

IN THE SUPREME COURT OF FLORIDA

The Florida Bar)
Re: Petition to Amend Rules) Case No. ____
Regulating The Florida Bar)
_____)

COMMENTS BY THE GOVERNMENT LAWYER SECTION

THE FLORIDA BAR GOVERNMENT LAWYER SECTION, in response to the June 1, 2004 filing of The Florida Bar entitled *Petition to Amend the Rules Regulating The Florida Bar (Petition)*, hereby submits the following comments:

1. This filing is made within the 30-day comment period pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar, and was authorized by the Executive Council of the Government Lawyer Section.
2. The Florida Bar has proposed to amend the rules governing Continuing Legal Education (CLE) programming **B** namely, the basic skills course requirements and the rules governing the Young Lawyer Division's (YLD) Practicing With Professionalism (PWP) CLE program **B** and these rules substantially affect government lawyers.
3. The amendments reflect, in part, the efforts of the leaders of the Government Lawyer Section and the Young Lawyers Division to reach a compromise on an issue that has previously been the subject of longstanding debate, including disputes before this Court.
4. The Government Lawyer Section generally supports the proposed rule, but offers these comments to clarify the Section's positions, and to reiterate concerns discussed with The Florida Bar and Young Lawyers Division.

THE BASIC COURSE DEFERRAL AND EXEMPTION

5. Currently, the Rules Regulating The Florida Bar provide a deferral for government lawyers from taking basic CLE courses sponsored by the Young Lawyer Division. *See*, Rule 6-12.4.
6. While this deferral has given government lawyers the flexibility to elect advanced CLE courses and other courses with content appropriate to their government employment, instead of the Young Lawyers Division's CLE offerings, it has also produced unwelcome results.
7. Most notably, attorneys who practiced in the public sector for many years, who developed an area of specialization, and who left public service for private practice, were still required to take basic CLE courses.
8. Thus, while the deferral helped young lawyers at the beginning of their careers, other experienced lawyers who previously benefited from the deferral were later required to spend their time and money on CLE programming of questionable relevance to their specialized practice in order to comply with the Rules Regulating The Florida Bar.
9. The proposed rules recognize this concern. While the deferral remains in place for government lawyers, the deferral from the basic courses becomes a full exemption for all government lawyers who spend at least six years in public service. *See*, Proposed Rule 6-12.4(c).^{1/}
10. The Government Lawyer Section strongly supports this amendment to the Rules Regulating The Florida Bar.

^{1/} The six years required to convert the deferral into an exemption is consistent with the period established by the Florida Legislature for a government lawyer to vest in the Florida Retirement System.

THE PRACTICING WITH PROFESSIONALISM DEFERRAL

11. In addition to the basic courses, the Young Lawyers Division also offers a CLE called *Practicing With Professionalism*.
12. This course, and its predecessor, *Bridge the Gap*, is the subject of a longstanding debate between the Government Lawyer Section and the Young Lawyers Division.
13. The Government Lawyer Section's concerns with *Practicing With Professionalism* include (a) the focus of the programming on private sector subjects, such as trust fund accounting; (b) the availability of professionalism programming from sources other than the Young Lawyers Division (including the voluntary bar associations, sections of The Florida Bar,^{2/} and the law schools); (c) the costs of attending the seminar; (d) the excessive length of the seminar; (e) the unavailability of videotaped sessions; and (f) the lack of *train-the-trainer* programs that would enable governmental agencies to offer internal training at a lower cost.
14. Based, in part, on these concerns, government lawyers were previously deferred from the requirement to take PWP. *See*, Rule 6-12.4(a).
15. In response to some of the Government Lawyer Section's concerns, the

^{2/} The Government Lawyer Section and the American Bar Association's Government Lawyer Division offered one of Florida's first professionalism seminars, and the Miami-Dade County State Attorney's Office has offered professionalism training to its staff (with former Attorney General Janet Reno as an instructor) with topics tailored to the audience, such as discussions of prosecutorial misconduct. An outspoken minority of the Government Lawyer Section remains concerned that these types of customized professionalism programs will be replaced by the generic PWP program. However, the majority of the Section recognized that government lawyers will only be required to take PWP once, and thereafter, lawyers may take any other available courses of their choosing.

Young Lawyer Division has modified the PWP program, making the program shorter, cheaper, available at more locations, and more relevant to all lawyers, including government lawyers. *See, Petition* &9-10.

16. Although the changes do not address all of the Government Lawyer Section's concerns, the Young Lawyers Division and The Florida Bar proposal will eliminate the government lawyers' deferral from PWP. *See, Petition, Appendix D, 0002, striking Rule 6-12.4(a)(4).*

17.

Notably, despite The Florida Bar's statements that "no area of practice should be exempted from attending PWP," *Petition* ¶16, the amendments revoke only the government lawyers' deferral, and leave other deferrals in place. *Petition, Appendix D*, 0002, Rule 6-12.4(a)(1), (a)(2), (a)(3), (a)(5).^{3/}

18. Recognizing that there are strengths and weaknesses to every compromise, a majority of the Government Lawyer Section's Executive Council voted to seek a compromise on these issues, and ultimately accepted the proposed amendments to Rules Regulating The Florida Bar with the following three clarifications: (a) PWP should remain relevant to the entire bar, and not become a private sector focused program; (b) changes will be administered with a grandfather clause exempting current government lawyers (who have served or will serve as government lawyers for at least six years) from PWP; and (c) additional measures should be implemented to control costs, especially given the rising debt and declining pay of young government lawyers, many of whom absorb the costs of attending PWP on their own.

ENSURING CONTINUED RELEVANCE TO THE FLORIDA BAR

19. The Government Lawyer Section Executive Council notes that the Young Lawyers Division has often stated that PWP will be continuously improved to remain relevant to the entire membership of The Florida Bar. *See, Petition, Appendix D* at 0043 (AYLD takes its responsibility to develop and present the PWP program very seriously. Over the years, the program has been refined and improved); 0044 (the goal of PWP is to provide a

^{3/} The focus of these revisions on only the government lawyers was another reason for the strong opposition of a minority of Government Lawyer Section Executive Council members. The majority, however, elected to compromise.

uniform and universal professionalism and ethics course to all new members of The Florida Bar[®]; and 0077 (AYLD continues to work on retooling PWP program[®] in The Florida Bar News, quoting YLD leaders to say that PWP is a general, universal program.[®])

20. Based on these representations, and the other points in §§21-37, below, the Government Lawyer Section does not oppose the elimination of the deferral from PWP for government lawyers.

ADMINISTERING THE RULES WITH A GRANDFATHER CLAUSE

21. Although the Government Lawyer Section does not oppose the elimination of the PWP deferral, the Section understands and expects that The Florida Bar will administer this program to defer and eventually exempt *current* government lawyers from the requirement to attend this seminar.
22. This proposed grandfather clause[®] is codified in the Comments to Proposed Rule 6-12.4, *see Petition, Appendix C*, p. 7, which states:

1. In [*case citation*], the Supreme Court of Florida accepted changes to rule 6-12.3 that were proposed by The Florida Bar and which, effective [*insert Implementation Date*], made lawyers who were engaged in a government practice for 6 years or more additionally exempt from the continuing legal education component of the Basic Skill Course Requirement. Further changes within those bar proposals, however, eliminated for any full-time governmental employee[®] the deferral of the Practicing With Professionalism (hereinafter PWP) component of the BSCR. To accommodate that latter change, the bar requested **B** and the Court accepted **B** a scheduled implementation of the revision whereby all such government lawyers who had benefited from the deferral as of its [*insert Implementation Date*] elimination, would still be entitled to defer the Practicing With Professionalism component of the BSCR as long as they continuously remained in government practice. In addition, the court accepted the bar's willingness to administer that [*Implementation Date*] change so that any

government lawyer then deferred from PWP and who had already or thereafter served 6 years or more in a governmental practice would be granted [an]^{4/} exemption from PWP. This comment memorializes those accommodations agreed to by the bar in its administration of these [*insert Implementation Date*] rule changes.

23. At the Government Lawyer Section Executive Council's June 25, 2004 meeting, some members noted that the Comment creating a grandfather clause for established government lawyers directly conflicts with the rule text, and expressed concern that statements in the rule take precedence over statements in the comments. *See, e.g. In re Amendment to Florida Rule of Criminal Procedure 3.220 (Discovery)*, 550 So.2d 1097, 1099. (Fla.1989)(A comments...are not adopted by the Court as part of the rules.)
24. After consulting with The Florida Bar and Young Lawyer Division officials, it is the understanding of the Government Lawyer Section that this Comment is binding upon The Florida Bar, and that the language is placed in the Comment to avoid unnecessarily long or confusing language in the rule text. *See, Petition, ¶20* (referring to these A temporary and transitional matters.)
25. For some members of the Government Lawyer Section, this language is a critical part of the compromise B all lawyers who now benefit from a PWP deferral will continue to be deferred from the seminar, and will become exempt from the requirement to take the PWP program after six years.^{5/}
26. The Comment language can be interpreted to give too much flexibility to The Florida Bar, because it states that A the court accepted the bar's willingness to

^{4/} The typographical error in Appendix C omitting A an should be corrected.

^{5/} Nothing herein precludes otherwise deferred or even exempted government lawyers from voluntarily attending Practicing With Professionalism.

administer the rule changes as if they included grandfather clause. *See*, Proposed Rule 6-12.4 (comment) in *Petition, Appendix C*, p. 7.

27. To avoid any confusion, the Government Lawyer Section respectfully requests that the comment be included in the rule; and that the last two sentences of proposed Rule 6-12.4 (Comment) be modified as follows: In addition, the court accepted the bar's willingness agreement and irrevocable commitment to administer that [*Implementation Date*] change so that any government lawyer then deferred from PWP and who had already or thereafter served 6 years or more in a governmental practice ~~would~~ shall be granted an exemption from PWP. This comment memorializes those accommodations agreed to by the bar in its administration of these [*insert Implementation Date*] rule changes.

28. It is the understanding of the Government Lawyer Section that The Florida Bar and the Young Lawyers Division understand these concerns, do not oppose modifying the Comment, and will address this issue in a reply brief.
29. While the Government Lawyer Section initially requested, and clearly prefers, placement of this commitment in the text of the Rules Regulating The Florida Bar, the Section does not oppose the alternative of amending the Comments, as long as the grandfather clause is clearly irrevocable.

INCREASING AFFORDABILITY FOR GOVERNMENT LAWYERS

30. Finally, the Government Lawyer Section remains concerned about the fiscal impact of this proposed rule upon young government lawyers.
31. Law school students are graduating with higher debt, reducing the appeal of traditionally-lower paying government lawyer jobs; tight agency budgets compound this problem by leaving many government employers unable to

- pay for their employees=mandatory CLE training.
32. To avoid imposing CLE costs on their employees, government agencies have offered free, internally-sponsored CLE programming. *See e.g.*, fn. 2.
 33. By making PWP mandatory, these amendments render agency-sponsored CLE programming irrelevant, and shift the CLE tuition burden to the law school graduates who already struggle with high debt and low salaries.
 34. Given these financial concerns, the Government Lawyer Section strongly supports the Young Lawyers Division's recent decision to create 120 scholarships of \$75 each for the next two years to help reduce the costs of attending PWP for some attorneys, as needed.
 35. However, the Government Lawyer Section remains concerned that further efforts are needed, and that all government lawyers should receive at least a modest discount to offset the costs of attending PWP.^{6/}
 36. While the Government Lawyer Section does not oppose the requirement to attend PWP on this basis, the Section remains concerned about the costs of this program for young government lawyers, and encourages The Florida Bar and the Young Lawyer Section to assist the Government Lawyer Section in

^{6/} It is the understanding of the Government Lawyer Section that The Florida Bar traditionally has opposed any form of tuition reductions for CLE, but this position was premised on the argument that lawyers could take free CLE classes by videotape; since PWP will now be mandatory, but still unavailable on videotape, a discount should be awarded to some attorneys **B** especially government lawyers **B** as needed. Furthermore, the Government Lawyer Section disagrees with position of The Florida Bar and the Young Lawyers Section that this course cannot be offered on videotape, and encourages the Bar leadership, and this Court, to explore this option as a way to increase the availability and affordability of PWP.

meeting the needs of Florida's government lawyers.

CONCLUSION

A majority of the Government Lawyer Section^{7/} generally supports the proposed amendments to the Continuing Legal Education portion of the Rules Regulating The Florida Bar, with the following clarifications:

- a. All government lawyers, past, present and future, remain entitled to defer compliance with Basic Skill Course Requirements otherwise required by the rule, and become exempt from these requirements by staying in government practice for 6 years or more; *see, §§5-10*;
- b. The Continuing Legal Education program known as Practicing With Professionalism, and its successor programs, will continue to focus on topics relevant to the entirety of The Florida Bar, including government lawyers; *see, §§19-20*;
- c. Government lawyers who currently benefit from the deferral of the Practicing With Professionalism requirement will still be entitled to this deferral; *see, §§11-18, 21-22; see also, Petition §19*;
- d.

^{7/} In two separate correspondence votes (conducted pursuant to the Bylaws of the Government Lawyer Section, Article IV, Section 1) the Section voted to file these comments. The first vote, taken from March 15 to April 12, 2004, was 20-3, authorizing the Section chair to file a brief with this Court supporting the proposed changes to the Rules Regulating the Florida Bar. A second vote was recorded on June 30 and July 1, 2004, and, at the time this brief was printed, 23 members of the Executive Council **B** an overwhelming majority **B** voted in favor of it, after being provided an opportunity to review its contents.

Past, present and future government lawyers who are now deferred from Practicing With Professionalism and who serve, or have already served, 6 years or more in public service (and who otherwise obtain the applicable ethics and professionalism CLE credits) will be exempt from PWP; *see*, §§21-29; *see also*, *Petition* §§19-20;

- e. The implementation of this deferral and exemption from Practicing With Professionalism is a firm and irrevocable commitment of The Florida Bar **B** and this Court **B** and is not a policy choice that can be reversed; *see*, §§25-29; *see also*, *Petition* §§19-20; and
- f. The Florida Bar and the Young Lawyers Division will continue to work with the Government Lawyer Section to ease the financial burdens that Practicing With Professionalism puts on lesser-paid government attorneys; *see*, §§30-36.

WHEREFORE, the Government Lawyer Section

- A. Respectfully requests that the important and irrevocable commitments concerning the Practicing With Professionalism deferral and exemption, as discussed in §§21-29, be placed in the text of the Rules Regulating The Florida Bar, to avoid future misunderstandings; in the alternative, this Court, in its opinion on this matter, should address and clarify this issue and modify the Comments to proposed Rule 6-12.4 (Comment) as discussed in §27;
- B. Respectfully requests that this Court acknowledge in its opinion, as appropriate, other essential aspects of this compromise, especially the need for continued attention to the costs of the Practicing With Professionalism program and its impact on young government lawyers; and
- C. Gratefully acknowledges the efforts of three individuals **B** Mr. Mark Romance, Immediate Past President of the Young Lawyers Division; Mr.

Michael Faehner, President of the Young Lawyers Division; and Mr. Paul Hill, General Counsel, The Florida Bar **B** for their persistent efforts to reach this compromise with the Government Lawyer Section.

Respectfully submitted,

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