

IN THE SUPREME COURT OF FLORIDA

**IN RE: PETITION TO AMEND RULE
3-4.3, RULE 3-5.3, AND THE COMMENTS
TO RULES 3-5.3 AND 4-3.1 OF THE RULES
REGULATING THE FLORIDA BAR**

CASE NO.: SC17-1965

PETITIONERS' MOTION FOR CLARIFICATION

Pursuant to Florida Rule of Appellate Procedure 9.330, Petitioners move for clarification of the Court's May 25, 2018 Order that declined to adopt Petitioners' proposed amendments to the Rules Regulating The Florida Bar (the "Rules") "at this time" and dismissing the Petition.

OVERVIEW

Rule 9.330(a) permits a movant to identify "the points of law or fact in the court's decision that, in the opinion of the movant, are in need of clarification." Petitioners respectfully request clarification from the Court as to whether: (a) decisional law that applies to factual findings by a referee in a disciplinary trial pursuant to *Fla. Bar v. Committe*, 136 So. 3d 1111, 1115 (Fla. 2014),¹ also applies to the grievance committee and review process prior to the disciplinary trial; (b) an attorney's use a client's trust funds to satisfy a sanctions obligation imposed on the attorney for prosecuting a frivolous claim is prohibited; (c) a time frame should be scheduled for The Florida Bar (the "Bar") to review the oral argument questions

¹ See also *Fla. Bar v. Gwynn*, 94 So. 3d 425, 430 (Fla. 2012), and *Fla. Bar. v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006) (Petitioners' Response at 2 and 7).

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and comments of Chief Justice Labarga and Justices Pariente, Canady, Polston, Lawson and Lewis regarding known problems with the grievance process, which the Bar agreed during oral argument would occur, and for the Bar to file a further response and report in connection with such review; and (d) the Court should defer ruling on the Petition pending such further response and report by the Bar to this Court with the attendant transparency to the members of the Bar. We discuss each in turn.

ARGUMENT

A. Does decisional law apply to the grievance process prior to the disciplinary trial before a referee?

The Petition requested an amendment expressly providing that prior appellate court decisional law of frivolity applies throughout the grievance process. The Bar asserted that Petitioners’ “concern that lower court rulings on Rule 4-3.1 violations may be ignored in bar proceedings is unfounded.”² The Bar’s Response and oral argument did not address Petitioners’ specific contrary examples raised in the Petition.³ The grievance process is a confidential process; accordingly, there is no empirical data to support the Bar’s general affirming statements as to the existing grievance system.⁴ This Court has plainly held that prior decisional law of

² See Bar’s Response at 3.

³ See Petition, ¶¶ 24 and 25.

⁴ During oral argument, Justice Canady asked the Bar for its acknowledgment that the Court would not know if this is or is not true since the Court “never gets to

frivolity are established facts that apply in the disciplinary trial before a referee. *See Committe*, 136 So. 3d at 1115 (“Given such facts [of prior decisional law of frivolous filings] in the record, the referee’s recommendation that Committe’s complaint was not frivolous is not supported”); *see also Gwynn*, 94 So. 3d at 430 (citing *Tobkin*, 944 So. 2d at 224) (although “the rules of evidence” do not strictly apply, “the referee’s consideration of the opinion would have been proper as a matter – decisional law – which under section 90.201, Florida Statutes (2005), must be judicially noticed.”) To avoid any ambiguity or misunderstanding whether a grievance committee can disregard prior appellate court decisional law that an attorney engaged in frivolous filings or arguments, Petitioners respectfully request the Court clarify its Order to specifically provide that its holding in *Committe* applies throughout the grievance process (or at least creates a rebuttable presumption that applies throughout the grievance process). Absent a clearly articulated reason to disregard prior decisional law, a grievance committee should uphold prior decisional law in applying the Rules and minimize disparate treatment of attorneys at the grievance committee stage.

review” a decision of dismissal at the grievance committee level; only the orders of a referee are subject to the Court’s review. (Oral Argument, In re: Petition to Amend Rule 3-4.3, Rule 3-5.3 and the Comments to Rules 3-5.3 and 4-3.1 of the Rules Regulating The Florida Bar, Case N. SC17-1965 (cited as “OA”) at 17:39 to 17:52.) The Bar concurred by stating that “a lot of what we are talking about today with respect to what happens in the grievance committees is an assumption on all of our parts because our grievance committees are confidential.” (OA at 21:31 to 21:36.)

B. Can an attorney use client trust funds to pay a personal sanctions obligation imposed on the attorney for prosecuting a frivolous claim?

The Petitioners requested an amendment to the Comment to Rule 4-3.1 to expressly prohibit an attorney from using client trust funds to pay the attorney's portion of a sanctions obligation imposed by the court for prosecution of a frivolous claim or argument.⁵ There were no comments by the Bar or any other party in opposition to this amendment. In paragraph 24 of the Petition, Petitioners provided an example of a grievance committee allowing an attorney to use trust funds to pay his personal portion of a sanctions obligation imposed by the court for prosecution of a frivolous claim. The requested amendment is not controversial, and an express reference in the Comment would be an aide to practitioners in the management of their law practices and would further highlight the issue that an attorney must use his or her own funds to pay the attorney portion of a sanctions order and cannot request the client to pay such sums for the attorney. Petitioners respectfully request the Court clarify its Order to make clear that the correct reading of an attorney's obligations under the Rules is to prohibit an attorney from using client trust funds to pay the attorney's portion of a sanctions obligation.

⁵ See paragraph 9 of the Petition.

C. Because the Bar agreed to review and address problems in the grievance process, should a timeframe be provided for the Bar to report back to this Court?

At oral argument, Chief Justice Labarga and Justices Pariente, Canady, Polston, Lewis and Lawson each asked questions, identified concerns or provided suggestions to improve the grievance process as follows:

Justice Pariente: We have seen situations even when this Court has found something improper, where a grievance committee goes off on its own and they disagree. (OA at 15:25 to 15:35.)

Why shouldn't there be self-reporting, why shouldn't there be a mandatory requirement that the grievance committee not only look at it but report it out unless they find in some way there was some basic underlying flaw in a fact or law so that we have this class of cases which are frivolous . . . this case points out in one area where judges are diligent in what they are doing and all of sudden it goes into a black hole . . . I would urge the Bar to look at this series of issues and see if those rules shouldn't be revised. (OA at 27:35 to 28:39.)

Justice Canady: There can be cases where a court had made a determination that a filing was frivolous and that will not end up being prosecuted by the Bar. (OA at 17:39 to 17:52.)

Look at the underlying problem at which the proposal is aimed. And it seems to me that if it is the case that courts are finding that there have been frivolous filings made and it is regularly the case that nothing happens about that in the disciplinary process, that might be problematic . . . there should be some sort of process that whenever a court makes a finding that there has been a frivolous filing that somehow that should be sure to find its way into the disciplinary process . . . that should at least be automatically brought to the attention of the Bar to be considered. (OA at 18:52 to 19:48.)

Justice Polston: Their frustration is with the grievance committees blowing past these findings and rulings by the courts. Frankly, I share their concern . . . I know of instances where grievance committees

have blown past this Court's rulings. That causes me concern . . . I think the underlying problem has to be addressed. (OA at 21:44 to 22:15.)

Justice Lawson: Wouldn't you agree with the fact that we do not have a mechanism that allows us to know what is going on is of concern? . . . It could be under our current process that courts are making findings that lawyers are making frivolous claims with no basis in fact or law and that those are being blown past and we would have no way of knowing at the Supreme Court. There is no mechanism that would tell us that is happening. That concerns me. (OA at 22:16 to 22:48.)

Chief Justice Labarga: Wouldn't it be better for transparency purposes to send that to a member of the Board of Governors that may be [outside the jurisdiction where the grievance committee is located] to make sure that someone who is completely objective looks at it? . . . I am a freak about transparency about things and think that just basically cures that. (OA at 23:40 to 24:08.)

Justice Lewis: The elephant in the room, disappointment, concern with the way in which the grievance committees operate. We get not only cases but letters from people saying you need to look into what the grievance committees are doing and this seems to be an outgrowth of that kind of concern. What you are hearing from my colleagues is a reflection of some of the complaints that we hear that things ought to be investigated a little more deeply are not and they stop at that level. Has the Board of Governors ever thought or considered taking a holistic approach and looking at the grievance process and whether there are folks escaping under the radar? (OA at 24:30 to 25:32.)

Justice Quince also acknowledged existing problems with disparate determinations by grievance committees faced with similar facts resulting in inconsistent sanctions. (OA at 10:39 to 11:02.) Florida's Standards for Imposing Lawyer Sanctions is specifically intended to reduce inconsistent sanctions because such inconsistency "cast[s] doubt on the efficiency and the basic fairness of all

disciplinary systems.”⁶ The Standards provide further that “the standards should help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar” and “[o]nly if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.”⁷ The proposed amendments attempt to support and implement Florida’s Standards for Imposing Lawyer Sanctions that “are designed . . . to promote . . . consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.”⁸

The Bar conceded that the grievance system is not perfect. (OA at 32:19 to 32:26.) The Bar also acknowledged the Court’s comments and agreed that:

We at the Board of Governors are always sensitive to the state of the grievance process and this opportunity to speak to you all about this issue in a larger fashion meaning what the thoughts are of the Court makes us think – let’s look at the grievance process and continue to work with the Court to make sure we, on the Bar’s side, are doing the best job we can do. So I am confident that we will take from this discussion today about the thoughts and concerns and continue to visit how the grievance process works and continue to work with this Court so that this Court is comfortable with the job the Bar and the Board is doing in terms of the grievance process. (OA at 26:30 to 27:21.)

⁶ Fla. Stds. for Imposing Law. Sancs. (May 2015), at 1.

⁷ *Id.* at 2.

⁸ *Id.* at 9.

The Bar acknowledged that “we are assuming because we do not know” what happens in the grievance committees. (OA at 20:15-20:18.)⁹ Petitioners provided examples of violations that were not reported or where grievance committees ignored facts that were indistinguishable from *Committe* and would have resulted in discipline. The Bar’s Response and oral argument evidences significant confusion surrounding the grievance committee process, which is akin to a grand jury, as compared to the disciplinary trial process that requires proof by “clear and convincing evidence.”¹⁰ *See* Response at 4; OA at 21:31 to 21:36 (grievance committee decisions are made by a clear and convincing evidence standard).

These inconsistencies in the grievance process highlight the need for review of the grievance system to produce non-disparate results consistent with Florida’s Standards for Imposing Lawyer Sanctions and codification of this Court’s decisions and rule of law. Petitioners respectfully request the Court clarify its Order to require the Bar to report back to the Court by a specific deadline as to Bar’s promised review and report as to the grievance process – at the very least to develop an action plan with deadlines and outreach to the members of the Bar, and

⁹ Response at fn. 4 as to assertions that the Bar makes relating to its confidential grievance process in which the Bar states what happens can only be assumed.

¹⁰ *Cf.* Grievance Committee Handbook, January 2015, at 13 (“[t]he committee is not to be guided by or make its determination based upon the existence of clear and convincing evidence.”).

the requirement of a supplemental response or report regarding next steps. Setting a timeframe supports Chief Justice Labarga's goal of transparency and keeps focus on the Petitioners' goal to uphold prior appellate court decisional law of frivolity and ensure non-disparate application of the Rules between attorneys. Petitioners further respectfully request that the Court allow the Petitioners and other interested members of the Bar to participate in the Bar's review process to address a broader interaction with the grievance system from every perspective, including the Bar, Board of Governors, referees, grievance committees, Bar members, respondents and complainants.

D. The Petition should remain pending during the Bar's review and reporting process.

Petitioners expended significant volunteer hours to bring the issues addressed in the amendments to the Bar's attention and then to this Court and to demonstrate the disparate application of Rules in the current grievance system. Numerous Justices expressed similar concerns about the current grievance system. The Bar promised to review the grievance system. But to make certain that the Bar is held to its promise to review and improve the grievance system, Petitioners respectfully request that this Court's Order be clarified to allow the Petition to remain pending through the Bar's report date and after until a meaningful process is in place to review the grievance system and address the substantive issues raised by the Petition.

CONCLUSION

For these reasons, Petitioners respectfully urge the Court to clarify its Order as set forth above. Alternatively, Petitioners respectfully request the Court to defer ruling on the Petition pending the Bar's report as to the review and corrective actions it has taken in light of the Court's comments at oral argument and hearing on such report.

Respectfully submitted,

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On behalf of 59 members of The Florida Bar

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to Joshua E. Doyle, the Executive Director of The Florida Bar (jdoyle@flabar.org), and Elizabeth Clark Tarbert, Ethics Counsel of The Florida Bar (eto@flabar.org), The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, Ronald Ponzoli, Gray Robinson, P.A. 515 North Flagler Drive, Suite 1425, West Palm Beach, Florida 33401-4349 (ron.ponzoli@gray-robinson.com), Bruce Robinson, Robinson, Kennon, and Kendron, 582 West Duval Street, Lake City, Florida 32055-5801 (bwr@rkkattorneys.com), and Andrew V. Tramont, 255 Alhambra Circle, Suite 1150, Coral Gables, Florida 33134 (avt@rtgn-law.com), this 7th day of June, 2018.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type, style and size used herein is Times New Roman 14-point font and this Motion for Clarification complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

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