

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 LEAVE TO RESPOND TO COMMENTS
REGARDING PROPOSED AMENDMENTS TO 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 AND INCORPORATED RESPONSE**

The undersigned petitioner respectfully requests leave to respond to comments filed in this case and states as follows:

REQUEST FOR LEAVE TO RESPOND

1. The undersigned petitioner filed the member-initiated petition (the "Petition") in this case on behalf of 59 members in good standing with The Florida Bar on November 6, 2017, pursuant to Rules 1-12.1(f) and 3-7.15 of the Rules Regulating The Florida Bar (the "Rules").

2. Comments to the Petition were filed by Andrew V. Tramont on December 5, 2017, and by The Florida Bar (collectively, the "opposers") on December 29, 2017. Both opposers have consented to the filing of a response by undersigned petitioner to the comments through Monday, January 8, 2018. The response is included with this motion below.

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RESPONSE TO COMMENTS

3. Overview. Neither opposer disputes the legal point of the Petition and proposed amendments that prosecution of a frivolous claim or defense, whether under section 57.105, Florida Statutes, Fla. R. App. P. 9.410, or Fed. R. Civ. P. 11, is a violation of Rule 4-3.1. This Court has already ruled as such. *See Fla. Bar v. Committe*, 136 So. 3d 1111, 1115 (Fla. 2014); *Fla. Bar v. Gwynn*, 94 So. 3d 425, 430 (Fla. 2012); *Fla. Bar v. Tobkin*, 944 So. 2d 219, 224 (Fla. 2006); *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571-572 (Fla. 2005). Furthermore, the Bar recognizes that this Court has repeatedly upheld as proper a referee's reliance on another court's findings of frivolity as a Rule 4-3.1 violation (Bar Response, p. 2). *See also Gwynn*, 94 So. 3d at 430. Yet, the opposers disagree that any codification of these decisions should be incorporated into the Rules, as proposed or this Court directs, when the prior determination of frivolity has been made by a Florida or federal appellate court (an "appellate court"). The opposers raise several arguments addressed below.

4. Chapter 3 Procedures are Not Changed. The procedures and right of a respondent to be heard in the grievance process are not changed in Chapter 3 of the Rules. Additionally, the Bar incorrectly asserts that the proposed amendments automatically impose a "finding of probable cause" or "the immediate referral to a referee." The proposed amendment to Rule 3-4.3 will curb a grievance

committee's or referee's discretion to disregard or reject a prior appellate determination of frivolity to treat all lawyers uniformly. The effect of adopting the changes will be to eliminate dismissal of a grievance complaint by the Bar under Rule 3-7.3(d) or a no probable cause finding by a grievance committee under Rule 3-7.4(j) since indisputable evidence of misconduct of Rule 4-3.1 exists based on the prior appellate determination of frivolity. But, an elimination of a finding of no probable cause does not equate to an automatic finding of probable cause. No changes are proposed to the definition of probable cause in Rule 3-2.1(j) which requires a finding of "misconduct justifying disciplinary action." The proposed amendment to Rule 3-4.3 is a finding of misconduct, but not a finding of probable cause. This distinction is further shown by the proposed amendment to Rule 3-5.3 that authorize diversion of isolated or minor misconduct under Rule 4-3.1 to a practice and professional enhancement program ("diversion") by a grievance committee or referee as an alternative to disciplinary sanctions. With the adoption of the proposed amendments, a grievance committee retains discretion pursuant to Rules 3-5.1(b)(2), 3-7.4(l), 3-7.4(m) and 3-7.4(o) to (I) find probable cause justifying disciplinary sanctions, (II) recommend an admonishment for minor misconduct, or (III) recommend diversion, but a grievance committee must uphold as a Rule 4-3.1 violation a prior appellate court determination of frivolity. A referee likewise retains discretion to recommend diversion pursuant to Rule 3-

5.3(h). With the adoption of the proposed amendments, the grievance committee will still consider all aspects of the respondent's conduct, including related or repeated violations, in determining whether and what disciplinary action is justified, while allowing a respondent the opportunity to present arguments and Bar counsel to provide input.

5. No Automatic Sanction. The Bar incorrectly asserts that the proposed amendments “exact an automatic sanction on lawyers.” The proposed amendments to Rules 3-4.3 and 3-5.3 expressly add diversion for misconduct of Rule 4-3.1 which is not a disciplinary sanction. Rule 3-2.1(i) provides that diversion is a removal of a disciplinary matter from the disciplinary system and placement of the matter in a skills enhancement program in lieu of a disciplinary sanction. Rule 3-5.3(i) explains that diversion is not a disciplinary sanction and the Bar “shall terminate its investigation into the matter and its disciplinary files.” Neither opposer directly addresses why a lawyer violating Rule 4-3.1 should not at least attend an ethics skills enhancement program.

6. No Limit on Due Process Rights. The opposers assert a respondent's due process rights are violated by the proposed amendments. The Bar focuses only on the procedures under Chapter 3 of the Rules and not the multitude of hearings or opportunities to brief the issues before the prior appellate court. Regardless, due process rights are not violated by the proposed amendments. Due process is

satisfied when an attorney is afforded appropriate notice and a full opportunity to be heard during the final hearing before a referee. *Fla. Bar v. Rubin*, 709 So. 2d 1361, 1363 (Fla. 1998); and *Fla. Bar v. Carricarte*, 733 So. 2d 975, 978-979 (Fla. 1999). All procedures for hearing, comment and opportunity to be heard before disciplinary sanctions are entered against a respondent remain unchanged.

7. Standard of Proof Argument Is Inapplicable. The Bar argues that a grievance process requires a higher standard of proof than might be employed in hearings before an appellate court. At issue is whether the respondent prosecuted a non-meritorious claim that is frivolous. While this inquiry may include some factual determinations as to whether any material facts existed to support the arguments made, it is essentially a legal determination with all material facts and law presented to the appellate court. *See, e.g., Visoly v. Sec. Pac. Credit Corp.*, 768 So. 2d 482, 492 (Fla. 3d DCA 2000) (an appeal is frivolous if it presents no justiciable question and is so devoid of merit on the face of the record that there is little prospect it will ever succeed). Differing standards of proof has not been recognized as a valid defense to a finding of misconduct based on a prior determination of frivolity in this Court's decisions. *Committe*, 136 So. 3d at 1115; *Gwynn*, 94 So. 3d at 430; and *Fla. Bar v. Tobkin*, 944 So. 2d at 224 (law of an appellate court is decisional law that applies to a referee in a disciplinary proceeding considering Rule 4-3.1).

8. “Best” Argument Chilled by Proposed Amendments Is Inapplicable.

The Bar asserts that the proposed amendments may chill a lawyer from prosecuting their “best” argument. Respectfully, a non-meritorious argument can never be a lawyer’s “best” argument. *See Boca Burger*, 912 So. 2d 561, 571-572; and *Hernandez v. de los Angeles Gil*, 998 So. 2d 651, 655 (Fla. 3d DCA 2008) (as to frivolous claims, the court stated that “[j]ust say no’ applies to some clients and matters, just as to drugs”). No lawyer should ever prosecute a frivolous claim. Furthermore, Rule 4-3.1, as well as section 57.105, Florida Statutes, Fla. R. App. P. 9.410, and Fed. R. Civ. P. 11, protect good faith arguments to extend the law. These protections are incorporated into the proposed amendments and allow the respondent to make those arguments before an appellate court.

9. Grievance Committees are Confidential. Finally, the Bar asserts petitioner’s concern over whether a grievance committee may ignore prior appellate decisions is “unfounded.” Petitioner provided one example in paragraph 24 of the Petition where a grievance committee disregarded or gave no weight to multiple, prior published appellate opinions imposing sanctions under section 57.105, Florida Statutes, and dismissed the grievance claim for no probable cause that Rule 4-3.1 was violated, and referenced other examples of possible non-enforcement of Rule 4-3.1 misconduct in paragraph 25 of the Petition. There is no public information to either support or contest the Bar’s statement since the

grievance committee process is confidential. Upon information and belief, no statistics are maintained by the Bar to support its statement. The Bar suggests that a grievance committee is like a jury, but the analogy is lacking in this context. A jury is a finder of disputed facts and its actions are subject to review on appeal. Grievance committees in contrast are more loosely organized and the Bar clearly supports their keeping unbridled discretion without this Court's review except when a matter escalates to a referee. The proposed amendments are intended to promote the professionalism of the Bar and to (i) prevent a grievance committee from failing to enforce Rule 4-3.1 when a prior appellate court determination of a frivolous claim exists, (ii) remind every lawyer that prosecution of non-meritorious arguments are not just sanctionable by a court, but are also an ethical violation under Rule 4-3.1, and (iii) promote uniform enforcement of Rule 4-3.1 between grievance committees.

MR. TRAMONT'S ADDITIONAL COMMENTS

10. Mr. Tramont's concern as to a frivolous claim being a violation of Rule 4-3.1 already exists whether or not the proposed amendments are adopted. This Court has held that a prior appellate court decision under section 57.105, Florida Statutes, constitutes misconduct under Rule 4-3.1. *Committe*, 136 So. 3d at 1115; *Gwynn*, 94 So. 3d at 430; and *Tobkin*, 944 So. 2d at 224. The proposed amendments to Rules 4-4.3 and 3-5.3(b) protect the lawyer who pushed too hard in

an isolated situation by providing the grievance committee the authority, in its discretion, to recommend diversion. Proceedings are confidential, and if a lawyer accepts diversion then there is no sanction entered or made public and the matter is removed from the disciplinary system.

11. Mr. Tramont's concern that strategic games are played with a sanctions motion is an issue that already exists and is not solved by the proposed amendments. If adopted, the amendments will call attention to Rule 4-3.1 which hopefully will encourage the dropping of in-fact non-meritorious claims and the burden of those claims on the court, parties and counsels.

CONCLUSION; RELIEF SOUGHT

As noted in the Petition, the proposed amendments are more than adequate in their present form, enforce Rule 4-3.1 and promote uniform application of Rule 4-3.1 when there is a prior appellate court decision of non-meritorious claims made. As proposed in the Petition, an appellate court has deeper knowledge and can better determine than a grievance committee whether a lawyer before it prosecutes a non-meritorious claim that is frivolous – and such determination should be enforced throughout the disciplinary process. The comments of the Bar and Mr. Tramont highlight the need for clarity and uniform enforcement of prior decisions of an appellate court, while protecting practitioners who should refresh their knowledge and understanding of Rule 4-3.1. The undersigned petitioner

respectfully requests for leave to respond to the comments filed, accept this response and adopt the amendments as proposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic service to John F. Harkness, Jr., the Executive Director of The Florida Bar (jharkness@flabar.org), Joshua E. Doyle, the Executive Director Designate 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, and Andrew V. Tramont (avt@rtgn-law.com), 255 Alhambra Circle, Suite 1150, Coral Gables, Florida 33134, this 8th day of January, 2018.

CERTIFICATE OF COMPLIANCE

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

Wells & Wells, P.A.
901 Ponce de Leon Blvd., Suite 200
Coral Gables, Florida 33134
Tel.: (305) 444-0016
Email: tom@twellsllaw.com
By: /s:/ Thomas O. Wells
Thomas O. Wells, Esq.
Florida Bar No.: 0785148