IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR
3-4.3, 3-5.3, AND 4-3.1 –
THE FLORIDA BAR'S RESPONSE

CASE NO. SC17-1965

THE FLORIDA BAR'S RESPONSE

The Florida Bar (the bar) respectfully requests that this Court allow the bar to file a response to the Florida Bar member initiated petition in this case. As grounds, the bar states as follows:

Florida bar member Thomas O. Wells filed a petition on behalf of more than 50 Florida bar members in good standing to amend Rules Regulating The Florida Bar 3-4.3, 3-5.3, and 4-3.1 on November 6, 2017.

Mr. Wells did not object to the bar's November 15, 2017 request for an extension of time to allow the bar to respond to the petition after the meeting of the Board of Governors of The Florida Bar (the board) on December 8, 2017.

The Disciplinary Procedures Committee and Rules Committee of the board of governors each voted unanimously to recommend that the board of governors oppose the petition in this case. The bar also received letters from 5 Florida Bar members in opposition to the petition, which were provided to the board of governors before its meeting and which are attached as Appendix A to this response.

The board met on December 8, 2017 and voted unanimously on voice vote to oppose the petition in this case. The board's opposition is based on several major problem areas in the Wells petition, which are set forth below.

Bar proceedings operate in a system where an aggrieved party initiates a grievance against a lawyer, alleging violation of the Florida Rules of Professional Conduct, or a judge or judicial officer refers a matter directly to the bar when the judge believes that the Florida Rules of Professional Conduct have been violated. Mr. Wells' petition would upend this whole procedure, imposing an automatic finding of probable cause on respondents, the bar, and referees when an appellate court has found a respondent to have violated R. Reg. Fla. Bar 4-3.1, related Fla. Stat. Section 57.105, Fla.R.App.P. 9.410, or Fed.R.Civ.P. 11.

The rule changes proposed by the petitioner take away the right of respondents to be heard and to respond to allegations of violations of rule 4-3.1 before a grievance committee of their peers. Under the petition, an appellate opinion alone would automatically be deemed conclusive evidence of probable cause for finding that rule 4-3.1 has been violated. Respondents would have no right to respond or defend against such a required finding. The petition eliminates the opportunity for a respondent to present arguments to a grievance committee and any input by bar counsel as to the context of the court's ruling.

The absence of grievance committee involvement in the process set forth in the petition, and the immediate referral to a referee for a finding of diversion, in the absence of aggravating factors, makes it impossible for a referee to look at a respondent's conduct in its entirety. Under the petition, the referee would receive a case with only one pre-determined finding of probable cause. The referee would have no guidance from a grievance committee, bar counsel, or the respondent as to the context of the allegations or any defenses of the respondent. Violations of Rule 4-3.1 rarely occur in a vacuum. As shown in this Court's decision in *The Florida Bar v. Gwynn*, 94 So. 3d 425 (Fla. 2012), violations of rule 4-3.1 are often only one part of many related rule violations by a respondent. The grievance committee process allows a grievance committee of the respondent's peers to view all aspects of respondent's conduct, including applicable appellate court opinions, to enable this Court to make an informed decision regarding the entirety of a respondent's conduct. This Court in *Gwynn* affirmed the referee's recommendations of guilt on numerous related rule violations, which included filing frivolous claims in violation of rule 4-3.1, along with failure to reasonably expedite litigation, using tactics with no other purpose than to delay court proceedings, and engaging in conduct prejudicial to the administration of justice. After considering all aggravating and mitigating factors, this Court ordered respondent to be suspended from for 91 days. *Gwyn* at 433-434.

This Court has consistently supported admission into evidence or judicial notice of opinions by lower courts relating to a respondent's actions, as part of the complete picture of a respondent's conduct, as noted in *The Florida Bar v. Tobkin*, 944 So. 2d 219, 223 (Fla. 2006). In its opinion in *The Florida Bar v. Shankman*, 41 So. 3d 166, 170 (Fla. 2010), this Court concluded that a referee had properly considered a federal district court sanction and an underlying magistrate's report as part of the record in the case. Petitioner's apparent concern that lower court rulings on Rule 4-3.1 violations may be ignored in bar proceedings is unfounded. *See also, The Florida Bar v. Head*, 27 So. 3d 1, 7-8 (Fla. 2010) (upholding referee's reliance on bankruptcy court transcript in findings of fact).

Nevertheless, opinions, orders, and transcripts of lower court or federal court proceedings present only *one part* of the picture in a bar discipline case. As this Court stated in *Florida Bar v. Head*, 27 So. 3d 1, 6-7, "[I]t is well established that in bar disciplinary proceedings, the referee is permitted to consider all relevant information pertaining to the alleged misconduct." Such relevant information includes matters that may not be admitted into evidence in state or federal courts, such as hearsay evidence. *The Florida Bar v. Tobkin*, 944 So.2d 219, 244 (Fla. 2006). As explained by this court in *Tobkin*, hearsay and other such evidence is admissible in bar proceedings because bar proceedings are "quasi-judicial rather than civil or criminal." *Tobkin* at 244. It is because bar proceedings are quasi-judicial, and not civil or criminal proceedings, that bar proceedings cannot contain a rule that automatically determines probable cause and exacts an automatic sanction on lawyers, based solely on the order of a civil or criminal appellate court. The petition misperceives the nature of bar discipline proceedings and would undermine them and the jurisdiction of this Court over bar proceedings.

Furthermore, a lawyer facing an automatic sanction by the bar under Rule 4-3.1, as proposed by the petition, could be afraid to make the best argument for a client in a case because there is a chance it might be perceived as too novel or "frivolous" by a trier of fact, thus creating a conflict with the lawyer's client under R. Reg. Fla. Bar 4-1.7(a)(2).

This Court must be able to review the entirety of a bar discipline matter before it, including all rule violations as determined by a grievance committee and organized in a formal complaint drafted by bar counsel, as well as all defenses and mitigating factors presented by respondent, not just an opinion or order from a civil or criminal appellate court. *Florida Bar v. Committe*, 916 So. 2d 741, 748-749 (Fla. 2005), *cert denied*, 126 S. Ct. 1890, 547 U.S. 1098, 164 L.Ed. 2d 569 (2005).

Altering this process with an automatic conclusive determination of probable cause, which bypasses a grievance committee entirely, violates due process rights of defendants and undermines the entire bar review process.

Finally, bar discipline proceedings operate with a higher standard of proof than civil court sanctions proceedings. Fla. Stat. Section 57.105(2) requires proof "by a preponderance of the evidence" while this Court has determined that the standard of proof of violation of bar rules is clear and convincing evidence in *The Florida Bar v. Rayman*, 238 So.2d 594 (Fla. 1970). The standard of proof for sanctions, therefore, is considerably lower than in disciplinary cases. The bar's burden of proof is considered by bar counsel and grievance committees during the investigation of the case and in determining whether to go forward with a discipline case. That discretion would be eliminated under Mr. Wells' proposal.

Therefore, the bar respectfully requests that this Court deny the petition to amend rules 3-4.3, 3-5.3, and 4-3.1 in this case.

Respectfully submitted,

/s/ John F. Harkness, Jr.

_____

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

Joshua E. Doyle
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Extension of Time to Respond of The Florida Bar has been sent by e-mail to Mr. Thomas O. Wells (tom@twellslaw.com) and Mr. Andrew V. Tramont (avt@rtn-law.com) on this 29th day of December, 2017.

/s/ John F. Harkness, Jr.

_____

John F. Harkness, Jr.
Executive Director
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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.

_____

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

APPENDIX A

LETTERS FROM FLORIDA BAR MEMBERS

December 29, 2017

From: Andrew Tramont
Sent: Thursday, October 5, 2017 4:07 PM
To: 'Tom@twellslaw.com'; 'diane@twellslaw.com'
Subject: Your proposed amendment to Bar Rule 3-4.3

Hi Diane and Tom:

I hope you're both doing well. Tom, I just saw your proposed amendment to Bar Rule 3-4.3, and I have some strong feelings about it. I thought you may want to consider my thoughts to see if there is some way to accommodate both your ideas and mine.

And although it's your proposal, and not Diane's, I'm including Diane on the email because I know she's the litigator in the firm, and so I'm sure she will have insight and perhaps some thoughts on the problems I'm raising.

Here is my concern:

Your amendment states: "A final decision by the Florida Supreme Court, a Florida appellate court or a federal appellate court determining prosecution of a frivolous claim or defense, whether pursuant to Section 57.105, Fla. Stats., Rule 9.410 of the Florida Rules of Appellate Procedure, Rule 11 of the Federal Rules of Civil Procedure, or any other similar statute or rule that prohibits the prosecution or defense of a claim unless there is a modification, or reversal of existing law or establishment of new law with a reasonable expectation of success, constitutes a conclusive determination of guilt of misconduct by the lawyer(s) who prosecuted such frivolous claim or defense for violation of Rule 4-3.1."

The problem is that it's not uncommon for lawyers, generally defense lawyers, to assert 57.105 or Rule 11 in response to the allegations set forth by another lawyer, generally plaintiffs' lawyers, in a pleading, motion or brief. They often do this for strategic reasons, the simple goal being to make the plaintiff "back off" from the allegations or the entire case. Yes, this is an unethical tactic, but to believe that it's never employed by defense lawyers would be the height of naivete. I speak from personal experience.

A few years ago, my firm and another firm represented 220 plaintiffs in separate actions in the state and federal courts of Florida, as well as in FINRA arbitrations. On the other side were no less than six very large, multi-national law firms. One of the firms had a former circuit court judge as a partner, and whenever our case was before that tribunal, either after having been directly filed or after her firm filed a motion to vacate FINRA arbitration awards in favor of our client, she was brought in to argue before her former colleagues on the bench. As you might expect, those particular cases did not go well for our client, and in one case the sitting judge simply ruled in her client's favor without even reading the papers we filed on behalf of our client.

This firm and its co-counsel firms then got the idea to challenge almost all of our filings with either Rule 57.105 motions or Rule 11 motions. Before those were ever decided, our 220 clients entered into a favorable settlement with the defendant.

If your proposed amendment had been in place at the time, although I can't speak for my partners or the lawyers from the other firm who handled these cases with us, I'm pretty sure I would have considered myself to be in a conflict position if I had been the lawyer who signed the filing at issue. Despite my strong belief that I have never filed a frivolous paper, I could not discount totally the

possibility that a judge would grant a motion for sanctions against me, possibly because he or she wanted to curry favor with the other side or maybe the judge truly believed the filing was frivolous. Since I could not eliminate that possibility, if I found myself facing such a motion I would have to tell my client, "I'm certain your claim is not frivolous, but I'm not willing to risk my license proving it. I'm going to withdraw as your counsel. Good luck with your case."

How likely is it that the client would be able to find another lawyer, who had not lived with the case for three years like we had so as to reach a conclusion as to its merits, and knowing that the defense would file a motion for sanctions as soon as he or she took over, would take on the case and risk his or her license? Not very, I would say. Multiply that one case by the 220 that we had, and you would have 220 people who firmly believed they were wronged not being able to find lawyers to obtain the remedies to which they were entitled.

In other words, the proposed rule places the lawyer in an almost automatic conflict position. It would be the equivalent of someone coming into my office, and asking me to take a case where, if I lose, I lose my license. I don't care how strong the case is, I'm turning the client away. Fundamentally there is no difference if that situation arises in the form of a sanctions motion in a pending case. I would have the same reaction, and I would move to withdraw. I've practiced for 38 years, and if I've learned anything in litigation, it's that "there are no guarantees," and just like I would never guarantee a victory for my client, I would never guarantee one for myself. And although I hate to say this, because we lawyers are supposed to pretend this bias doesn't exist, it is especially the case where your opponent and/or opposing firm is politically connected to the judiciary, and you're not.

Finally, it's not enough to say that the lawyer found guilty of having violated a sanctions rule can appeal. How comforting is that? Just like you don't know what will happen at the trial level, you can't be assured that an appellate court will get it right either.

I don't know if there is a solution. The only way to balance the evils of this proposed rule is to add a part that would say that if a lawyer files a 57.105 or Rule 11 motion or their appellate equivalents, and that motion is denied, it's conclusive proof that he or she has violated Rule 4-3.1. Although this balances the stakes, it's still not fair. In fact, it serves to highlight the unfairness of the proposal generally.

But I would be happy to discuss my concerns with you at your convenience. If you're so inclined, let me know and I can stop by or we can get together after work or for lunch. I hope to hear from you soon.

Andy

ANDREW V. TRAMONT, ESQ.

Rodriguez Tramont Nuñez, P.A.

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From: Andrew Tramont
Sent: Tuesday, October 10, 2017 4:35 PM
To: 'Thomas Wells'
Subject: RE: Article on the Proposed Rule Change to Address Frivolous Proceedings in an Appellate Court

Hi Tom:

I don't see anything in the article that would prompt a change in my views. In fact, as I reflected further on our conversation, a couple things occurred to me:

First, treating a 57.105 appellate finding as a conclusive determination of an ethics violation may be counter-productive, because it may actually dissuade someone from filing a legitimate 57.105 motion. I haven't filed or served many sanctions motions in my 38 year career, but I've done it a few times. On the other hand, I've never filed a Bar complaint against another lawyer. So if your proposed rule was enacted, I can see a scenario where I would firmly believe my opponent has filed a sanctionable pleading (either violating 57.105 in state court of Rule 11 in federal court), but I would do nothing because I would fear that I was placing his or her license at risk. Whether that speaks ill or well of me I'll leave for others to decide, but knowing myself I can safely say I wouldn't do it. If others think similarly, lawyers may end up getting away with more sanctionable conduct under your rule than they already are under existing rules.

Second, appellate rules could prevent a targeted lawyer from raising whatever he or she needs to raise to protect their license and livelihood. Let's say a 57.105 motion is filed against me. A hearing is held, and the motion is briefed. I forget to raise a particular argument in the trial court. I think of it while the case is on appeal. It's a good argument, but the appellate panel ignores it because I didn't raise it below. That's a proper appellate approach, but a harsh result when it means I'm then tagged with an ethics violation. This wouldn't happen if the Bar had to file a disciplinary complaint against me. I'd get to raise whatever arguments are available to me, despite what I argued or failed to argue at the hearing on the sanctions motion. Given the stakes involved, that seems like a much fairer approach.

Similarly, if the targeted lawyer knows that under the proposed rule the appellate court's ruling will be "conclusive" for purposes of whether the lawyer violated the ethical rules, and that as an appellate matter the lawyer should raise every available argument at the trial court's hearing on the sanctions motion, then must the lawyer raise all of the mitigating factors that are available to lawyers accused of Bar violations? Should the lawyer bring in witnesses to testify about his or her good character, or that he or she was going through a tough divorce, or had an addiction problem? All of that could turn the a typical 57.105 question of whether, for example, the lawyer's breach of contract claim had factual merit, into a real zoo of a proceeding.

Finally, I must respectfully differ with your view that the typical punishment that would be imposed - - a letter of admonishment or sending the lawyer to a diversion program - - is relatively benign. It's a blot on your reputation. As I mentioned to you in our conversation, I've applied for and been admitted in five different states, not to mention numerous federal courts. I'm always asked if I've had any state bar file charges against me, no matter the outcome of a case. I'm very happy to be able to say "no." If I had to say "yes," I doubt that the scrutiny I would undergo would be lessened by the fact that the punishment I received didn't rise to the level of a suspension.

Thanks for the dialogue, Tom. I applaud your efforts to improve the conduct of our brethren, and I hope you understand why I respectfully take issue with your approach.

Andy

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From: Eric Bruce [mailto:Eric@heintzlaw.com]
Sent: Wednesday, October 18, 2017 10:00 AM
To: F. Scott Westheimer <swestheimer@smrl.com>
Subject: 57.105 proposed Bar rule equaling an ethics violation

Scott,

My understanding is that a Bar Rule has been proposed which would make a 57.105 finding by the court to be conclusively an ethics violation. This is a terrible idea on many levels and would turn 57.105 into a weapon in all cases, which is not the purpose of the rule. I hope that you are voting against this proposed rule.

Eric Bruce
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From: Maria Sperando [mailto:Maria@sperandolaw.com]
Sent: Wednesday, October 18, 2017 2:07 PM
To: lornab@lebburtonlaw.com
Subject: proposed new rule

Dear Board Member:

I am writing in opposition to the proposed rule that would make a 57.105 finding conclusive as an ethics violation.

1. This rule would impose an unnecessary burden on our courts because judges right now have the ability to refer to the Florida Bar instances of what they perceive to be unethical conduct.

2. This rule would usurp the authority of the Florida Bar to impose discipline on attorneys, transferring that authority from the Florida Bar to the courts.

3. This rule would make our judges a de facto one-person grievance committees robbing the attorney of due process. Although felony convictions operate as a conclusive finding of unethical conduct, a felony conviction requires a unanimous jury decision beyond reasonable doubt (or a plea waiving same) along with other sacrosanct protections afforded criminal defendants. A 57.105 order is the decision of a single judge who may or may not be considering factors other than the conduct at issue.

4. This rule would undermine the attorney client relationship. If an attorney had to consider whether her making a new and creative argument would ultimately be determined to be frivolous and thus an ethics violation, that would necessarily chill her willingness to make those arguments and thus create a serious conflict between the interests of the client and those of the attorney.

From: David Templer [mailto:dlt@templerhirsch.com]
Sent: Wednesday, October 18, 2017 11:05 AM
To: John Hickey <hickey@hickeylawfirm.com>; dennis wkm-law.com <dkainen@wkm-law.com>; ljlott@lottfischer.com; jay@manuelthompson.com; rponzoli@richmangreer.com; diana@santamarialaw.net; mhiger@bergersingerman.com; john@alpizarlaw.com; deborah.baker@gmlaw.com; jcohen@jaycohenlaw.com
Subject: Proposed Rule 57.105 = ethics violation

Governors:

Some of you know me. Rather than email the entire Board I selected a few of you.

I write to oppose any proposal to make a 57.105 sanction an ethical violation that is Bar actionable. It may well be that a particular 57.105 sanction evidences an ethical violation. However, to make any 57.105 sanction akin to an ethical violation goes too far. Such a rule would seemingly have the effect of encouraging the use of 57.105 to gain tactical advantages in litigation. In and of itself I think that is a sufficient reason to kill the proposal. This leaves aside, of course, that a judge would become a lone-wolf grievance committee, even when such a judge is known to be biased (did I dare say that? Oh yes).

Some proposals and ideas, however well intended they may be, are just bad ones. This is one of them.

Thanks for listening. Wishing you all well.

David

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27 Years of Service Excellence

From: Rosemary N. Palmer [mailto:floridalawlady@gmail.com]
Sent: Sunday, October 22, 2017 3:13 PM
To: Robinson, Bruce <bwr@rkkattorneys.com>; Shaw, Marcy <marcy@mlshawlaw.com>; Bible, Kathy <kbible@floridabar.org>
Subject: Member petition frivolity

Dear Disciplinary Committee, Chairs and Staff,

I have shared with the Member that I oppose his petition. I practice in the area of civil rights (which is where Section 57.105 and Rule 11 are used most often by defendants in civil rights cases to intimidate or remove clients and attorneys who are fighting for those civil rights). The Member does not seem to understand that ALJ's and judges also don't always make accurate calls on the issue, and that the very threat is enough for clients to walk away from good cases, which means bad actors can continue their discrimination. The proposal would effectively preclude any good faith argument for a change in the law.

The member petition is also unbalanced as it does NOT also propose that those who FILE 57.105 and Rule 11 motions and alj's/judges who grant them, only to be eventually overturned be in violation of the code of conduct and also be immediately disciplined by the bar. (I would argue that would not be sufficient to redeem the member proposal, however.)

The Member conceded to me that FL Bar Rule 4-3.1 covers the facts, but is upset because the Bar doesn't do enough to someone. That means his problem is not the rule, but that he doesn't want anyone to look beyond the ruling itself in deciding to discipline the attorney. That would not provide due process.

The Member petition would be a gift to those in our world who would undermine civil rights and any challenge to state actions. If it were to pass, most will give up pursuing viable cases upon receipt of the safe harbor letter, out of fear. That will leave those who violate civil rights a big tool to undermine any claims against those who commit discrimination, to the detriment of civil rights and social order.

I'd be happy to speak to anyone on the subject.

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