IN THE SUPREME COURT OF FLORIDA

In re: Amendments to Rules
Regulating the Florida Bar Case No. SC04-2246

On behalf of the Florida Public Defenders Association, Inc., the undersigned respectfully submits the following comments to the proposed changes to the Rules of Professional Conduct as initially published in *The Florida Bar News* on October 15, 2004.

1) As to Rule 4-1.6, Confidentiality of Information, paragraph B, it appears that Subsection 2 would be redundant, since a client causing a death or substantial bodily harm to another would be committing a crime. A lawyer who believes his client is going to commit suicide, however, would be covered in #2 if the phrase "to another" was removed.

2) As to Rule 4-1.7, Conflict of Interests, the issue outlined in Forsett vs. State, 790 So.2nd 474 (2nd DCA 2001) is not adequately addressed. It appears under the rule that informed consent must be confirmed in writing. The rule should be amended to allow that to occur before a tribunal as is the procedure in Forsett hearings.

3) As to Rule 4-1.14, Client with Diminished Capacity, which was in the interim report to review the ABA Model Rules 2002 but not in the October 15, 2004 *Florida Bar* News filing, I believe this is a rule viewed in a civil context and not a criminal context. In a criminal context, attorneys regularly deal with clients who have a diminished capacity and may in fact have difficulty understanding the impact of entering a plea or going to trial. Furthermore, while the client may be competent in a criminal context, the placing of a duty on the attorney to seek the appointment of a guardian ad litem, a conservator or a guardian will only result in additional ethics complaints against criminal defense attorneys. I submit that this rule has the potential for severe, unintended consequences in terms of complaints against criminal defense attorneys.

4) As to Rule 4-1.16, Declining or Terminating Representation, it is submitted that paragraph (a)(3) should be changed to say, "in a non court appointed situation, the lawyer is discharged."

The comments under this rule state that a client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. The next paragraph goes on to indicate that there may be a difference in a court appointed situation. It would appear

more prudent to state that except in a court appointed situation, a client has a right to discharge a lawyer at any time, with or without cause.

5) As to Rule 4-3.3, Candor Toward the Tribunal, I believe this issue needs to be reevaluated in terms of the criminal distinction versus the civil distinction. In light of the case of Torres-Arboledo vs. State, 524 So.2d 403 (Fla. 1988), the situation is different in criminal court than civil court. As expressed in footnote 2 at page 410 of that opinion, the court said as follows: "Although we expressly hold that a trial court does not have an affirmative duty to make a record inquiry concerning a defendant's waiver of the right to testify, we note that it would be advisable for the trial court, immediately prior to the close of the defense's case, to make a record inquiry as to whether the defendant understands he has a right to testify and that it is his personal decision, after consultation with counsel, not to take the stand. Such an inquiry will in many cases avoid post conviction claims of ineffective assistance of counsel based on allegations that counsel failed to adequately explain the right or actively refused to allow the defendant to take the stand." No such inquiry is made in a civil case. If a criminal defendant wishes to testify and commit perjury, the defendant is going to have the right to

take the stand and do so. I submit that the previous rules regarding the use of a narrative and the direction to the attorney that the false testimony contained in that narrative could not be utilized in further argument provides a much better framework within which the criminal justice system can operate.

I further submit that the aspect of indicating that a person should just withdraw when this occurs is inappropriate in a criminal context such as is faced by Public Defender offices. In 2003, the Sixth Judicial Circuit handled 78,000 cases. If the office withdrew because a client mentioned committing perjury, there would be an incredible impact on the system. I submit the proper procedure is that when a client voices an intent to commit perjury, that the attorney needs to counsel him to not do so. If the client persists in indicating that the client wishes to commit perjury, the lawyer should then inform the client that the lawyer will have no choice but to inform the court. If the client persists and wishes to take the stand and testify, the use of a narrative should be utilized and the false testimony in the narrative should not be further argued by counsel. This is a specific procedure that can guide lawyers when confronted with this situation. This is not a situation which frequently arises, but it is a

situation that arose three times in a three week period this year in this particular office. Fortunately, we have been able to counsel the clients into not wanting to take the stand and testify falsely.

The additional problem if the bar insists on the withdrawal procedure is the concern with the duty of the withdrawing lawyer to follow the case. Does the withdrawing lawyer have a duty to track the case to see if, in fact, the client subsequently takes the stand and appears to commit perjury? This appears to be an unrealistic expectation.

6) As to Rule 4-3.5, Impartiality and Decorum of the Tribunal, I would submit that the committee recommendation to reject this rule is proper. The committee makes note of the specific provisions in Florida Rule of Civil Procedure 1.431(g) and I would note that the Criminal Rules Committee of the Florida Bar recommended adopting the same rule for criminal trials. That change has occurred.

7) As to Rule 4-4.2, Communication with Person Represented by Counsel, the comment indicates that the rule applies even though the represented person initiates or consents to the communication. The question that constantly arises in the criminal context is a family member sending an attorney to the jail to speak with a client represented by the Public

Defender's Office. We have always treated that differently than a situation wherein the client calls a private practitioner and asks that private practitioner to come and speak to them about possible representation. Under the comment, the visiting lawyer would be in violation regardless of who initiated the communication.

The Committee's consideration of these comments is appreciated.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this, the 21st day of December, 2004.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was generated in Times New Roman 14 and complies with the font requirements of Rule of Appellate Procedure 9.210.

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