IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND RULES REGULATING THE FLORIDA BAR

CASE NO. SC04-914

RESPONSE OF THE FLORIDA BAR CRIMINAL LAW SECTION TO PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR

The Florida Bar Criminal Law Section hereby responds to the PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR filed in this cause and states the following:

I

THE PROPOSED AMENDMENT

Rule 6-12.1 of the Rules Regulating The Florida Bar imposes a requirement that new members of The Florida Bar (hereinafter referred to as "the Bar") complete a basic skills course, which includes the Practicing With Professionalism program sponsored by the Bar's Young Lawyers Division (hereinafter referred to as the "YLD") and two additional basic level CLE courses presented by the YLD. The rule identifies its purpose when it states that "[i]t is of primary importance to the public and to the members of The Florida Bar that attorneys begin their legal careers with a thorough and *practical* understanding of the law (emphasis added)." Throughout the 16 years that this rule has been in existence, attorneys who have been full-time government employees have been eligible to defer compliance during their tenure in public service. *See* Rule 6-12.4(a)(4). The Bar now asks this court to do away with this long-standing deferment policy with regard to the Practicing With Professionalism program. It also seeks to increase the number of required basic CLE courses from two to three.

The Bar's proposal is poorly conceived and counterproductive. It would provide minimal, if any, benefit, while decreasing the amount of relevant professionalism instruction that new government lawyers would receive. It disregards the purposes underlying the basic skills requirement and the Bar's responsibility to the public. Accordingly, the Bar's petition should be denied.[1]

II

THE CRIMINAL LAW SECTION

The Criminal Law Section consists of almost 3,000 members of The Florida Bar. Because of the nature of their practices, many attorneys who begin their careers with prosecutor's offices, public defender's offices, and the Attorney General's office, join the Section. Thus, the Section has a larger number of members and future members who have an interest in the question of whether the government lawyer deferment should be abolished than do most of the Bar's sections.

III

HISTORY

In *The Florida Bar: Amendment to Rules Regulating The Florida Bar*, 524 So. 2d 634 (Fla. 1988), this court first required new lawyers to comply with the basic skills requirement by attending what was then known as the Bridge-The-Gap Program. From the very outset, government lawyers were allowed to defer compliance with the requirement until such time as they left public service.

[1] The Bar's contention on page 9 of its petition that the Criminal Law Section does not oppose the proposed amendments is incorrect.

Twelve years later, however, in case no. SC00-273, the Bar proposed eliminating the deferment for government lawyers. After responses were filed,[2] the Bar withdrew the portion of the petition that dealt with the deferment and, consequently, the subject was not addressed by this court.[3]

IV

THE MINIMAL BENEFIT AND THE COUNTERPRODUCTIVE NATURE OF THE BAR'S PROPOSAL

A OVERVIEW

The most basic, and significant, problem with the Bar's effort to disrupt the status quo is the fact that the proposed change would provide minimal benefit and would actually decrease the amount of relevant instruction in professionalism that government lawyers will receive.[4]

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[2] Those responses included one filed by the Criminal Law Section, which adopted the response filed by the Government Lawyer Section.

[3] In this response, the Criminal Law Section will make references to pleadings and matters contained in appendices filed in case no. SC00-273. The Section thus respectfully asks that this court take judicial notice of its files and records in that case. It is clearly appropriate for a court to take judicial notice of such matters. *Loren v. State*, 601 So. 2d 271, 173 n 1 (Fla. 1992); *Gulf Coast Home Health Servs. of Florida, Inc. v. Dept. of Health & Rehab. Servs.*, 503 So. 2d 415, 417 (Fla. 1st DCA 1987).

[4] This contention was the primary thrust of the opposition to the Bar's proposal in case no. SC00-273. *See* pages 3-5 of the Government Lawyer Section's response in that case. The Bar is therefore clearly mistaken in the statement it makes on page seven of its present petition that the government lawyers who objected at that time registered two objections, expense and time away from the office. While those factors were raised, *id.* at 5-6, they were not even mentioned until the above matters had already been discussed. Moreover, the response also discussed the fact that the proposal would result in government lawyers not receiving relevant practical training at the time they enter private practice, *id.* at 7, the inconsistency of the proposed change due to its failure to encompass other groups also receiving deferments, *id.* at 7-9, and the possibility of the Government Lawyer Section creating and taking on the responsibility for presenting a program dealing specifically with the professionalism concerns of government lawyers. *Id.* at 11-12.

Public attorneys are no different from other lawyers in the fact that they are required to meet the CLE requirements of Rule 6-10.3(b). That rule mandates that every three years, each Florida lawyer must complete a minimum of five CLE credit hours in the area of legal ethics, professionalism, substance abuse, or mental illness awareness programs. Under the present deferment, therefore, government lawyers who do not take the basic skills course must take some other course or courses to satisfy this requirement. Because most government offices presently have their attorneys satisfy the Rule 6-10.3(b) professionalism requirement through courses specifically geared to the concerns of attorneys in public service, the professionalism credits they are now receiving in their first three years of practice are generally more relevant than those they would receive by attending the basic skills course.[5]

This fact is apparent not just from simple logic, but also by comparing the PWP program with the programs presently attended by government lawyers.

B PWP

A significant portion of PWP consists of a presentation developed by the Bar's Center for Professionalism which shows clips from popular movies involving lawyers and discussing the ethical and professionalism problems faced by the lawyers in those movies. It is important to realize that this presentation is not unique to the PWP program. It has been offered at the Bar's annual meeting Bar CLE programs and is available to legal groups and organizations throughout the state. It has, in fact, been given as part of

[5] Should this court feel that new lawyers working for the government should receive their initial professionalism training in a time frame that is equivalent to the time frame within which private practitioners take PWP, Rule 6-10.3(b) could be easily amended to incorporate such a requirement without the need to make the radical changes proposed by the Bar.

the in-house training offered by government offices such as the Miami-Dade County State Attorney's Office. Thus, there is nothing unique about the program in this respect.

It is somewhat difficult to determine from the PWP agenda exactly what is contained in the remainder of the PWP program. That agenda, which is the same each time the program is offered, describes the various segments with generic phrases, such as "Interactive Multi-media Professionalism/Ethics Presentation,"[6] "Panel Discussion on Professionalism" and "Life As a New Lawyer – 30 Things That They Didn't Teach Me In Law School." *See* Appendix A, Agenda from August 6, 2004 through December 3, 2004, PWP programs). There is certainly no way to tell from those titles the true substance of the segment.

Recent participants in the PWP program, however, have indicated to the undersigned counsel that the program has been geared almost entirely to the private practitioner and has focused to a great extent on matters relating to allocation of credit for hours worked in large law firms, client relations, fees, and even considerations attorneys should take into account when purchasing their own residences.[7] Several individuals

[6] This portion is apparently the presentation referred to above involving the movie clips.

[7] The Criminal Law Section does not suggest that the emphasis on concerns faced by private practitioners is inappropriate. Many, if not most, of the more acute professionalism concerns arise from economic factors, such as billing, trust accounts, advertising, client acquisition, client contact, client retention, fees, mingling of funds, or inappropriate practices for the purpose of running up billable hours or of prevailing in cases in which lawyers have a personal economic interest in the outcome. These are not issues faced by government lawyers. *See* Message From the Chair, constituting Item 10 of the Supplemental Appendix to the Government Lawyer Section's response in case no. SC00-273. Because the majority of attendees at PWP are in private practice, the focus is quite properly on these economic concerns. Indeed, efforts to be all-inclusive by addressing to any great extent the concerns of government lawyers concerns would disserve the primary group in attendance.

termed the program "a waste of time" for government lawyers.[8] These observations tend to be corroborated by the content of the YLD website. PWP participants are given a handout, *see* Appendix B, indicating that "[w]hile there have never been course materials for this seminar per se," materials that those taking the program "might find helpful in their practice" are available at that website. A look there is quite revealing. The materials contain the following subjects: "PWP – Law Practice and Office Management;" "PWP – The Bar Programs;" "PWP - Client Relations, Marketing and Partnership Criteria;" "PWP – Maintaining a Trustworthy Account; and "LOMAS – 30 Things They Did Not Teach Me In Law School,"[9] as well as a section entitled "Other Information," which includes "Chemical Dependency and Stress Management" and "The Ethics Hotline." *See* Appendix C, printout from the YLD website. It is thus apparent that PWP is primarily focused on the concerns of private practitioners. Courses in subjects such as law office management, client relations, marketing, partnership criteria, and maintaining a trust account are just not relevant to government lawyers. It seems that in making "changes" since filing its petition in case no. SC00-273, the Bar has done little more than change the names of the various segments of PWP[10] to generic sounding ones

[8] The Criminal Law Section does not dispute the fact that the course is a valuable one for private practitioners, as well as for attorneys leaving public service for private practice.

[9] The inclusion of the reference to "LOMAS," the Bar's support service for law office management, makes it clear the PWP presentation also entitled "30 Things They Did Not Teach Me In Law School" is one geared toward law office management concerns that impact on the private practitioner, not the government lawyer.

[10] The prior terminology is set forth in Appendix B to the response filed by the Government Lawyer Section in case no. SC00-273 and is discussed on pages 3-4 of that response.

that invoke the magic word "professionalism,"[11] while continuing its focus on content geared toward private practitioners.

C COURSES DESIGNED FOR GOVERNMENT LAWYERS

The courses specifically designed for government lawyers, on the other hand, provide training that is relevant to the things those lawyers are doing.

For instance, both the Florida Prosecuting Attorneys Association and the Florida Public Defenders Association offer programs for new lawyers, each of which include a significant focus on professionalism.[12] Moreover, the Criminal Law Section offers a day-long program on closing argument which involves bringing together the local State

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[11] Supporting this conclusion is the fact that the advertisements run by the Bar prior to the petition in case no. SC00-273 included within the "Professionalism Session" such subjects as "Advertising," "Chemical Dependency," "Client Relations," "Client Trust Accounting," "Duties During Representation," "Formation of the Attorney-Client Relationship," "Gender Bias and Diversity," "Introduction to Law Office Management Advisory Service," "Professionalism," "Stress Management," and "Terminating Representation." *See* Appendix A to the response filed by the Government Lawyer Section in that case. There seems to be little difference in the content embraced by these titles and the content presently being offered by PWP. As Gertrude Stein said, "A rose is a rose is a rose." By the same token, a program geared to private practitioners is a program geared to private practitioners is a program geared to private practitioners.

[12] As indicated in a letter from Nancy Daniels, the President of the Florida Public Defenders Association, that group presents a "Defender College" for new attorneys, has incorporated the Bar's four-hour "Practicing with Professionalism" presentation into its conference, and is already providing skills and ethics training. Bar's Appendix D, p. 73-74. Similarly, the Florida Prosecuting Attorneys Association (hereinafter referred to as the "FPAA") offers its "Prosecution 101" seminar, which includes a significant amount of instruction relating to professionalism, including segments dealing with subjects such as Bar complaints and grievances, prosecutorial ethics, the role of the prosecutor, pleas and sentencing negotiations, standards for filing charges, prosecutorial misconduct including closing arguments, mistrials and double jeopardy, caseload/time management, and dealing with witnesses, both civilian and law enforcement. *See* Appendix D, portion of agenda for December 4-5, 2003, "Prosecution 101" seminar. Further, as noted in a letter from Arthur I. Jacobs, written on behalf of the FPAA, that organization has conducted programs which include "ethics portions and 'Practicing with Professionalism,'" and State Attorney offices have "programs dealing with education for their young attorneys particularly emphasizing the 'Practicing with Professionalism' programs in every circuit." Bar's Appendix D, p. 79.

Attorney and Public Defender offices. This program, which has been given in several cities throughout the state and which provides its participants with extensive materials, has been so successful that chief judges have agreed to close the courts on the day it has been offered to ensure that all attorneys would be able to attend. The Section also includes professionalism training in its Prosecutor-Public Defender training program, a week-long program which draws participants from all 20 circuits and which has been given annually at the University of Florida since the 1970's.

The Florida Bar Government Lawyer Section, along with the American Bar Association, Government and Public Sector Division, has also been very active. In 1999, in Key West, those entities jointly sponsored the first national conference on professionalism for government lawyers, a two-day program which featured Justice Anstead as a luncheon speaker.[13] Those groups have also sponsored other professionalism programs over the years, most recently presenting a seminar entitled "Ethical Considerations in Public Sector Law" in Miami Beach on October 15, 2004.[14]

Further, as noted by Justice Cantero on page 3 of the Fall, 2004, issue of The Professional (Vol. VI, No. 1), a publication of the Bar's Center for Professionalism, the center has since 2001 created new programs for the State Attorney/Public Defenders Professionalism Seminars.

Of course, government offices throughout Florida, have offered in-house programs directed specifically to the professionalism needs of their attorneys. One of

[13] Appendix E is a copy of the agenda for this program. A copy of the materials, which consisted of approximately 250 pages, was provided to this court as a supplemental appendix to the response of Government Lawyer Section in case no. SC00-273.

[14] Appendix F is a copy of the materials for that program, the faculty for which included former Florida Attorney General Robert Butterworth.

these programs, presented by the Miami-Dade County State Attorney's Office, featured former United States Attorney General Janet Reno

Further, unlike PWP, participants in the various programs directed to the specific needs of government lawyers receive tangible[15] material that they can retain and use on a daily basis, material relating directly to their area of practice.

D AN INESCAPABLE CONCLUSION

It is beyond dispute that in light of the foregoing, government lawyers are presently receiving training that is much more effective and relevant for their needs than would be the training that they would receive by attending PWP. This fact alone provides a strong reason for continuing the deferment. Other factors, however, as will be set forth in the following portions of this response, make that conclusion even more clear.

E THE NEGATIVE IMPACT ON PROFESSIONALISM INSTRUCTION

Requiring new government lawyers to attend PWP would likely sound the death knell for, or at least deal a crippling blow to, the programs designed for them. While it is true that government offices are inherently underfunded, there can be no question that the problems they face in this regard are presently at their most severe. This is due to the

[15] The importance of such "tangible" material, as opposed to the posting of material on an internet site is significant. Attorneys can take the "tangible" material with them to court, can read it in a comfortable setting, rather than bent over a computer, and can more easily flip between or among different portions of the material. Also, "tangible" material is always available to them, as opposed to items on the internet, which may or not be available at any given moment depending on electronic whims. (In this regard, it should be noted that for a period of months, efforts to reach the PWP materials yielded nothing more than a garbled few lines which included references to "TEAM EVIL," "Moroccan GanGsters, "Sn00py," and "all moroccan hackerz." *See* Appendix G. On other occasions, efforts to access The Florida Bar website resulted in a screen indicating that the website was "offline due to maintenance.") Further, items posted on the internet are subject to interference by hackers and may, when updated, lose wording that is important to some issue that is governed by prior versions of a rule, statute, or other matter.

philosophy presently guiding the executive and legislative branches of Florida's government to minimize the size of government and the resources to be expended.[16] Under these circumstances, it is unrealistic to believe that government law offices will accept the absences and the expenditures involved in sending their attorneys to additional professionalism training if they have to send them to PWP.[17] This court frequently deals with cases in which death warrants have been signed. By approving the Bar's proposal, this court would itself be signing a death warrant, one that calls for the effective end of relevant professionalism instruction for new government lawyers.[18]

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[16] The Criminal Law Section does not wish to inject politics into this matter and thus does not mean to imply that the present approach is either good or bad as a matter of policy. It refers to the current philosophy in simple recognition of the reality that now faces government offices.

[17] The Bar's present proposal does impose less of an burden with regard to the number of days attorneys would miss than did its proposal in case no. SC00-273. That proposal would have required government lawyers to be out of their offices for a minimum of four days and would have involved expenses of at least $340 per person. *See* the response filed by the Government Lawyer Section in that case, p. 5-6. Although the present proposal reduces the number of days to one, allowing attendance at a program designed for government lawyers, as well as attendance at PWP, would increase the number of days to at least two, often three, because many of the seminars are two days in length, and possibly more if travel time requires an extra day or days. It must also be realized in considering this matter that the impact of lost days is far greater now than it was in 2000, when the prior petition was filed. As noted above, the austerity approach that extends to all phases of state government has stretched the resources of public offices far beyond the point to which they had previously been stretched. Missed days and extra expenditures are therefore far more significant now than was the case four years ago. Moreover, while the cost of attending PWP has been reduced to $135 per person, that amount is still a significant expenditure for lawyers who are among the lowest paid in our profession, especially for those who are paying off student loans. Further, if it is paid by the government office, it reduces the amount of money that can be spent for more relevant professionalism training and, in the instance of large offices, can add up to a tidy sum. For instance, in the Miami-Dade County State Attorney's Office, which may well hire 50 new attorneys out of law school each year, paying the fee for that number of lawyers would cost the office $6,750 per year, not including mileage, parking and other incidental expenses.

[18] The fact that the adoption of the Bar's proposal would mean that new government lawyers will not be attending programs designed to provide professionalism training for

F REQUIRING PWP WOULD DISSERVE THE BAR AND THE PUBLIC

Further analysis reveals that eliminating the deferment would lead to no significant benefit. The Bar will undoubtedly suggest that attendance at PWP cannot hurt government lawyers and that some benefit from it may carry over to the time those attorneys enter private practice. Such an argument ignores the fact that, for the reasons expressed above, the PWP training will in almost all respects, *substitute* for the relevant professionalism training, not supplement it. Thus, adoption of the Bar's proposal would hurt in that it would keep government lawyers from receiving more relevant professionalism training.

Moreover, it must be remembered that under the existing provision, government lawyers are not *exempted* from PWP. Rather, they are allowed to *defer compliance* with it until such time as they leave public service. Unless they spend their entire career employed by the government, they will still have to take PWP. The Criminal Law Section suggests that such timing is entirely appropriate. It is when government lawyers enter private practice that the PWP instruction will be most relevant to them. Taking the course at that time allows the material to be fresh in their minds and provides them with up-to-date information. Clearly, the attorneys, the Bar, the courts, and the public would be best served by such a situation,[19] not one in which the attorneys rely on dusty

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their needs would make many such programs economically unfeasible. Thus, experienced government attorneys would have fewer options to choose from to satisfy their ethics and professionalism CLE requirement. Some of them would therefore have to attend some programs that are not as well suited to their needs as programs that might be available within the wider range of courses that they would have to choose from if the deferment is retained. Thus, adoption of the Bar's proposal would likely have a negative impact not just on new government lawyers, but on experienced ones as well.

[19] This is particularly true with regard to practical matters relating to the practice of law, such as client relations, trust accounts, billing, and setting and collecting fees. It is

memories from a course attended years earlier of matters that may or may not still be in effect.[20] Indeed, changing the situation in the manner proposed by the Bar would constitute an abandonment of the Bar's responsibility to protect the public because it would result in attorneys entering private practice without proper recent preparation.

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important that lawyers leaving the public sector receive training in such matters at the time they leave. To whatever extent instruction in professionalism can be deemed to have supplanted instructions in these matters (and, for the reasons set forth above, the Criminal Law Section does not believe that it has), as the Bar implies in its petition, it would appear that PWP has strayed from its roots and should be reevaluated. Practical considerations were the reason for the adoption of the basic skills requirement, *The Florida Bar Re: Amendment to Rules Regulating The Florida Bar*, 524 So. 2d 634, 634 (Fla. 1988), and are recognized in Rule 6-12.1's previously noted attestation to the importance of attorneys beginning their legal career with a "practical" understanding of the law. While the professionalism movement has properly led to inclusion of instruction in that area as part of PWP, practical considerations should not be sacrificed in the name of professionalism. Doing so would hardly be professional.

[20] The fact that lawyers leaving public service are required to take PWP also undermines one of the arguments set forth by the Bar in advocating its proposal. The Bar suggests on pages 10-11 of its petition that it is necessary for there to be an interaction between government lawyers and those in private practice. That interaction is now, and, in the event that the Bar's petition is denied, will continue to be, provided by the lawyers going into private practice after service as a government lawyer. Indeed, it would seem likely that the interaction envisioned by the Bar would be of higher quality if it includes participants who have significant experience in the public arena, rather than those just entering it. The interaction if PWP is required for new government lawyers would, by contrast, consist of interaction between two groups whose only experience is that of law school and who differ, not by developed professional perspectives, but only by the direction in which their career paths will be taking in the future.

It is also interesting to note with regard to the Bar's desire for interaction, that the Government Lawyer Section has for years attempted to promote the idea that such interaction should be encouraged within the Bar's committee structure and that incoming presidents should therefore insure government lawyer representation on all relevant committees. While some incoming presidents have been somewhat receptive to the concept, that has not always been the case, and, in any event, the Bar, has adopted no policies designed to realize, or even further, the goal. One has to wonder why the Bar feels the interaction it discusses is so critical among attorneys who lack the experience to offer an informed perspective on the profession, but is not a high priority with regard to committees made up of experienced practitioners that will act on issues affecting the entire profession.

G CONSISTENCY FOR THE SAKE OF CONSISTENCY

It appears that the reason for the Bar's proposal is to a large degree premised on a desire for consistency. Perhaps the most blatant manifestation of this desire comes from the current Bar President, who is quoted in an article as saying, "I think uniformity is the key, and we should have all young lawyers do it."[21] Bar's Appendix D, p. 85. As Ralph Waldo Emerson long ago taught us, however, "A foolish consistency is the hobgoblin of little minds."

In considering this aspect of this issue, it should first be noted that for the above reasons, achieving consistency here would mean reducing the relevant professionalism instruction received by government lawyers and would mean that government lawyers entering private practice would do so without having recently experienced the needed instruction. Those considerations alone show that the consistency sought by the Bar is a "foolish" one.

It should also be noted, however, that it appears that, while the Bar speaks to consistency, it is in the process of considering undermining that very concept. The

[21] *See also* pages 10-11 of the Bar's petition, which indicates that "the program is designed to provide the material in a uniform way" and which suggests that they YLD should "implement a uniform program." This desire is not new, as it formed the basis for the Bar's previous effort in case no. SC00-273. Exhibit B in the Bar's Appendix in that case (an excerpt from a Board of Governors meeting) stated, "Ms. [Elizabeth] Russo [speaking on behalf of the Bar's Board of Legal Specialization and Education] … said the Rules Regulating The Florida Bar are uniformly applied to all sectors of the legal profession and, as a matter of consistency, ethics requirements and professionalism requirements should also be uniformly applied to all sectors of the legal profession." Likewise, the Bar's Exhibit C in that case (a Florida Bar News article) quotes then YLD President and Board of Governors member Greg Coleman as saying, "If The Florida Bar is going to promote ethics and professionalism, then we need a way to reach all lawyers…. It's a phenomenal course that everyone should take …." The article further indicates that Board of Governors member Dr. Alvin Smith expressed the opinion that the important thing was that all lawyers took the professionalism course and quotes Board member Robert Rush as stating that "[i]t's part of the process of becoming a lawyer."

minutes of the Bar's Program Evaluation Committee (hereinafter referred to as the PEC) from the meeting at which the plan to eliminate the government lawyer deferment was formulated also includes discussion of breaking PWP into separate transactional and litigation tracks. *See* Appendix D to the Bar's petition, p. 5. Moreover, there was discussion about having new lawyers take the appropriate professionalism courses either in law school or during their first year of practice. *Id* Indeed, the current President of the Bar "stated that it would be great if young lawyers had a choice in what courses they took and when they took them." *Id.* Recognizing the potential benefits to transactional and litigation tracks is no different than recognizing the existing benefits of professionalism training specifically geared to the needs of government lawyers.[22] Likewise, allowing

[22] The PEC's discussion in this regard an additional, quite serious, concern. Because the YLD is responsible under Rule 6-12.2 for the "planning, content, and presentation of programs for BSCR compliance," there are no guarantees that the format will not be changed at some point in the future or that the YLD will not seek to further modify the rule. In fact, in a letter written to then Government Lawyer Section Chair Keith Rizzardi, then YLD President Mark Romance specifically refused to provide any assurance that the YLD would not seek such modifications. Bar's Appendix D, p. 61. Thus, even if it was to be assumed that the program in its current format would be preferable to the more relevant instruction government lawyers are now receiving, there would be nothing to say that it would stay that way. This is particularly true in light of the fact that, although the rule vests the responsibility with the YLD, the Bar's Board of Governors is in a position to put pressure on the YLD to make change it wants made. A telling indication that the Board does undertake such efforts is apparent from an article found on page 1 of the Bar's Appendix D, in which Board member and PEC Chair Richard Gilbert is quoted as saying that "we're also going to take a look at CLE and try to compare the sections' operation, then pick and choose what works and what doesn't, improving CLE for all of the sections." Mr. Gilbert's comments make it clear that PEC was not going to be making suggestions to the sections, but was going to impose its choices as to what is good and what is bad on the sections. Indeed, it appears that the present case is here because of a similar choice by PEC, not at the behest of the YLD. The PEC minutes contained in the Bar's appendix specifically note that the YLD "appeared to be defensive about the PWP program" and that the then Bar President "stated that the PEC needs to let the Young Lawyers Division know there are problems with the program." *See* the Bar's Appendix D, p. 5. Moreover, the minutes of the YLD meetings reflect that this issue was instigated, not by the YLD, but by the Bar. *See* Appendix H (excerpts from YLD

courses to be given by law schools would constitute a recognition of the fact that appropriate professionalism training can be provided in manners other than PWP.[23]

Additionally, the government lawyer deferment is consistent with the approach taken with regard to the required substantive courses.[24] It should be remembered that the initial format of the basic skills course requirement was changed from one which presented standardized instruction in substantive areas to one which gives attendees the flexibility to attend courses in subject areas most suited to their practice. As this court recognized, this change allowed "members a certain measure of autonomy in fashioning the substantive portion of their required continuing legal education." *Amendments to the Rules Regulating The Florida Bar*, 702 So. 2d 1258, 1258-1259 (Fla. 1997). The

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minutes), p. 1, January 10, 2003, listing the elimination of government lawyer exemptions [sic] as a recommendation from the Bar Program Evaluation Committee; p. 2, June 26, 2003, flatly stating that the "Florida Bar raised issue removing of deferment Governmental Lawyers;" p. 3, August 22, 2003, indicating that "The Florida Bar's Program Evaluation Committee requested that the Young Lawyers make several changes to the PWP program," including "eliminating the government lawyer deferral for the PWP and basic course programs." Further, it is apparent that although the article quoting Mr. Gilbert was dated September 15, 2002, Bar's Appendix, p. 1, and the PEC meeting discussing the government lawyer deferment occurred on December 12, 2002, Bar's Appendix D, p. 4, the Government Lawyer Section was not even notified that the matter was at issue until June, 2003, *see* article on page 30 of the Bar's Appendix D, when PEC's attitude was already set in stone.

[23] Underscoring the fact that the programs specifically designed for government lawyers can be an appropriate way to provide such training is the fact that such programs often utilize law professors, likely the very ones who would provide the training if done as part of a law school curriculum as part of the faculty. For instance, in the national program on professionalism for government lawyers discussed previously in this response, the faculty included Prof. Lee Schinasi of the University of Miami School of Law, and Prof. John Jay Douglass, of the University of Houston Law Center. Also, former Florida Attorney General Robert Butterworth, who, as noted earlier, was among the faculty at the October 15, 2004, program sponsored by the Government Lawyer Section and the ABA Government and Public Sector Division, is presently the Dean of St. Thomas University School of Law.

[24] The consistency in this regard is a "wise" one, not a "foolish" one, so Emerson's words of warning have no applicability.

government lawyer deferment provides a similar autonomy and it does so in a manner that allows those who utilize it to obtain relevant professionalism training relevant to their duties as government lawyers at the time they are government lawyers, while still requiring attendance at PWP at the time when such attendance best serves the interests of the attorney, the courts, the public and the Bar.

The Bar also addresses the matter of consistency by stating on page 10 of its petition, "No area of practice should be excepted from attending the course or, worse, permitted to present its own professionalism course in place of the YLD's course, because such an exception would encourage other sections and substantive areas of practice to seek to create their own program."

This argument ignores the fact that the government lawyer deferment is not based upon a substantive area of practice, but on the significant differences between the nature of the practice engaged in by lawyers in public service and private practitioners. Second, it is incorrectly based on the premise that government lawyers are "excepted" from PWP. As previously noted, this is not the case. Rather, they are allowed to defer compliance with it until the time when it becomes relevant for them. Although these factors seem to dispose of the matter, the Bar's argument also merits a response on a much more basic level. The concept of developing and offering specialized training in professionalism should be *encouraged*, not discouraged, especially when, as here, the generic PWP course will eventually be taken as well. The Bar's Center for Professionalism and this court's Commission on Professionalism are constantly striving to create courses and materials that are directly relevant to particular areas of practice. The Bar's position smacks more

of an effort to protect its own financial interest,[25] to achieve a public relations coup, or to promote personal agendas, rather than to serve the best interests of members of the Bar and the public. Simply put, specialized professionalism instruction is a good thing. The Bar should be supporting efforts to provide it, not undermining them.

V

THE SINGLING OUT OF GOVERNMENT LAWYERS

The Bar asks this court to eliminate the deferment for government lawyers, but its proposal retains the deferments for lawyers on active military duty and for nonresident attorneys.[26] Although the Bar asserts on page 10 of its petition that it "has a compelling interest in informing all of its new members vital information and explanations necessary for the practice of law in Florida" and that "[n]o area of practice should be excepted from attending the course," its proposal does not encompass all such lawyers. Rather, it eliminates the deferment *only* for government lawyers. The Bar's proposal therefore singles out government lawyers and fails to accomplish its purpose. There is no rationale to support such an approach. There has been no suggestion that government lawyers have somehow become less professional over the years, while military lawyers and out of

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[25] It has not gone unnoticed by the Criminal Law Section that with the financial downturn over the past several years, the Bar has not found itself in the fiscal position it would hope to be in. Nor has the Section failed to realize that the Bar is in the process of trying to force its sections to either provide a greater portion of their dues to the Bar or to pay the Bar for certain services that had previously been provided without charge or with reimbursement for charges incurred. It is safe to say that the Bar has been actively seeking ways to increase its revenue and that this proposal, while likely not entirely motivated by that desire, is certainly consistent with it.

[26] Unchanged in the Bar's proposal is a deferment that is available when compliance would create a hardship. Rule 6-12.1(d)(1)(B). The Criminal Law Section does not contend that is inconsistent to retain this deferment while eliminating the one for government lawyers because the Section believes that this deferment would be appropriate even in the absence of any other deferments.

state practitioners have not. Certainly, many of the same reasons for allowing military lawyers to defer compliance apply equally to government lawyers. Moreover, it would seem that there are stronger reasons for allowing lawyers in public service to defer compliance than there are for allowing out of state attorneys to do so. Most of the out of state attorneys are in private practice, so the basic skills course would be quite relevant to them. Also, unlike government lawyers, they would be able to claim the costs they incur in satisfying the requirement as business expenses for tax purposes, thus decreasing any financial burden.[27] To the extent that the Bar might suggest that economic factors form a basis for the deferment of out of state lawyers, such a suggestion would validate the concept that economic considerations should be weighed in determining whether a deferment is appropriate and would demonstrate the importance of considering the Criminal Law Section's above discussion of those matters as the apply to government lawyers and government offices. It would also undermine the rationale of proponents of the proposed change to the effect that economic factors should not outweigh the need for instruction in professionalism.

VI

AN ALTERNATIVE APPROACH

The Criminal Law Section submits that for the foregoing reasons, it is clear that government lawyers are receiving professionalism training that is better for them than that provided by PWP and that the Bar's request to do away with the deferment should

[27] The Criminal Law Section notes that out of state practitioners are allotted four seats on the Bar's Board of Governors. Not only does the Criminal Law Section not have a seat, but the Bar has consistently rejected efforts of the Bar's Council of Sections to be given one, *nonvoting*, seat on the Board to represent the interests of the Bar's many sections. The Criminal Law Section declines to speculate as to whether this disparity played any role in the Bar's approach to this matter.

simply be denied. Should this court feel that there needs to be consistency in the professionalism training received by government lawyers, however, it should nonetheless reject the approach urged by the Bar.

Instead, the Criminal Law Section would suggest that under such circumstances, a program specifically designed for government lawyers, rather than PWP, should be required. Such a program would be of much more benefit to attendees, because it would focus on issues relevant to them and not spend time on the various matters now included that are relevant only to private practitioners.

The Criminal Law Section notes that in case no. SC00-273, the Government Lawyer Section offered to undertake the responsibility for presenting such a program. *See* the response filed by Government Lawyer Section in that case, p. 11-12. Presumably, that section would still amenable to the concept. If not, various affected sections and divisions, including the YLD, could work together to put together a broadly based program. The Criminal Law Section would certainly be amenable to being part of such a coalition.

Another version of this approach would be to establish certain criteria and requirements for the course and allow individual government offices, or associations of those offices, to present the program.

A third possibility would be to require the YLD to develop a government lawyer track, similar to the litigation and transactional tracks discussed by PEC.

While the Criminal Law Section strongly reiterates its belief that no change needs to be made to the status quo, it emphasizes that if this court disagrees, the best alternative would be to insure that whatever course is to be required would be one that focuses on

the specific needs of government lawyers, not one that substitutes generic the generic PWP instruction for courses that meet these needs.

VII

INCREASING THE NUMBER OF REQUIRED BASIC LEVEL CLE COURSES

The Bar's petition also asks this court to increase from two to three the number of basic level CLE courses new admittees must complete in order to meet the basic skills requirement. It does not discuss this portion of the proposal in its petition, nor does it even indicate any reason why it feels a necessity for this action. Moreover, the Bar's Appendix C, which is entitled "Selected Text of Proposed Amendments with Reasons for Changes," merely states as the reason for the change, "Increases number of basic elective CLE courses from 2 to 3." *Id.* at 1. The Criminal Law Section can only assume that the Bar is motivated by the financial considerations discussed previously in this response.[28]

[28] This assumption is buttressed by the fact that implementation of the Bar's suggestion will in no way insure that new admittees will take more CLE than they would otherwise, only that a greater portion of that CLE will result in revenue to the Bar. Rule 6-10.3(b) requires attorneys to compete 30 hours of CLE within their first three years of practice. They can do this through programs offered by the Bar or through other programs approved for credit by the Bar, including various in-house programs which might be available to them without charge. By forcing those attorneys to take YLD courses, the Bar is insuring that it will receive the fees for those courses, fees which it would not have obtained in situations in which the attorneys attended programs put on by other entities. Moreover, because the YLD courses do not have to be completed until a member's first three year reporting cycle is concluded, many attorneys may well be wasting their time taking these basic level courses at a point in their career when their experience level warrants more advanced instruction. Certainly, many, if not most, lawyers who have been practicing for close to three years are ready for at least intermediate CLE in areas in which they have been practicing. Consideration of the foregoing factors not only leads to the conclusion that the Bar's present request should be denied, but it also raises questions as to whether the basic course requirement should even exist. When the basic skills requirement was first adopted, attorneys received basic instruction in numerous substantive areas at the time they began practicing as part of the Bridge-The-Gap" seminar. That made sense. Requiring such basic instruction within a time period that can extend as far as three years into a lawyer's career, especially when that lawyer is bound

Because the Bar, as the petitioner, bears the burden of demonstrating a need for a change to the status quo, and because it has made no effort to meet this burden, this portion of the petition should be denied.[29]

VIII

CONCLUSION

Although the Bar has identified no problems that need to be addressed with regard to the government lawyer deferment, it advocates for a "one-size-fits-all" mentality to professionalism training, an approach that carries heavy consequences. It would lead to government lawyers receiving generic instruction, rather than instruction specifically geared to their concerns and needs. It would undermine the future of relevant professionalism training. It would disserve the majority of PWP participants by injecting issues irrelevant to them. It would single out government lawyers when the expressed rationale for the proposal applies equally to other groups. It would fail to protect the public because it would do away with government lawyers receiving practical training at the time they become private practitioners.

The Criminal Law Section urges this court to ask itself whether the bar, the courts, and the public would be better served by new government lawyers who receive

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in any event to obtain 30 hours of CLE within the same period, seems to serve little purpose. This court may therefore wish to determine not whether the present requirement should be modified to increase the number of basic level courses from two to three, but whether the requirement should be eliminated entirely.

[29] The Criminal Law Section notes that as part of this aspect of the present proposal, the Bar suggests exempting from the basic CLE course requirement government lawyers who utilize the deferment and who serve for at least six years in the public arena. The Criminal Law Section endorses this aspect of the proposal regardless of whether this court determines that the number of required courses should be two or three. Attorneys who have practiced for six years will not significantly benefit from basic level courses and there is thus no need to require them to take such courses.

professionalism training relevant to their needs or who receive generic training. Likewise, whether the bar, the courts, and the public would be better served by lawyers leaving government service for private practice learning about subjects like trust accounting, client relations, marketing, partnership criteria, and office management at the time they make the transition or the time they are initially admitted to the Bar. The Criminal Law Section submits that the answers to these questions are obvious and that they make it clear that the Bar's request to do away with the government lawyer deferral should be denied.

With regard to the proposed increase in the number of basic level CLE courses, no suggestion has even been offered as to any reason for the change. Thus, this request should also be denied.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300, this ___ day of _____, 2004.

ANTHONY C. MUSTO