

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
4-1.1 AND 6-10.3 (TECHNOLOGY)

CASE NO. SC16-

**PETITION TO AMEND THE RULES REGULATING THE
FLORIDA BAR 4-1.1 AND 6-10.3 (TECHNOLOGY)**

The Florida Bar (the bar), pursuant to R. Regulating Fla. Bar 1-12.1, petitions this court for an order amending the Rules Regulating The Florida Bar and states:

Authority to File Petition

This petition has been authorized by the Board of Governors of The Florida Bar (Board of Governors). The bar requests this Court's permission to file these amendments out of cycle. Most of the amendments relate to technology in the practice of law. Technology changes rapidly, and therefore the bar requests that these related amendments be dealt with on an expedited basis. This Court has itself acknowledged technology's role in the practice of law in administrative order AOSC07-59 establishing the Florida Courts Technology Commission, stating:

Technology is increasingly influencing the manner in which the court system conducts its business. This trend represents significant promise with regard to access for court users as well as the generation of data necessary for the efficient management of the courts, yet at the same time presents numerous challenges. The purpose of the Florida Courts Technology Commission is to advise the Chief Justice and Supreme Court on matters relating to the use of technology in the Judicial Branch.

These amendments merely codify lawyers' responsibilities regarding the use of technology in the practice of law. Technology is pervasive and used extensively in virtually every lawyer's practice. Additionally, implementation of the

continuing legal education proposal will occur over time, as lawyers' reporting cycles are staggered. The bar therefore believes that the changes should be adopted as quickly as possible to begin that process. Other amendments correct or clarify the continuing legal education rule after changes adopted by this court. These other amendments are included in this petition because they are within one of the rules for which the bar seeks a change relating to technology. Amendments to the same rule are best kept in the same petition for administrative convenience.

Organization of Amendments

The bar proposes amendments to Rules Regulating The Florida Bar 4-1.1 and 6-10.3. This section provides information regarding development of these rules proposals as required by Part III of this Court's administrative order number AOSC 06-14 of June 14, 2006 in *In Re: Guidelines for Rules Submissions*. Each entry provides the following information: an explanation of each amendment; the reasons for each recommended change; the sources of each proposal; the names of groups or individuals who commented or collaborated on a proposal during its development; voting records of pertinent committees and the Board of Governors; and dissenting views within the Board of Governors, if any, regarding each submission.

Amendments

CHAPTER 4 RULES OF PROFESSIONAL CONDUCT SUBCHAPTER 4-1 CLIENT-LAWYER RELATIONSHIP Rule 4-1.1 COMPETENCE

Explanation: Within the comment, adds that lawyers may need the assistance of nonlawyers with technological competence, that lawyers must safeguard confidentiality of information including electronically stored information, and that lawyers must understand the benefits and risks of technology used.

Reasons: The Vision 2016 Commission Technology Subcommittee recommends adding commentary to the rule addressing the need of lawyers to maintain a minimum level of competence relating to technology, as technology is extensively used in the practice of law, and reminding lawyers of their obligation to safeguard confidentiality of information, particularly as it relates to

electronically stored documents. The American Bar Association (ABA) adopted amendments to its model rules in response to recommendations from the ABA Ethics Commission 20/20 relating to technological changes requiring updating of terminology and concepts in the rules; an excerpt of ABA Report and Recommendation 105A relating to rule 4-4.1 is attached in Appendix D. Thirteen states adopted the change also. A subcommittee of The Florida Bar's Professional Ethics Committee recommended adopting the ABA proposals; an excerpt of that recommendation is attached in Appendix D. Other recommendations of the ABA Ethics Commission 20/20 were previously filed by the bar and adopted by this Court in the bar's 2014 biennial petition. *In Re: Amendments to the Rules Regulating The Florida Bar (Biennial Petition)*, 167 So.3d 412, (Fla. June 11, 2015). The concept of technological competence is already endorsed in Florida Ethics Opinions 06-2 and 10-2, which are attached in Appendix D. Both opinions also address confidentiality relating to electronic storage and transmission of information. The Vision 2016 Commission Technology Subcommittee recommended both the addition of the ABA Model Rule amendment and additional amendments drafted by the subcommittee to address technology.

Source: Vision 2016 Commission Technology Subcommittee

Background Information – Member Commentary / Committee Action: The Florida Bar's Professional Ethics Committee subcommittee recommended amendments to the comment to rule 4-1.1 to conform rule 4-1.1 to ABA Ethics Commission 20/20 recommendations for ABA model rule 1.1 on May 30, 2012. Rules Committee rejected the amendments 5-1 by voice and e-mail vote on February 24, 2014. Vision 2016 Commission Technology Subcommittee approved 11-0 on April 8, 2015. Rules Committee approved 5-1 by e-mail vote on April 27, 2015. Program Evaluation Committee approved 14-0 on a strategic basis on May 21, 2015. Board of Governors first reading May 22, 2015. Budget Committee approved fiscal impact 5-0 on June 24, 2015.

Board Action: Board of Governors approved on voice vote with objection on July 24, 2015.

CHAPTER 6 GENERAL

SUBCHAPTER 6-10

Rule 6-10.3 MINIMUM CONTINUING LEGAL EDUCATION STANDARDS

Explanation: Within subdivision (a), clarifies that all members are required to complete and report continuing legal education requirements except those

exempt under rule 6-10.3, and clarifies which CLE exempt members are automatically qualified and which must apply for the exemption. Within subdivision (b), increases continuing legal education requirement from 30 to 33 hours within a 3-year cycle, and adds the requirement of a minimum of 3 of the 33 hours in technology. Within subdivision (b), deletes the requirement that the Professionalism Center approve courses offering professionalism credit. Within subdivision (g), changes the requirement from 8 to 12 months for basic skills completion prior to admission to The Florida Bar.

Reasons: Changes to subdivision (a) are proposed by bar staff to clarify which Florida bar members must apply for the continuing legal education exemption and which must apply and be approved for the exemption. The amendments would assist Florida bar members in determining whether they must actually apply to receive an exemption or whether an exemption automatically applies.

Regarding amendments to subdivision (b), the Vision 2016 Technology Subcommittee (the subcommittee) recommended changes to the continuing legal education requirements to address lawyers' need for basic technological competence, as technology is extensively used in the practice of law. In order to educate lawyers on technology without diluting other course requirements, the subcommittee recommended increasing the number of continuing legal education requirements by 6 hours per 3-year cycle with a minimum of 6 hours in technology. The 30 credit hours per 3-year period of continuing legal education required for Florida bar members has not changed since the adoption of mandatory continuing legal education in Florida in 1987. *The Florida Bar re Amendment to Rules Regulating The Florida Bar (Continuing Legal Education)*, 510 So.2d 585 (Fla. 1987). The subcommittee also obtained information from 45 other states. Only 1 of those states required fewer hours than the current 30 credit hours per 3-year cycle required in Florida, and only 5 others have an equivalent requirement. Other states range from 36 to 45 credit hours per 3-year cycle. Ultimately, the board voted to approve recommending a 3-hour increase of continuing legal education hours for a total of 33 credit hours of mandatory continuing legal education with all 3 additional hours in technology.

The bar offers many continuing legal education programs that are readily available to bar members. The bar's Practice Resource Institute offers 16 on-line continuing legal education courses with a technology component, totaling 27.5 hours of continuing legal education. Of those, all but 1 are available at no charge. The bar's Young Lawyers Division offers an additional 6 courses with 6 hours of

continuing legal education in technology that are available at no charge. The bar's 24/7 on-demand continuing legal education catalog contains 225 individual on-line/on-demand continuing legal education programs. Of those 225 continuing legal education programs, 14 programs are available for free to Bar members and an additional 70 programs are available between \$20 - \$50 each. The bar calculated the course offerings on March 8, 2016, but this type of programming remains fairly consistent throughout the year as new programs are added and old programs expire. As of December 2015, more than 144,289 complimentary education programs, representing more than 334,961 hours of continuing legal education credit, have been accessed via the 24/7 on-demand catalog since the launch of the bar's complimentary Practice Resource Institute education programs began in September 2010. These numbers do not include over 4,800 downloads directly from the Practice Resource Institute YouTube page during the 2015 calendar year. The on-line courses available via the 24/7 on-demand catalog are not categorized as technology versus other areas such as ethics, professionalism or general credits, as technology has not been a continuing legal education requirement. The bar intends to continue to offer continuing legal education to its members via the 24/7 on-demand catalog at no charge to members, including continuing legal education devoted to technology.

Regarding additional amendments to subdivision (b), the Program Evaluation Committee recommended deletion of the requirement that the Professionalism Center approve courses offering professionalism credit in its periodic review of the Professionalism Center as a bar program. Staff time spent reviewing applications for course credit then could be spent directly serving bar members in producing courses and other written materials. Additionally, approval of all continuing legal education courses would be in a central location, as approval of professionalism course credit would be moved to the Department of Legal Specialization and Education as are all other continuing legal education courses. The Department of Legal Specialization and Education already approves ethics and substance abuse continuing legal education credit, which fall within the same category as professionalism for purposes of continuing legal education. Copies of the recommendations and pertinent minutes of the Program Evaluation Committee; this Court's administrative order creating the Center for Professionalism plus excerpts of the exhibits attached to the order relating to continuing legal education; and information from the Henry Latimer Center for Professionalism regarding approval of professionalism credit for continuing legal education are attached in Appendix D.

Amendments in subdivision (g) are proposed by bar staff and change the requirement for basic skills completion prior to admission to The Florida Bar to match the requirement in Rule 6-12.3(b)(1), which was approved by the Florida Supreme Court on May 12, 2005 in *In re Amendments to the Rules Regulating The Florida Bar*, 903 So.2d 183 (Fla. 2005).

Source: Vision 2016 Commission Technology Subcommittee, Program Evaluation Committee, and bar staff

Background Information – Member Commentary / Committee Action: Vision 2016 Commission Technology Subcommittee approved by voice vote of 11-0 on April 8, 2015. Vision 2016 Commission Technology Subcommittee approved amended proposal to a specified 6 hours of technology by voice vote of 10-1 on April 30, 2015. Program Evaluation Committee approved 13-1 on a substantive basis and approved 14-0 on a strategic basis on May 21, 2015. Board of Governors first reading on May 22, 2015. Rules Committee approved 4-0 on a procedural basis on June 2, 2015. Budget Committee approved fiscal impact 5-0 on June 24, 2015. A motion on the floor to amend the Vision 2016 Commission Technology Subcommittee proposal to increase continuing legal education hours to 36 total with 3 required technology failed at the Board of Governors July 24, 2015 meeting. A motion to amend to increase continuing legal education hours from 30 to 33 hours total with 3 required technology credit hours was made on the floor and passed on voice vote with objection. The Board of Governors approved the amended motion on voice vote with objection on July 24, 2015.

Board Action: The Board of Governors approved the amended motion on voice vote with objection on July 24, 2015.

Official Notice of Amendments

Pursuant to R. Regulating Fla. Bar 1-12.1(g), formal notice of intent to file all the proposals in this petition was published in the March 1, 2016 issue of the bar *News*. A copy of the text of the published notice from the Internet version of that bar *News* issue is included with this petition, in Appendix C. This notice can also be found at:

<http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/3680fc4aaa2b4e6d85257f5500767b8d!OpenDocument>

Other Pending Amendments

A petition to amend Rule 4-1.5 is currently pending in case number SC16-104. The proposed amendments within this filing are unrelated to the rule proposed to be amended in case number SC16-104 and may be considered independent of it.

Contents of Appendices

The complete text of all proposals is included in Appendix A to this petition, in legislative format (i.e., deleted language struck through, shown first, followed by new language underlined).

A separate two-column presentation follows in Appendix B, which includes extracted text of affected rules with proposed amendments in legislative format and an abbreviated recitation of the reasons for the changes.

The notice of intent to file this petition is provided in Appendix C.

Various communications of note that were received during the rules development process, and which are specifically referenced in this petition where relevant to specific amendments, are provided in Appendix D.

Comments in Response to Amendments

The bar received 1 comment in opposition to the proposed amendment to rule 6-10.3 regarding the increase in continuing legal education requirement by 3 hours, which is attached in Appendix D. The comment opposes any increase in mandatory continuing legal education requirements. Additionally, some board members opposed the amendments, indicating the desire not to impose additional requirements on bar members.

Oral Argument Not Requested

The bar does not seek oral argument regarding these amendments, unless this Court orders oral argument or bar members file comments that require additional response or appearance by the bar.

Effective Date Request

The bar requests that any changes be made effective no sooner than 60 days from the date of this Court's order so that the bar can educate its members regarding any amendments and prepare to implement the change.

The bar requests that this Court enter an order amending the Rules Regulating The Florida Bar as requested in this petition.

Respectfully submitted,

/s/ John F. Harkness, Jr.

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CERTIFICATE OF READ-AGAINST

I certify that the Rules Regulating The Florida Bar set forth within this petition have been read against the most recent on-line copy of *West's Florida Rules of Court* by the bar's Rules Administrative Coordinator.

/s/ John F. Harkness, Jr.

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

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.

/s/ John F. Harkness, Jr.

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