

IN THE
Supreme Court of Florida
Case No.: SC21-284

IN RE: AMENDMENT TO RULE REGULATING
THE FLORIDA BAR 6-10.3.

COMMENTS OF JAMES D. WING

I am James D. Wing, Florida Bar number 195537. I have practiced law since 1969. I have been a member of the Florida Bar since 1975 specializing in commercial litigation. Since 1975 I have known as partners, mentors, and friends Reece Smith, Chesterfield Smith, Arthur England, Stanley Myers, Ed Cutler, Dan Pierson, Henry Latimer, and many other prominent practitioners and judges. Each of them encouraged public service and service to the Bar. I write in my personal capacity, and not as Chair of the ABA Business Law Section Directors and Officers Liability Committee in which I have been active since 2012.

This court's order was issued without prior notice on April 15, 2021. Scheduled to commence the following Monday was the Spring virtual meeting of the ABA Business Law Section. On Tuesday, a CLE program was scheduled, sponsored by the Business Law Section's

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Professional Responsibility Committee and its Corporate Counsel Committee. The panelists were A.J. Singleton of Lexington, Kentucky, chair of the Business Law Section's Professional Responsibility Committee; Robert Creamer, the Business Law Section's liaison to the ABA Standing Committee on Ethics and a former member of that Committee; Professor Sarah H. Duggin of the law school of the Catholic University of Washington, D.C. where she is the Director of its Compliance, Investigations and Corporate Responsibility Program and a former general counsel of Amtrak; and myself.

The program was directed at the ethical issues facing corporate counsel who are called upon to create, renew, and even just comment upon executive protection programs -- i.e. exculpation, advancement, indemnification and liability insurance -- that business entities invariably provide to legally unrepresented directors, officers and managers, technically known in the ethics rules as entity "constituents." The program furthered a multi-year effort of domestic and international programs and publications of my committee at educating the Bar on the law and mechanics of providing such protections. The April 2021 program was the first to extend those efforts into a close consideration of the applicable

ethical rules and practices by leaders of the Business Law Section's committee on professionalism and ethics.

The panelists' preparation for the program was time-consuming and burdensome. As program materials, the panel prepared a lengthy memorandum that discussed the application of relevant ethics rules that govern entity counsel who are called upon on the "clear day" to prepare or renew a protection program for the benefit of unrepresented "constituents." Such a program must necessarily anticipate the "stormy day" when the interests of one or more of those "constituents" and the entity itself may become extremely adverse. The memorandum is currently in the process of becoming a full peer-reviewed academic article for inclusion in "The Business Lawyer," the flagship publication of the ABA.

I have confirmed that the above program, the program materials, and the expertise and fitness of the panelists were all vetted and approved by the ABA CLE committee as meeting the applicable standards for CLE credit long before April 15. You can be certain that the eminent Professor Duggin's gender, in no way, shape, or form, was a factor in her inclusion on the panel. In fact, I have personally arranged a number of ABA programs of this type and have never felt compelled to include on a panel anyone who did not substantively belong as a panelist.

This Court's order of April 15 "...recognizes and is grateful for the Bar sections' important contributions to the legal profession in our state." (4/15/21 Order at 2). I'm sure the Court would view the above efforts as consistent with that recognition and with the related goal of improving the visibility of the Florida Bar nationally and internationally as worthwhile contributors to the development of law and practice.

The Court's order is also clear that it is not to be applied retroactively: "The amendment shall become effective immediately and shall apply prospectively to any course that has not already been approved as of the effective date. The Court expects that The Florida Bar will amend its policies as necessary to ensure compliance." (*Id.* at 2-3). The order goes on to establish the comment period which motivates this communication.

The quoted language above relating to the intended prospective effect of the Court's order is unambiguous. The Order is to be prospective only. The above program indeed was approved by the ABA as meeting its substantive standards for CLE credit long before April 15. All of us on the panel worked diligently and professionally to deliver the program. But when I duly applied for faculty CLE credit, credit was denied because The Florida Bar has interpreted the Order to mean that the words "by The Florida Bar" are to be inserted at the end of the first quoted sentence. As a

result, it has refused me credit just because the program had been approved by the ABA without regard to its objective content and even though all work necessary to prepare and develop the program materials and prepare for the presentation occurred before April 15.

I suggest that this response by The Florida Bar misreads this Court's sensitivity to retroactivity and misapplies the Court's order. The Florida Bar's interpretation of the Court's order is to further prospective compliance with the order, not take away CLE credit for those who in good faith acted in reliance on the non-existence of the Order. Not only are faculty members disappointed, but so are members of the Florida Bar who, in good faith, attended the above program (it was the most-attended session of that Tuesday) and other programs of that week.

I respectfully request the Court to clarify its Order to remedy what I believe is its unintended retroactive effect.

July 12, 2021

Respectfully submitted,

/s/ James D. Wing
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing comments was filed with the Clerk of Court via Florida Courts ePortal this 12th day of July, 2021.

/s/ James D. Wing
James D. Wing (FBN 195537)

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045 and 9.210, the undersigned certifies that the foregoing comment complies with the applicable font requirements because it is written in 14-point Arial. The comment contains 946 words, excluding those parts exempted by Rule 9.045(e).

/s/ James D. Wing
James D. Wing (FBN 195537)