IN THE SUPREME COURT OF FLORIDA

CASE NOs. 09-1181 and 10-1349

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,

Petitioner,

-vs-

THE STATE OF FLORIDA, *et al.*,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

AMENDED BRIEF OF AMICUS CURIAE, THE CRIMINAL LAW SECTION OF THE FLORIDA BAR, IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST

The Criminal Law Section of The Florida Bar ("Section") was created in 1976 to provide a forum for Bar members with a common interest in criminal law. The Section is committed to the improvement of individual trial skills and the administration of justice. This brief was reviewed by the Executive Committee of

the Board of Governors of The Florida Bar, which consented to its filing consistent with applicable standing board policies. It is tendered solely by the Criminal Law Section, supported by the separate resources of this voluntary organization – not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

Many attorneys who practice in the criminal justice system are paid by the State of Florida, and most members of the Section are, or have been at one time, employed by the state. Moreover, Section activities foster a high standard of ethical conduct in all members of the profession who participate in the criminal justice system. As such, the Section has a keen interest in whether the ethical standards for state-paid lawyers are set by this Court or by the Legislature.

SUMMARY OF THE ARGUMENT

At stake in these consolidated cases are the province of this Court, and the independence of our judiciary, to promulgate and enforce the ethical standards of lawyers who practice in Florida courts.

Article V, Section 15, of the Florida Constitution gives this Court, not the Legislature, the inherent and fundamental authority to regulate the admission and discipline of attorneys. A necessary part of that authority is the promulgation of

the ethical standards governing lawyers – standards which apply to all attorneys in all situations, even attorneys who are paid by the state.

In these cases, the lower court held -- at least in the context of state-paid attorneys – that section 27.5303(1)(e), Florida Statutes, permits the Legislature to supplant this Court's determination of what constitutes an ethical conflict of interest with its own, separate code of what are judicially cognizable ethical violations.

The Legislature's intrusion upon this Court's authority is unconstitutional as in violation of the separation of powers. Indeed, the independence of our judiciary requires that this Court, not the Legislature, govern lawyers who practice in Florida.

ARGUMENT

THIS COURT, NOT THE LEGISLATURE, PROMULGATES AND ENFORCES THE ETHICAL STANDARDS FOR ALL ATTORNEYS, INCLUDING THOSE PAID BY THE STATE.

In these consolidated cases, the Criminal Law Section of The Florida Bar respectfully disagrees with the portion of the Third District Court of Appeal's opinions that looks to a Legislative statute, rather than the Rules Regulating The Florida Bar and Florida's Rules of Professional Conduct, to determine ethical standards. These opinions, if not reversed, create a dangerous precedent which undermines the independence of the judicial branch. That portion of the lower court's opinions reads thusly:

> In 1990, the Florida Supreme Court determined that "[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he [or she] represents, a conflict of interest is inevitably created." [*In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1135 (Fla.1990)]. In 2004, the legislature promulgated, and in 2007 amended, section 27.5303, which permits assistant public defenders to withdraw from representation based on a conflict of interest. § 27.5303(1)(a), Fla. Stat. (2007).
>
> > If, at any time during the representation of two or more defendants, a public defender determines that the interest of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without a conflict of interest ... then

> the public defender shall file a motion to withdraw and move the court to appoint other counsel.

Id. The obligation to withdraw, however, is not without exception. "In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon inadequacy of funding or excess workload of the public defender or regional counsel." § 27.5303(1)(d), Fla. Stat. (2007). Within section 27.5303, the Legislature provided guidance as to what constitutes a conflict of interest.

> In determining whether or not there is a conflict of interest, the public defender or regional counsel shall apply the standards contained in the Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004.

§ 27.5303(1)(e), Fla. Stat. (2007). The only conflicts addressed in appendix C are conflicts involving codefendants and certain kinds of witnesses or parties. Conspicuously absent are conflicts arising from underfunding, excessive caseload, or the prospective inability to adequately represent a client.

> We must assume that when the Legislature drafted section 27.5303, it was aware of the prior state of the law. [Citation omitted.]
>
> Thus, when the Legislature promulgated a law, which prohibited withdrawal based on excessive caseload and which stated that the "conflict of interest" contemplated by section 27.5303 included only the traditional conflicts arising from the representation of codefendants, we must assume that the Legislature understood the existing law and intended to modify it. Here, PD11 failed to submit to the trial court any evidence that a "conflict of interest," as described by section 27.5303(1)(e), existed.

State v. Public Defender, Eleventh Judicial Circuit of Florida, 12 So. 3d 798, 803-04 (Fla. 3d DCA 2009).

Thus, the opinions below hold that this Court's pronouncement of what constitutes an ethical conflict of interest was supplanted by the Legislature. The lower court's opinions are not explicit whether this Legislative power extends to all lawyers, or just state-paid lawyers. Even under a narrower reading, the opinions subject the thousands of lawyers employed or paid by the State of Florida to ethical regulation by the Legislature rather than this Court.

Requiring legislative approval before a court can recognize ethical conflicts of interest has no basis in law. The Florida Constitution provides: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, Section 15, Fla. Const. Shortly after the passage of the constitutional amendment containing that language, this Court held: "On the effective date of this amendment we will no longer recognize any legislative control on the subject of who may be admitted to the practice of law or any legislative determination on the subject of who must be or shall be disciplined. These will then be the exclusive functions of the judiciary." *State ex rel. The Florida Bar v. Evans*, 94 So. 2d 730, 734 (Fla. 1957). *See also The Florida Bar v. McCain*, 330 So. 2d 712, 714 (Fla.

1976) ("The responsibility for disbarring, suspending or otherwise disciplining lawyers who are admitted to practice in Florida rests with this Court alone.").

This Court's authority over the ethical standards governing lawyers is more ancient and fundamental than even this constitutional grant of authority:

> This constitutional power and rule promulgated by this court are but a recognition of the inherent power of the judiciary to discipline members of the Bar. The power of courts to discipline attorneys at law is as ancient as the common law itself. As early as the 13th century there were organized in England the Inns of Court which were voluntary non-corporate and self-governing legal societies. Then, the Benchers, who were senior members of the Inns, were entrusted with power to discipline and even disbar a barrister guilty of misconduct. The Courts, as successors to the 'Benchers,' have from time immemorial, both in England and in this country, exercised as authority inherent in them, and without question, the right and power to discipline members of the Bar practicing before them. The constitutional power contained in Art. V, Sec. 23 of the Florida Constitution[1] is but a recognition of this already existing authority of the Florida Courts.

The Florida Bar v. Massfeller, 170 So. 2d 834, 838 (Fla. 1964) (citation omitted). *See also In re The Florida Bar*, 316 So. 2d 45, 48 (Fla. 1975) ("Even without this specific constitutional authority, this Court and courts in other jurisdictions have uniformly held that the legislature has no power to control members of the Bar.").

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[1] This provision was subsequently renumbered as Art. V, Section 15, Fla. Const.

As part of this Court's authority to discipline lawyers, this Court, not the Legislature, has the authority to establish the ethical standards for lawyers. *See* Art. V, Section 2(a), Fla. Const. ("The supreme court shall adopt rules for the practice and procedure in all courts…. "). As this Court noted when it created an integrated bar:

> Attorneys are not, under the law, State or County Officers, but they are officers of the Court and as such constitute an important part of the judicial system. As was said in the case of *In re Integration of Nebraska State Bar Association*, [275 N.W. 265, 268 (Neb. 1937)], the law practice is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of the government.

Petition of the Florida State Bar Association, 40 So. 2d 902, 907 (Fla. 1949). *See also State ex rel. The Florida Bar v. Evans*, 94 So. 2d at 733 ("Especially since the integration of The Florida Bar in 1950 the prescription of ethical standards, the designation of educational and moral requirements, and the exercise of supervisory jurisdiction are all peculiarly judicial functions.").

These ethical standards apply to all lawyers, including attorneys whose salaries or fees are paid by the state. In the context of allowing collective bargaining for state-paid attorneys, this Court said that "the ethical rules governing attorneys licensed to practice law in Florida apply to lawyers employed by the

State of Florida" and that "[a]ttorneys representing public entities are under the same professional obligations to their clients whether they are retained or whether they are salaried employees. Attorneys violating these rules are subject to sanctions, whether they violate them collectively or individually." *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1035 (Fla. 1999). Similarly, this Court has rejected an assertion by an attorney that he was not governed by the Court's ethical rules because he was employed as a City Attorney at the time. *The Florida Bar v. Weil*, 575 So. 2d 202, 204 (Fla. 1991) ("The nature of his practice, as city attorney, does not deprive The Florida Bar, acting as an agency of this Court, of jurisdiction to enforce the Rules Regulating The Florida Bar.").

This principle is a corollary of the rule that the same ethical rules govern an attorney's conduct at all times and in all situations. As this Court expressed in the context of an attorney behaving unethically as trustee of an estate (hence, as a client of other attorneys): "That an attorney might, as it were, wear different hats at different times does not mean that professional ethics can be 'checked at the door' or that unethical or unprofessional conduct by a member of the legal profession can be tolerated." *The Florida Bar v. Della-Donna,* 583 So. 2d 307, 310 (Fla. 1989). *See also The Florida Bar v. Bennett*, 276 So. 2d 481, 482 (Fla. 1973) ("Some may consider it 'unfortunate' that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple

business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense, 'an attorney is an attorney is an attorney'…. ").

Under the lower court's opinions, section 27.5303(1)(e), Florida Statutes, is a Legislative limitation on the ethical rules governing certain state-paid lawyers. *See State v. Public Defender, Eleventh Judicial Circuit of Florida*, 12 So. 3d at 804. As such, the statute is an unconstitutional violation of the separation of powers:

> The independence of the Courts of the other two coordinate and equal branches of our state government does not permit of any interference by either of said branches in the exercise by the Courts of this state of their inherent and constitutional power to discipline members of the Bar. Any statute enacted by the Legislature which attempted to do so would of necessity be stricken down as unconstitutional.

The Florida Bar v. Massfeller, 170 So. 2d at 838 (holding that the immunity statute could not apply to disciplinary proceedings).[2]

This Court has turned aside previous Legislative attempts to impose ethical obligations on attorneys, even when this Court agreed with the substance of the legislation. For example, *In re The Florida Bar*, 316 So. 2d at 45, involved an attempt to apply the financial disclosure law to the judiciary and officers of The

[2] Whether the lower court's statutory interpretation was correct, or whether another interpretation might have been possible to avoid the statute's unconstitutionality, are beyond the scope of this brief.

Florida Bar. While agreeing with the substance of that law, and while ultimately adopting similar requirements (in what is now Canon 6 of the Code of Judicial Conduct), this Court held the statute was inapplicable because "[t]he legislature has no power under Article III, Section 18, Florida Constitution, to adopt an ethical code of conduct which would govern the judiciary, whether it concerns financial disclosure or otherwise." *Id*. at 47. This Court further held the enactment inapplicable to not only judges but the attorneys involved, because "[t]he officers of the Florida Bar are acting in that capacity as 'officers of the Court,' and in accordance with Article V, Section 15, Florida Constitution, this Court has exclusive authority to regulate them." *Id*. at 49.

Similarly, in *In re Board of Bar Examiners,* 353 So. 2d 98, 99-100 (Fla. 1977), this Court held invalid as applied to the Board of Bar Examiners a state statute designed to provide equal access to testing for handicapped individuals. Although this Court and the Board agreed with the underlying purpose of the statute, this Court still held that "[o]ur Constitution prohibits legislative interference with this Court's exercise of its power to govern admissions to The Florida Bar." *In re Board of Bar Examiners,* 353 So. 2d at 100-101.

And in another case, this Court likewise held Chapter 119 public record requests inapplicable to the judiciary and judicial entities, stating: "If judicial entities are included within the scope of chapter 119, the legislature has sought to

exercise legislative power concerning a matter that is explicitly withheld and vested elsewhere in the constitution, *i.e.*, article V." *The Florida Bar*, 398 So. 2d 446, 447 (Fla. 1981).[3]

The lower court's opinions are in direct conflict with this Court's authority. The Third District Court of Appeal's holdings -- that the Legislature can, by subsequent legislation, supplant what this Court has previously declared to be an ethical violation -- cannot be squared with this Court's unbroken line of precedent. The Legislature has the authority neither to substitute for this Court's ethical standards for attorneys nor divide The Florida Bar by creating a separate ethical code for attorneys whose salaries or fees are paid by the state. This attempt, as now found in section 27.5303(1)(e), Florida Statutes, works to violate the separation of powers. Art. II, Section 2, Fla. Const. ("The power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.").

As this Court said when it created an integrated bar: "We think the independence of the judiciary is something more than a tinkling symbal [sic], in fact, we think it means that in those matters which are purely and essentially

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[3] While the Criminal Law Section is aware that changes made to Article I, Section 24 of the Florida Constitution, adopted in 1992, do have some impact on this decision, their impact does not reach the issue of separation of powers.

judicial the judiciary may chart its course without interference from other departments." *Petition of the Florida State Bar Association*, 40 So. 2d at 907. That the lower court ceded this power to the Legislature creates an intolerable interference with this Court's inherent and constitutional authority over the ethical standards of the attorneys – state-paid and otherwise -- who practice before Florida's courts.

CONCLUSION

To protect the Florida Constitution and the independence of Florida's judiciary, this Court should reverse the portion of the Third District Court of Appeal's opinions that allow the Legislature's code of judicially cognizable ethical conflicts to supersede the ethical rules promulgated by this Court.

Respectfully submitted,

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I HEREBY CERTIFY pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that this brief complies with the type-font limitation and is printed in 14-point Times New Roman.

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