the Rules of Judicial Administration. Nevertheless, the Board is directly petitioning this Court to amend Florida Rule of Judicial Administration 2.061, in addition to amending various provisions in the Rules Regulating the Florida Bar.

Amendments to the Rules of Judicial Administration are governed by Rule of Judicial Administration 2.130(b). Under Rule 2.130(b)(3), the Florida Bar appoints the members of the RJAC to consider rule proposals. The RJAC is a "rules coordinating committee" which reviews all proposed changes to the procedural rules. Rule 2.130(b)(5). The RJAC is separately charged with the duty to "originate proposals" regarding the Rules of Judicial Administration and to review them regularly "to advance orderly and inexpensive procedures in the administration of justice." Rule 2.130(b)(6). The RJAC "may accept or reject proposed amendments or may amend proposals" and "shall consider and vote on each proposal." Rule 2.130(b)(6).

Only after the RJAC has voted on and approved the proposal does the RJAC submit the proposed rule change to the Board. Rule 2.130(c)(2). The

Board then recommends "acceptance, rejection, or amendment." Rule 2.130(c)(3). The Board's recommendation is transmitted to this Court, together with the RJAC's proposed rule change and the RJAC's response, if any, to the Board's recommendation. Rule 2.130(c)(4).

In this instance, the Board did not follow these procedures in proposing its amendment to Rule 2.061. The RJAC has not voted on or approved this amendment, and the Board did not recommend this amendment after first obtaining the RJAC's approval. Instead, the Board directly submitted it to this Court under the amendment procedures of Rule 1-12.1, which apply only to the Rules Regulating the Florida Bar, not to the Rules of Judicial Administration.

Under Rules 2.130(b)(1) and (2), proposals to amend rules "may be made by any person" and "shall be submitted to the clerk of the supreme court in writing." Under Rule 2.130(b)(2), however, the clerk automatically refers such "proposals to the appropriate committee," which in this instance would be the RJAC. The Board does not have the authority under Rule 2.130(b)(2) to submit proposals directly to this Court with the expectation that the Court will directly approve them. Instead, as a knowledgeable participant in the process, the Board should have submitted the rule proposal directly to the RJAC for approval, pursuant to the RJAC's power under Rule 2.130(b)(6) to "originate proposals,"

rather than directly to this Court under Rule 2.130(b)(2). Both the spirit and the letter of Rule 2.130 call for and require the Board to obtain approval by the RJAC, before it can submit to this Court a proposal to amend the Rules of Judicial Administration.

The RJAC recognizes that Rule 2.061 covers much of the same ground as Rule 1-3.10 of the Rules Regulating the Florida Bar, and that the Board may have believed it had a special competence to propose changes to Rule 2.061, given its authority to propose changes to Rule 1-3.10. That Rules 1-3.10 and 2.061 may overlap each other, however, does not excuse a failure to follow proper procedures for proposing changes to Rule 2.061. The RJAC was and remains willing to work with the Board to coordinate any changes to Rules 1-3.10 and 2.061 and to maintain consistency between the two rules, but the RJAC is unwilling to forego its responsibilities under Rule 2.130 to approve or disapprove rule amendments that are within the RJAC's domain.

To its credit, the Board did provide some notice to the RJAC that the Board was considering changes to Rule 2.061. The RJAC, however, has never been presented with a final version of the Board's proposal for the RJAC to approve or disapprove. On March 18, 2003, the RJAC received a letter stating that the Florida Bar's Special Commission on the Multijurisdictional Practice of Law would present

a preliminary report to the Board in April 2003 "for discussion in concept only" of "possible rule changes." The letter indicated that the first formal reading of the rule proposals would not take place until late May. In May, however, the Board took no action. At the RJAC's meeting in June, the RJAC was told that the Board had not yet approved the language of its rule proposals.

In August, the rule proposals were pulled from the Board's agenda to address concerns about the proposals' impact on international arbitrations and mediations in Florida. At the RJAC's September meeting, the RJAC learned that the Board would likely amend the proposals to address these concerns. On September 16 and 29, the RJAC chair communicated with the Board about whether the proposal to amend Rule 2.061 could be removed from the amendment package to allow the RJAC an opportunity to study it. In October, however, the Board approved the rule proposals on their first reading. The Board denied leave to the RJAC Chair to appear in person to object at the Board's meeting for the second reading on December 5, 2003, and the Board gave final approval to the proposals at this meeting. The RJAC learned of this final approval at its January 2004 meeting.

Thus, although the RJAC had some notice that the Board was interested in changing Rule 2.061, the Board never formally presented a final version of the

proposed changes to the RJAC. The RJAC only learned of the final version the same way that the rest of the Florida Bar learned of it, through publication in The Florida Bar News.

At the RJAC's meetings in both June and September 2003, the RJAC understood that the rule proposals were still tentative and subject to change. By the time of the RJAC's next meeting in January 2004, the Board had already approved the rule changes and published them, with the intent to file them with this Court for formal adoption. The Board therefore has not followed the procedures outlined in Rule 2.130.

B. Deletion of the Provision Giving Trial Judges Discretion to Permit More Than Three Appearances Per Year May Violate the Sixth Amendment.

The Board has proposed several significant changes to Rule 2.061. Because the Board did not present a final version of its proposal to the RJAC, the RJAC has not yet had an opportunity to come to a conclusion about these changes. The RJAC may ultimately agree with some or all of these changes. Preliminarily, however, the RJAC believes that legitimate questions exist about at least one of these changes, and an opportunity for further study and review is therefore appropriate.

The Board deleted the provision in Rule 2.061 allowing judges in their discretion to permit out-of-state counsel to appear more than three times in one year. The Board also deleted a provision treating related representations as a single appearance. Pursuant to these changes, if a nationally known out-of-state constitutional expert on abortion law appeared for two pregnant teenagers in two cases in the circuit court, and the district court transmitted one of the appeals to this Court for immediate resolution, this Court would not have the discretion to permit this out-of-state counsel to appear in this Court, because counsel would already have appeared twice in the circuit court and once in the district court that year. The RJAC has questions about whether such a restriction on this Court's discretionary authority is appropriate or desirable.

In a civil rights case, the Fifth Circuit considered a Mississippi rule allowing only one *pro hac vice* appearance per year and found that the district court erred by denying a *pro hac vice* request. "[T]he assertion of the District Court's regulatory interest cannot justify a rule that limits the number of pro hac vice appearances, whether it be to one case a year or three cases a year. . . . It is difficult to see how the concern of the District Court in decorum, dignity, competency, good character or amenability to service and discipline is served by a numerical limitation." Sanders v. Russell, 401 F.2d 241, 245-46 (5th Cir. 1968).

In criminal cases, denying criminal defendants the right to select counsel of their choice may violate the Sixth Amendment. The First Circuit adopted this rationale to vacate a criminal conviction, after a Puerto Rican court used a one-appearance-per-year rule to deny *pro hac vice* admission to out-of-state counsel.

> [W]e cannot discern how a simple numerical limitation on the number of *pro hac vice* appearances per year advances the district court's legitimate interest in regulating the conduct of its attorneys. Our skepticism about the propriety of such a rule is heightened by the fact that its application can deprive a criminal defendant of his sixth amendment rights. The right to counsel of choice cannot be denied without a showing that the exercise of that right would interfere with the fair, orderly and expeditious administration of justice. The mere fact that a defendant seeks to retain an out-of-state attorney does not hinder the efficacious administration of justice. . . . Accordingly, we hold that Local Rule 204.2 of the District Court of Puerto Rico is invalid as applied to criminal defendants seeking to retain outside counsel.

United States v. Alvarez, 816 F.2d 813, 817-18 (1st Cir. 1987).

For these reasons, the RJAC requests an opportunity to approve or disapprove the Board's proposed amendments to Rule of Judicial Administration 2.061.

CERTIFICATE OF TYPE SIZE

These comments are typed in 14 point Times New Roman type.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by U.S. Mail this 15th day of April, 2004, to John F. Harkness, Jr., Executive Director of the Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.

Respectfully submitted,

Stanford R. Solomon
Chair
Rules of Judicial Administration Committee

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