IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
BIANNUAL FILING

CASE NO. SC10-1967

THE FLORIDA BAR'S MOTION FOR LEAVE TO FILE REPLY AND REPLY TO COMMENTS OF TIMOTHY P. CHINARIS

THE FLORIDA BAR (the bar) respectfully requests leave to file a reply to the comments of bar member Timothy P. Chinaris regarding the bar's petition to amend the Rules Regulating The Florida Bar and states as follows:

1. Timothy P. Chinaris is the only individual who filed timely commentary following the filing of the bar's Petition to Amend the Rules Regulating The Florida Bar on October 15, 2010. Mr. Chinaris's comments relate to the bar's proposal to amend rule 5-1.2, subsection (d).

2. The bar proposes to amend rule 5-1.2(d) as follows:

> **(d) Signing Trust Account Checks.** A lawyer in a law firm or sole proprietorship that receives and disburses client or third-party funds or property through a trust account shall not sign any trust account check in blank (before the payee and the exact amount of payment are entered on the trust account check). A lawyer shall sign all trust

account checks with the actual handwritten signature of the lawyer and shall not use a signature stamp or other means of signing checks drawn on a lawyer's or law firm's trust account that does not require the actual handwritten personal signature of a lawyer. All trust account checks must be signed by a lawyer.

3. Mr. Chinaris has asked the court to consider the burden that this particular proposed rule change may present to solo practitioners and law firms with five or fewer lawyers. He argues for a change to 5-1.2(d) which would still allow a lawyer to authorize a trusted nonlawyer to be a signatory on a lawyer's trust account per Florida Ethics Opinion 64-40 (Reconsideration).

4. The bar acknowledges that the issue raised by the commentator is important and deserves consideration by this court. The bar was in fact very mindful of the impact of the proposed changes to rule 5-1.2(d) on its membership. The impact of proposed rule 5-1.2(d) was carefully considered by The Florida Bar Board of Governors (the board) at both the committee and full board level. After due consideration and discussion, the board determined that asking lawyers to sign their own trust account checks was not unduly burdensome because Florida lawyers are responsible for every action taken regarding their trust accounts pursuant to the other provisions of rule 5-1.2. Furthermore, the board felt that any temporary inconvenience to Florida lawyers, as they adjust to the new rule, would be outweighed by the public interest in protecting client funds and ultimately in

protecting the lawyers themselves from dishonest employees.

5. Some other state bars already have rules similar to proposed rule 5-1.2(d), which forbid nonlawyer signatories on trust account checks and require lawyer approval for all withdrawals or transfers from a client trust account. In response to a National Organization of Bar Counsel Listserve inquiry by the bar, a number of these states reported no member problems with such rules in their jurisdictions. Louisiana Rule of Professional Conduct 1.15(f) requires that a lawyer personally sign every trust account check. Louisiana bar counsel reported that they are finding good compliance with this new rule and fewer instances of employee theft or account errors as a result of their new rule. Washington's current Rule of Professional Conduct 1.15A(h)(9) similarly provides that only a lawyer admitted to practice may be an authorized signatory on lawyer trust accounts in that state. *See also*, New York Rules of Professional Conduct 1.15(e) (authorized signatories on a lawyer trust account checks or withdrawals from trust accounts must be lawyers); Minnesota Rule of Professional Conduct 1.15(j) (all checks, transfers, drafts or other withdrawal instruments on client trust accounts must be signed or authorized by a lawyer); Hawaii Rule of Professional Conduct 1.15(e) (only an attorney admitted to practice law in Hawaii shall be an authorized signatory on a client trust account).

6. The commentator has suggested that a detailed survey should be undertaken before making the proposed change to rule 5-1.2(d). Respectfully, the bar found no need for an extensive formal survey regarding the proposed rule change. Ample notice was given to bar members through the official notice and publication requirements set forth in rules 1-12.1(d), (e) and (g), Rules Regulating The Florida Bar. These rules require the bar to notify its members of upcoming board actions and proposed rule changes specifically to give them ample opportunity to be heard.

7. The proposed change to rule 5-1.2(d) was duly noticed when it came before the board for reading and final consideration. Both written and oral comments and objections from bar members (a total of seven) regarding the proposed rule were duly noted and considered by the board. Proposed rule 5-1.2(d) passed the board by a clear majority vote. Timely notice was again given of the bar's intent to file its Master Rules Petition. Mr. Chinaris is the only bar member who filed formal comments with this court objecting to proposed rule 5-1.2(d).

8. While the commentator is correct that the majority of cases where there has been theft from a trust account involved lawyers themselves, there have been a number of instances where nonlawyers embezzled funds from a lawyer's trust account or escrow account and improperly used the lawyer's trust account for

personal purposes. *The Florida Bar v. Hines*, 39 So.3d 1196 (Fla. 2010) (attorney found guilty of improperly allowing nonlawyer complete access to escrow accounts containing client funds - case remanded to referee for sanctions); *The Florida Bar v. McAtee*, 601 So.2d 1199 (Fla. 1992) (attorney disciplined where trust audit confirmed that his employee had stolen trust account funds and funds from bankruptcy trustee accounts); *The Florida Bar v. Whitlock*, 426 So.2d 955 (Fla. 1982) (lawyer disciplined for trust account violations, including allowing nonlawyer to manage trust and general accounts without adequate supervision). An attorney has even been disciplined for allowing a nonlawyer to be a signatory on the attorney's operating account, where the nonlawyer used the funds for personal reasons, thereby commingling personal or firm funds with a client's funds. *The Florida Bar v. Graham*, 605 So.2d 53, 55 (Fla. 1992).

9. Current rule 5-1.2(d) and Florida Ethics Opinion 64-40 (Reconsideration) have recently been the cause of confusion for a referee in *The Florida Bar v. Hines*, *supra*. This court reversed the referee's recommendation that Hines be found not guilty of violating rule 4-5.3 even though she allowed a nonlawyer unfettered access to an escrow account holding client funds in real estate transactions. The referee had relied on Florida Ethics Opinions 64-40 and 64-40 (Reconsideration) as supporting the broad conclusion that it is not unethical for an

attorney to have a nonlawyer signatory on an escrow or trust account in any circumstances. This court opined that Florida Ethics Opinion 64-40 (Reconsideration) did not merit such a broad interpretation, but noted that the bar's ethics opinions are not binding on courts or referees. *Hines* at 1201.

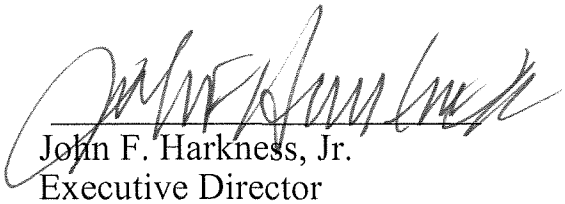
10. Under existing rule 5-1.2(d) there is clearly confusion and a dearth of guidance regarding the responsibility of attorneys for nonlawyers with access to client funds on the part of both attorneys and referees in discipline cases. The *Hines* case underscores the need for an amended rule that would remove any ambiguity regarding required signatories on lawyer trust accounts.

11. Theft of client funds from trust accounts is a serious problem for the bar, its members and the public. The bar submits that failure to amend rule 5-1.2(d) would only exacerbate the problem by continuing to allow lawyers to abdicate their responsibilities for their trust accounts to nonlawyers. When a lawyer knows that he or she is not required to sign all trust account checks it is concomitantly easier for the lawyer to pay little or no attention to required recordkeeping procedures for the trust account specified elsewhere in rule 5-1.2, Rules Regulating The Florida Bar. Protection of the public and of lawyers themselves can be best achieved by

requiring lawyers to sign all checks drawn on their trust accounts as contemplated by proposed rule 5-1.2(d).

WHEREFORE, the bar respectfully requests that this court approve the proposed amendments to rule 5-1.2(d), Rules Regulating The Florida Bar, as initially proposed by the bar.

Respectfully submitted,



John F. Harkness, Jr.
Executive Director
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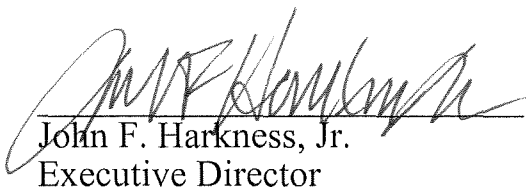
Florida Bar Number 123390

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to File Reply and Reply of The Florida Bar has been sent by United States mail to the following individual on this 8th day of December, 2010.



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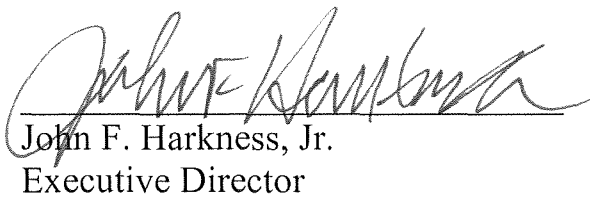
CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that this Reply is typed in 14 point Times New Roman Regular type.



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