

**IN THE SUPREME COURT OF FLORIDA**

IN RE: PETITION TO AMEND RULE  
REGULATING THE FLORIDA BAR 1-3.2(b)

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CASE NO. SC19-1335

**PETITIONERS' MOTION FOR LEAVE TO RESPOND TO DISABILITY  
RIGHTS FLORIDA'S RESPONSE TO PETITION TO AMEND RULE  
REGULATING THE FLORIDA BAR 1-3.2(b)**

The undersigned petitioner respectfully requests leave to respond to Disability Rights Florida Response to Petition to Amend Rule Regulating the Florida Bar 1-3.2(b), and states as follows:

**REQUEST FOR LEAVE TO RESPOND**

1. The undersigned petitioner filed the member-initiated petition in this case on behalf of 50 members in good standing with The Florida Bar, pursuant to Rules 1-12.1(f) of the Rules Regulating the Florida Bar, on August 7, 2019.
2. Disability Rights of Florida's comments in Response to the Petition to Amend Rule Regulating the Florida Bar 1-3.2(b) was filed by Megan Marie Collins, on September 6, 2019.
3. The undersigned petitioner respectfully requests for leave to respond to Disability Rights of Florida's Response to the Petition to Amend Rule Regulating the Florida Bar 1-3.2(b). The response is included with this motion below.

RECEIVED, 09/13/2019 05:36:32 PM, Clerk, Supreme Court

**RESPONSE TO COMMENTS**

Disability Rights Florida's comments are well-meaning, however, further amendment of the proposed rule 3-4.8 is unnecessary. The proposed rule already fully contemplates providing a waiver of monitoring costs as a reasonable accommodation (or for any other reason) under the Americans with Disabilities Act in the use of the word "may" in proposed rule 3-4.8 ("The Supreme Court of Florida *may* require that the member admitted under the consent agreement pay monitoring costs."); instead of the prior directive in Rule 1-3.2(b), which provided no discretion and stated, "The probation will be monitored by The Florida Bar *and the costs paid* by the member on probation."

Unquestionably, the movement in the legal profession trends towards eliminating questions and investigations that focus primarily on mental health history, diagnosis and treatment instead of otherwise disqualifying behaviors and actions. However, while there should be focus on changes to the admission standards to the Florida Bar, such issue is not before the Court in this petition. All interested parties should file a petition under Rule 1-12 of the Rules of the Supreme Court Relating to the Admission to the Bar to suggest changes to Rule 3 of those Rules to alter the "Essential Eligibility Requirements and Disqualifying Conduct" to ensure that the requirements for eligibility focus on conduct of the applicant, rather than mental health history, diagnosis and treatment. In such petition, or if the Court

requests a committee or study, the Court can evaluate the lack of nexus between past mental health or substance abuse treatment and the practice of law, as well as the dissuading effect of such inquiry would have on obtaining such treatment. However, this rule does not encompass that very important inquiry. Because of The Florida Bar's limited role in enforcing agreements entered into by members, the Rules Regulating the Florida Bar do not set standards of eligibility or qualifications for *admission* into the Bar.

The ability to waive surcharges, which may be in violation of the ADA, is well within the Court's discretion under proposed Rule 3-4.8. The Florida Supreme Court has plenary authority over admission decisions, including approving consent agreements entered into by an applicant and the Florida Board of Bar Examiners. *See Uberoi v. Labarga*, No. 4:16cv638-RH/CAS, 2017 U.S. Dist. LEXIS 132426, at \*1 (N.D. Fla. Aug. 18, 2017). As such, the Supreme Court could consider a request to waive such fees. Whether the Supreme Court chooses to waive the fees would be a decision which would precede jurisdiction of the Florida Bar under the Rules Regulating the Florida Bar. Under Rule 3-23.9 of the Rules Relating to Admission to the Florida Bar, the applicant can choose to enter into a consent agreement that is approved by the full board of the Florida Board of Bar Examiners. Under Rule 5-15 of the Rules Relating to Admission to the Florida Bar, the Supreme Court may grant admission to the Florida Bar under a consent agreement and require the Florida

Bar to administer the agreement. Proposed Rule 3-4.8 provides the Florida Bar with authority to collect fees if included in the consent agreement, but does not make the collection of such fees mandatory, and the Supreme Court has the authority to waive the collection of such fees. In contrast, the wording of the current Florida Bar rules makes collection of such costs mandatory.

Even if procedurally correct, substantively, to include the terms “qualified individual with a disability” and “reasonable accommodation” as stated in Disability Rights Florida’s proposed rule change may be legally inaccurate, confusing and broad. In the original Petition, the undersigned distinguished between the Consent Agreement as a whole and the imposition of costs as part of the Consent Agreement:

Where a consent agreement is a reasonable accommodation for a qualified person with a disability, who would otherwise meet the essential eligibility requirements under Rule 3-10.1 of the Rules Relating to the Admission to the Bar, additional surcharges to membership may be deemed to be an unlawful surcharge under 28 C.F.R. § 35.130(f). Because of the overall income of The Florida Bar, the costs of such monitoring would not be considered an undue financial burden under 28 C.F.R. § 35.164.

Petition, p. 8. Accordingly, a consent agreement is the reasonable accommodation. Where a person is required to pay additional money for the accommodation which is required because of a disability, such additional surcharges may be unlawful. By analogy, to charge a lawyer for monitoring costs for a disability to become a member

of The Florida Bar would be similar to requiring a deaf lawyer to provide and pay for a sign language interpreter in court so he or she could argue before a judge.

As to inaccurate, as stated above, the accommodation is the consent agreement, as the purpose of the consent agreement is to allow person who would otherwise be ineligible for practice pursuant to rule 3-11(j) or (k) (evidence of mental or emotional instability or evidence of drug and alcohol dependency), to be admitted to the Florida Bar subject to conditions. The proposed rule is confusing as it imports an entire area of disability law into this rule, and adds uncertainty as to who would be qualified or not, or when an accommodation would be reasonable.

As to breadth, the issue is a person who would be disqualified for conduct, even though the persons disability may have contributed to the conduct, may be led to believe that the applicant may be qualified, when he or she is not. Or even though the person was provided a conditional admission notwithstanding a history of otherwise disqualifying conduct, that applicant should not be entitled to free monitoring by the Florida Bar to ensure that the same disability related unlawful conduct occurs. The issue with who is qualified and what is reasonable is purely a matter of a fact-intensive individualized inquiry.

On the other hand, for young applicants with a disability with no prior otherwise disqualifying conduct that are faced with the choice of, on one hand, a consent agreement, and on the other hand, the due process of months of

investigation, medical and psychological examinations, specifications, a hearing before the Board of Bar Examiners, and a potential petition to this Court - the choice is often a consent agreement which is the quicker, easier, and less expensive way to become a lawyer. This comes at the sacrifice of privacy and rights that may have nothing to do with past conduct or behavior or ability to practice law competently.<sup>1</sup>

The final issue regarding the breadth of the rule is that the rule implicitly limits the type of accommodation that can be requested to the Supreme Court of Florida. The role of the Court in considering accommodations under the Americans with Disabilities Act is not limited to surcharges in the event that a person has a disability. *See, e.g.*, 28 C.F.R. § 35.130. There should also be no implication that reasonable accommodations would be limited to just the waiver of the surcharge. There may be other circumstances in which the Court may entertain an accommodation request under the Americans with Disabilities Act, including, but not limited to, a modification of the term of a consent agreement, such as a term that requires residency within the State of Florida, or the time frame of the agreement.

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<sup>1</sup> This is in no way to imply that mental health and mental wellness should not be consistently encouraged, even in the absence of a mental illness or a substance abuse disorder. However, any financial or disciplinary penalties that require treatment may increase the stigma of mental illness and would not otherwise encourage mental health wellness.

There is no question that this rule is not perfect, and The Florida Bar is struggling with ending the stigma of mental illness. Last week, Florida Bar President John Stewart opined about the proposed parental leave rule, and his words ring true about this proposed rule as well:

Perfection can mean the death of progress,” he said to the packed luncheon co-hosted by several voluntary bars in Miami.

...  
“We are moving the needle in the conversation. I think you can tell by the questions and the arguments made.” he continued. “The rule wasn’t perfect — there’s no question about that — but the concept is a solid one. Whatever we do in this arena is not going to be perfect. We need progress in this arena.”

This, he said, also applies to diversity in the legal profession more broadly. Waiting for a perfect rule, situation or program risks losing the faith from the very people these programs are trying to help.<sup>2</sup>

We need progress in this area as well. However, the proposed changes to 4-3.8, do not add to the ending of stigma or move the needle in the conversation. The discretionary nature of the proposed rule provides the Florida Supreme Court with the ability to consider waiver requests or reasonable accommodation requests as equitable relief and as required by law.

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<sup>2</sup> Daily Business Review, Florida Bar President Says Proposed Parental Leave Rule is Not Perfect But is 'Moving the Needle'” September 05, 2019, found at <https://www.law.com/dailybusinessreview/2019/09/05/florida-bar-president-says-proposed-parental-leave-rule-is-not-perfect-but-is-moving-the-needle/> (last accessed September 7, 2019)

**Oral Argument Not Requested**

Again, the Petitioners do not seek oral argument regarding these amendments, unless this Court orders oral argument.

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

Respectfully submitted,

By: /s/ Matthew W. Dietz  
Matthew W. Dietz, Esq.  
Florida Bar No.: 0084905  
**Disability Independence Group, Inc.**  
2990 Southwest 35th Avenue  
Miami, Florida 33133  
T: (305) 669-2822  
[mdietz@justdigit.org](mailto:mdietz@justdigit.org)  
[aa@justdigit.org](mailto:aa@justdigit.org)



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of September, 2019 a true and correct copy of the foregoing reply have been filed using the E-Filing Portal, and served by email to: Joshua E. Doyle, Bar Executive Director, at The Florida Bar Headquarters 651 E Jefferson St, Tallahassee, Florida 32399-6584, [jdoyle@floridabar.org](mailto:jdoyle@floridabar.org); and Megan Marie Collins, Esq., Disability Rights Florida, 1000 N. Ashley Dr., Suite 640, Tampa, Florida, 33620, [meganmcollins@disabilityrightsflorida.org](mailto:meganmcollins@disabilityrightsflorida.org).

Respectfully submitted,

By: /s/ Matthew W. Dietz  
Matthew W. Dietz, Esq.  
Florida Bar No.: 0084905  
**Disability Independence Group, Inc.**  
2990 Southwest 35th Avenue  
Miami, Florida 33133  
T: (305) 669-2822  
[mdietz@justdigit.org](mailto:mdietz@justdigit.org)  
[aa@justdigit.org](mailto:aa@justdigit.org)

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this reply has been prepared in MS Word using Times New Roman 14-point font, and in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

By: /s/ Matthew W. Dietz  
Matthew W. Dietz, Esq.  
Florida Bar No.: 0084905