IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO RULES
REGULATING THE FLORIDA BAR
_____/

CASE NO. SC00-273

THE FLORIDA BAR'S SUPPLEMENTAL PETITION

In its order of September 1, 2000, this court directed The Florida Bar to address and clarify the need to adopt or amend rules 1-3.10 and 3-4.1. Specifically, the court directed the bar to address the issue of how the conduct of non-Florida lawyers engaged in mediation or arbitration within this state can be regulated if such lawyers are not required to be admitted under rule 1-3.10. In addition, the court directed the bar to address the advisability of amending rule 3-7.12 to include a statement that disciplinary resignation is equivalent to disbarment. The Bar responds to the court's directive as follows:

The Need to Adopt Rule 1-3.10

1. **Generally**. Rule 1-3.10 and *pro hac vice* admission regulation are needed, most importantly, to "protect the

public from being advised and represented in legal matters by unqualified persons," and to provide specific guidance to out-of-state lawyers who may be interested in appearing in Florida via a *pro hac vice* appearance as well as judges attempting to apply the *pro hac vice* rules. *State of Florida ex rel. The Florida Bar v. Sperry,* 140 So.2d 595 (Fla. 1962), *judgment vacated on other grounds,* 373 U.S. 379 (1963).

Pro hac vice admission is permitted by 1-3.2(a), R. Regulating Fla. Bar (exhibit A), and 2.060(b), Fla. R. Jud. Admin.. (exhibit B). Those rules provide little guidance to lawyers and almost no standards for judicial review of petitions to appear. To fill these needs the Rules of Judicial Administration Committee and The Florida Bar began independent evaluations of existing rules. From those evaluations came a coordinated approach reflected in the proposed amendment to 1-3.2(a), R. Regulating Fla. Bar (exhibit C), proposed new 1-3.10, R. Regulating Fla. Bar (exhibit D), proposed amendment to 2.060(b), Fla. R. Jud. Admin. (exhibit E), and proposed new 2.061, Fla. R. Jud. Admin. (exhibit F). The proposed amendments to the Florida Rules of Judicial Administration are currently before the court in case number SC00-706.

Proposed amendments to existing rules 1-3.2(a), R. Regulating Fla. Bar, and 2.060(b), Fla. R. Jud. Admin., merely relocate *pro hac vice* admission requirements. The

relocated and detailed admission requirements are found in proposed rules 1-3.10, R. Regulating Fla. Bar, and 2.061, Fla. R. Jud. Admin.. In content the proposed rules are virtually identical and in no way are they contradictory.

Pro hac vice admission was created to allow non-Florida lawyers a limited opportunity to appear in Florida courts. It was not created as a collateral opportunity for Florida bar members to continue the practice of law in Florida.

2. **The basis for evaluation**. A review of the bar's rules related to *pro hac vice* admission and practice was undertaken when it became apparent that a loophole existed with regard to inactive or suspended Florida lawyers and former Florida lawyers who were disbarred or whose disciplinary resignation had been accepted. Florida lawyers who were not active, or who had been suspended, disbarred, or who had resigned in lieu of discipline (and, therefore, unable to practice law in Florida)but who were members of other state bars could, under the existing rules, continue to practice in Florida via *pro hac vice* admission based on the lawyers' out of state membership in good standing.

It seems nonsensical that an attorney who this court sees fit to suspend or disbar from practice for disciplinary reasons could continue to practice in the state by virtue of membership in another bar. If such

attorneys are permitted to practice law in Florida through *pro hac vice* admission despite previous disciplinary action taken by this court, the court's purpose of protecting the public from those unqualified or unfit to practice is lost. The proposed new rules close the loophole and prevent the admission of those persons who are not otherwise able to practice in Florida (inactive, suspended or former members of The Florida Bar) through *pro hac vice* admission.

Inactive members of The Florida Bar are specifically rendered ineligible to practice law in Florida by 1-3.2(4), R. Regulating Fla. Bar. For consistency such members are not allowed to appear via *pro hac vice* admission.

3. **The problems revealed by evaluation.** As the above-mentioned review of the *pro hac vice* rules was being undertaken, it was determined that additional rules were needed to provide better guidance to judges and out-of-state practitioners. The proposed rules were developed to provide the further needed clarification and direction. Specifically, the proposals will provide guidance with regard to what is a "general practice before Florida courts"; a question that is often-asked by attorneys and judges alike as they attempt to comply with the existing rules. In addition, the proposed rules create added protection for the public by requiring out-of-state counsel to associate Florida counsel and clarify

further that lawyers admitted to appear under the rules are subject to the Rules Regulating The Florida Bar.

The court's jurisdiction over out-of-state attorneys admitted *pro hac vice* is clearly set forth in existing 3-4.1, R. Regulating Fla. Bar, wherein the rule states, that:

> every attorney of another state who is admitted to practice for the purpose of a specific case before a court of record of this state is within the jurisdiction of this court and its agencies under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

The proposed language of new rule 1-3.10(a)(1) provides notification on the application of the rules in the same location as other rules pertaining to *pro hac vice* so that there can be no question regarding the applicability of Florida's ethics rules.

4. **Defining "general practice."** Current rule

2.060(b), Fla. R. Jud. Admin., states that "[a]ttorneys of other states may not carry on a general practice in Florida unless they are members of The Florida Bar in good standing." Attorneys and judges often contact the bar for guidance on what constitutes a "general practice." Although judges should continue to have discretion in reference to admitting lawyers *pro hac vice*, for the sake of consistency in application the proposed rules provide the sought after guidance. During review the bar and the rules committee were advised that in some instances non-Florida lawyers had set up residence in Florida and regularly appeared by way of *pro hac vice* admission.

The proposed rules state that a non-Florida lawyer shall not be permitted to carry on a general practice before Florida courts. But the new rules give further clarification and direction by providing that "more than 3 appearances within a 365-day period in separate and unrelated representations shall be presumed to be a 'general' practice." The bar submits that by setting forth a standard by which to guage what level of practice in the courts constitutes a "general practice" the results of *pro hac vice* motions will be more consistent and fair. Please note that under the provisions of the proposed rules, the trial judge continues to have discretion to permit *pro hac vice* admission "upon a showing that the appearances are not a 'general practice'

or that denial will work a substantial hardship on the client."

5. **Effect of discipline or contempt during *pro hac vice* admission**. In addition to setting forth the parameters for *pro hac vice* admission and the jurisdiction of the court over persons so admitted, the proposed rules set forth the ramifications of professional discipline or contempt. Proposed rule 1-3.10(a)(3), R. Regulating Fla. Bar, states that "[n]on-Florida lawyers who have been disciplined or held in contempt by reason of misconduct" while admitted *pro hac vice* shall be denied further admission under the rule and the applicable provisions of the Florida Rules of Judicial Administration. The rule is needed in order to protect the public from unlicensed individuals who have misused the privilege bestowed upon them. As stated in an earlier pleading of the bar, "[n]on-Florida lawyers admitted *pro hac vice* have received a boon and been given a trust. They should be on their best behavior and misconduct significant enough to warrant a finding of contempt or a disciplinary sanction violates the trust reposed in them." *Response of The Florida Bar To Comments of Richard N. Friedman*, February 28, 2000, p. 2.

6. **Establishing uniform content for verified motions.** Subdivision (b) of both proposed rules set forth the information that should be included in the verified motion. The bar submits that this information is

necessary in order for the judge to make an informed decision on a motion to appear *pro hac vice*. In addition to the basic information currently required under the Florida Rules of Judicial Administration (a showing that the member is a member in good standing of the bar of another state, a statement of all jurisdictions in which the attorney is an active member in good standing, and the number of cases in which the attorney has filed a motion for permission to appear in Florida in the preceding 3 years), the new proposed rule would require additional information, i.e., a statement of the current Florida Bar membership status (if any, and this requirement is contained in the bar rule only), a statement indicating the date the legal representation commenced, a statement specifically identifying all matters in which admission has been sought in the prior 5 years and whether the *pro hac vice* admission was granted, a statement that all provisions of the rule and the Florida Rules of Judicial Administration has been read, information regarding the associated Florida lawyer, and a certificate indicating that the verified motion has been served on all counsel of record.

The bar submits that a uniform motion is needed to make *pro hac vice* appearance consistent throughout the state. Further, the content proposed gives judges, for the first time, adequate information on which an informed ruling may be made.

The Need To Amend 3-4.1

1. **Historical background for amendment.** On July 3, 1997 this court rendered an opinion in *The Florida Bar re: Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997). This court's opinion was issued in response to a proposed formal advisory opinion filed by the Standing Committee on the Unlicensed Practice of Law (hereinafter "Standing Committee"). The opinion dealt with the subject of nonlawyers representing individuals in securities arbitrations brought in Florida. In footnote 1 of the opinion, this court noted that "the proposed opinion specifically does not address . . . (2) the propriety of an investor's representation in securities arbitration by an attorney who is licensed to practice in another jurisdiction, but not Florida . . ." *Id,* at 1180. The reason this was not addressed was due to the fact that the issue of out-of-state attorney representation in arbitration proceedings was not before the Standing Committee. Accordingly, no public testimony was taken on the issue.

Although the issue was not before the Standing Committee at that time, the question of out-of-state attorney representation in arbitrations brought in Florida kept resurfacing. For this reason, on April 23, 1999, the Standing Committee held a public hearing on the

following two issues: 1) whether it constitutes the unlicensed practice of law for an out-of-state attorney to represent an individual in Florida before an NASD arbitration panel in a matter involving nonsecurities Florida law issues; and 2) whether it constitutes the unlicensed practice of law for an out-of-state attorney to represent another in Florida in a proceeding before the American Arbitration Association. The testimony at the public hearing showed that out-of-state attorney representation in arbitrations in Florida was taking place on a regular basis. However, the testimony also showed that the demonstrated harm in the area was due to the fact that the attorneys were not subject to Florida's Rules of Professional Conduct and often engaged in unethical conduct that was virtually unregulated.

Although the Standing Committee had concerns regarding the conduct and generally felt that the representation constituted the unlicensed practice of law,[1] the Standing Committee did not reach a final determination on that issue and a proposed formal advisory opinion was not filed with this court. The Standing Committee felt that the violations of Florida's Code of Professional Conduct were more problematic and

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[1] The unlicensed practice of law discussion focused on the fact that representation of a party in arbitration is the practice of law and there is no specific rule authorizing the conduct. *See Nonlawyer Representation in Securities Arbitration*, supra.

that regulating the conduct from an unlicensed practice of law standpoint was not the most effective route to take to protect the public. This is due in part to the remedies available in an unlicensed practice of law matter. When an individual not licensed to practice law in Florida engages in the unlicensed practice of law in Florida, The Florida Bar may seek an injunction to prevent the activity from taking place in the future. Rule 10-7.1, Rules Regulating The Florida Bar. The unlicensed practice of law rules regulate the appearance of the individual, but do not adequately address misconduct during the appearance.

On the other hand, application of the Rules Regulating the Florida Bar and the Code of Professional Conduct more effectively regulates conduct during the representation. If an individual is subject to the rules and the code, the individual will have specific guidelines to follow during the course of the representation. [2] The public will be better protected with the greater likelihood of preventing the harm from occurring and providing a broad set of remedies for the harm that does result.

2. **Effect of proposed amendment.** As the testimony

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[2] Some of the testimony which the Standing Committee heard involved instances of out-of-state attorneys telling opposing counsel that since they were not subject to Florida's ethics rules, they were not going to follow them.

showed that the problem involved the inapplicability of the Code of Professional Conduct, the Standing Committee referred the matter to the Disciplinary Review Committee of The Florida Bar for possible adoption of a rule that would regulate the conduct of the non-Florida attorneys. The current amendment was a result of that committee's work. To summarize, the proposed amendment places the out-of-state attorney on the same footing as a member of The Florida Bar by applying the Rules Regulating The Florida Bar, including the Rules of Professional Conduct, for any unethical conduct that may occur during the course of the representation. Should the out-of-state attorney engage in unethical conduct outside of the representation, the rules would not apply. The proposed amendment therefore puts the out-of-state attorney on the same footing as a member of The Florida Bar for the purposes of the arbitration or mediation. The end result is the protection of the client and the integrity of the judicial process.

3. **How the conduct can be regulated.** In this court's order of September 1, 2000, this court directed the bar to address the issue of how the conduct of non-Florida lawyers engaged in mediation or arbitration within this state can be regulated if such lawyers are not required to be admitted *pro hac vice*. If the court has premised this issue on an assumption that in order to regulate the conduct of persons practicing law in Florida there must be some type of admission to practice, the bar

respectfully suggests that such is not the case.

The authority of the court to regulate the conduct of out-of-state lawyers practicing law in Florida comes from this court's express and inherent authority over the admission to the practice of law.

Article V, section 15 of the Florida Constitution gives this court "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

This court also has the inherent authority to regulate the practice of law. In *The Florida Bar v. Sperry,* 140 So. 2d 587, 588 (Fla. 1963), *judg. vacated on other grounds*, 373 U.S. 379 (1963) this court recognized that while the matter before it did "not involve either the admission of an applicant to the Bar or the discipline of one already admitted," the express grant of constitutional authority over the admission to practice law gave this court the inherent authority to "prevent the practice of law by those who are not admitted to practice." As held by this court, "[t]he express power contained in our state constitution makes unnecessary any discussion of the inherent power of the courts to regulate to practice of law and those who engage in it." *Id.* at 589.

If this court can prevent the practice of law by those who are not admitted to practice, this court can also permit the practice of law by those who are not admitted to practice. As held by this court, "[i]mplicit

in the power to define the practice of law, regulate those who may so practice and prohibit the unauthorized practice of law is the ability to *authorize* the practice of law by lay representatives." *The Florida Bar v. Moses*, 480 So. 2d 412, 417 (Fla. 1980)(emphasis in original).

Thus it becomes clear that the court may regulate the conduct of all who practice law in Florida, whether licensed or not and whether permitted or otherwise.

Equally as clear, to the bar, is the fact that the court should regulate the conduct of those practicing law in Florida. The reason for this conclusion is that the testimony shows frequent unregulated conduct by many who hold no intent to comply with the Rules Regulating The Florida Bar. Those rules are well known to the courts and Florida's lawyers. They are readily available to non-Florida lawyers. Applying one set of rules to the conduct of all who practice law in Florida promotes consistency and ensures maximum public protection. Failure to apply any rules provides no public protection.

As noted above, the testimony received by the Standing Committee showed that non-Florida lawyers are coming into Florida to represent individuals in an arbitration or mediation. As the non-Florida attorneys are in Florida and engaging in the activity, this court can regulate the activity by requiring that the individual abide by the Rules Regulating The Florida Bar and the Rules of Professional Conduct. Therefore, this

court has the authority to adopt the amendment to rule 3-4.1 and regulate the conduct of out-of-state attorneys appearing in an arbitration or mediation in Florida.

If the court believes that conduct can be regulated only on admission to practice or permission to appear, the bar requests approval of 1-3.10, as it is separate from the issues presented by the amendment of 3-4.1, and referral of 3-4.1 back to the bar for further study.

Advisability of Amending Rule 3-7.12

The Florida Bar has no objection to the court's suggestion in this regard, but submits that a proposed amendment to both 3-7.12 and 3-5.1(j), R. Regulating Fla. Bar, is required. Specifically, The Florida Bar suggests addition of the following language in both rules:

> Disciplinary resignation is the functional equivalent of disbarment in that both sanctions terminate the license and privilege to practice law and both require readmission to practice under the *Rules of the Supreme Court Relating to Admissions to the Bar*.

The full text of both rules is submitted as exhibit G.

Wherefore, The Florida Bar prays the court will approve the petition filed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing was furnished by U.S. Mail on this ____ day of October, 2000 to: Robert A. Butterworth, Attorney General and Richard E. Doran, Deputy Attorney General, Office of the Attorney General, The Capitol, Suite PL01, Tallahassee, Florida 32399-1050; Richard N. Friedman, Dadeland Professional Building, Suite 209, 9655 South Dixie Highway, Miami, Florida 33156-2813; Arthur I. Jacobs, General Counsel for Florida Prosecuting Attorney Association, Post Office Box 1110, Fernandina Beach, Florida 32035-1110; Anthony C. Musto, Immediate Past-chair, The Florida Bar Government Lawyer Section, Post Office Box 2956, Hallandale Beach, Florida 33008-2956; George E. Tragos, Chair, The Florida Bar Criminal Law Section, 600 Cleveland Street, Suite 700, Clearwater, Florida 33755 and Robert D. Trammell, General Counsel, Florida Public Defender Association, 311 South Calhoun Street, Suite 204, Tallahassee, Florida 32301.

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