

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULES  
REGULATING THE FLORIDA BAR -  
CHAPTERS 3 AND 14

Case No. SC22-1293

**MOTION TO PROVIDE COPY OF UNPUBLISHED OPINION OR ORDER  
AND FOR EXTENSION OF TIME TO FILE COMMENTS**

The Florida Bar Public Interest Law Section (PILS) hereby moves this court to enter an order for The Florida Bar to provide (or, alternatively, for this court itself to provide) PILS with a copy of the unpublished opinion or order the Bar considered in proposing the amendment to Rule 3-7.16 in this cause and for this court to grant an extension of time for the filing of comments until 30 days after the opinion or order is provided, or, should this request for its provision be denied, until 30 days after the denial. In support thereof, PILS states the following:

**The Existing Rule 3-7.16**

Rule 3-7.16(a) currently provides that a complaint or investigation of alleged misconduct by an attorney must be made or initiated within six years from the time the matter giving rise to the complaint or investigation is discovered.

Rule 3-7.16(d), however, currently extends that time period for constitutional officers who are required to be members in good standing of The Florida Bar until six years after those officer leave office.

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Rule 3-7.16(d) in no way currently precludes the making of a complaint or the initiation of an investigation while the officers are in office.

Thus, the rule as it now exists allows the Bar to proceed at any time from the conduct giving rise to the complaint or investigation until six years have passed from the officer leaving office.

### **The Current Proposal**

The current proposal continues to recognize that no inquiries or complaints may be instituted after the constitutional officer has been out of office for six years. But it proposes delaying the starting date of when the Bar can act until the officer leaves office.

Specifically, it seeks to amend Rule 3-7.16(d) to prohibit the Bar “from filing a complaint or taking any other disciplinary action against a constitutional officer who is required to be a member in good standing of The Florida Bar to hold that office while that constitutional officer holds the constitutional office.”

### **PILS’ Desire to Provide Informed Comments on the Proposal**

PILS believes that it is important for it to submit comments because the proposal on its face seems to be a bad idea for each of many reasons including, but not limited to, the fact that (1) Florida has had many elected state attorneys and public defenders serve for decades and the delay in

proceeding against such individuals would often render it impossible to either go forward at all or to go forward in a fair manner; (2) the adoption of this proposal would keep the public from knowing about misconduct by public officials and thus keep them from casting informed ballots when the officials run for reelection; and (3) the Bar's explanation that the Governor has the power to suspend constitutional officers, to the extent that it suggests that the Governor can take on the disciplinary function while those officers are in office, would violate the separation of powers provision of the Florida Constitution which places that function with the judicial branch.

Knowing that the Bar is not prone to proposing amendments without basis, being unable to ascertain the basis for this one, and desiring to address the reasoning behind the proposal, PILS officers and members inquired as to the reason for this proposed change, thinking that perhaps there is some logical explanation for the Bar's approach. Bar officials confirmed that in making the proposal, the Bar gave consideration to an unpublished opinion or order of this court.

PILS has asked the Bar to provide it with a copy of the opinion or order so that it can assess it in commenting on the proposal. An initial informal request was denied on the ground that the opinion or order is

confidential. Subsequently, PILS' immediate past-chair asked that all documents relating to the proposal, including the opinion or order, be provided. While material made available to Board of Governors members was produced, the opinion or order was not provided. Bar officials indicated that the reason it would not be provided was because this court had designated the opinion or order as confidential.

PILS believes that the case in which the unpublished opinion or order was entered was Case No. 61,293 and that the opinion or order was entered on February 1, 1982.<sup>1</sup>

The Bar's unwillingness to provide the opinion or order is completely understandable. Given this court's designation of it as confidential, PILS

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<sup>1</sup> It bases this belief on (1) the fact that this particular opinion or order was cited by a member of the Board of Governors in the article cited on page 18 of the corrected petition in this cause, Burgoon, "Florida's Lawyer Discipline System: What Every Attorney Needs to Know," Florida Bar Journal, Vol. 95, No. 1 n. 8 (January/February 2021), for the proposition that the Bar cannot investigate or attempt to discipline state attorneys; (2) the fact that PILS' immediate past-chair's request specifically referenced this case as the one PILS believed to be the case relied on by the Bar and the response received, while not specifically confirming that PILS' assumption as to the case involved was correct, stated, "Because the case is confidential, we cannot provide it, even redacted."; and (3) in the undersigned counsel's follow up conversations and emails with a Bar official, the official acknowledged the existence of an unpublished opinion or order, and, while not specifically acknowledging the identification of the case, did not express any disagreement with that identification, which had been expressed by the undersigned counsel in both a conversation and an email.

realizes that the Bar cannot provide it unless this court enters an order allowing it to do so.

It is also understandable that the Bar did not cite the opinion or order in its petition as its unpublished nature means that it has no precedential value. *Pedroza v. State*, 291 So. 3d 541, 546 (Fla. 2020); *Dept. of Legal Affairs v. District Court of Appeal, Fifth District*, 434 So. 2d 310, 312 (Fla. 1983).

This motion therefore is not meant in any way to complain in any respect about the Bar's handling of this matter.

But the circumstances that dictated the Bar's actions has created a situation under which the Bar, the petitioner in this matter, has access to the opinion or order. And of course, this court has access to it as well. See *Dept. of Legal Affairs*, 434 So. 2d at 312 ("This court has the records of its own decisions and the judges have the opportunity to discuss such cases collegially."). Commenters, such as PILS, can only guess about what it says and therefore cannot fully address it.

Thus, comments may not go to the matter at issue through no fault of the commenters. Such circumstances do not further the ends of justice or the public interest. As this court noted, "All lawyers, and lay people also for that matter, should be able to research and available all existing law. If

there is a body of law floating around in unwritten or unpublished opinions, only those persons privy to those cases know those pronouncements. This creates unwarranted confusion and disparity in the orderly presentation of issues.” *Id.*

### **The Unpublished Opinion or Order**

PILS suggests that it is likely that whatever reasons may have justified the confidentiality in 1982 (or such other time if PILS is incorrect in its assumption as to the specific case in which the opinion or order was entered) may no longer justify that approach today.<sup>2</sup>

PILS therefore asks that this court assess those reasons, and, if they do not warrant continued confidentiality, enter an order for the Bar to provide (or alternatively for this court to itself provide) a copy of the opinion or order.

If this court determines that confidentiality is still warranted, PILS would request that this court enter an order for the Bar to provide (or alternatively for this court to itself provide) a redacted copy of the opinion or

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<sup>2</sup> PILS notes that the above discussed decision in *Dept. of Legal Affairs* may itself demonstrate the fact that confidentiality is no longer called for. It was decided *after* (by slightly over 17 months) the opinion or order in the case PILS believes to be the one that influenced the Bar’s proposal. It seems likely, given the strong sentiments expressed in *Dept. of Legal Affairs*, that this court would not have made the opinion or order PILS is seeking to obtain confidential had it been issued after those sentiments were expressed.

order that excludes the identity of the individual(s) involved and any factual information that might identify the individual(s).

### **Extension of Time**

The Bar's corrected petition in this cause was filed on October 25, 2022, thus triggering under Rule 1-12.1(g) of the Rules Regulating The Florida Bar a 30-day period for comments that will expire on November 24, 2022.

Because PILS does not know if the opinion or order will be provided, it is unable to complete its comments at this time in a fully informed manner.

Given the fact that this situation will continue until the opinion or order is provided (or until PILS' request for its provision is denied), along with the approach of the Thanksgiving holiday, PILS requests that this court extend the time for it to comment until 30 days after the provision of the opinion or order, or, in the event that PILS' request for its provision is denied, until 30 days after the denial.

WHEREFORE, PILS respectfully requests that this court enter an order for The Florida Bar to provide (or, alternatively, for this court itself to provide) PILS with a copy of the unpublished opinion or order the Bar considered in proposing the amendment to Rule 3-7.16 in this cause and

that this court extend the time for the filing of comments until 30 days after the order or opinion is provided, or, in the event that PILS' request for its provision is denied, until 30 days after the denial.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on November 8, 2022, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record.

*Anthony C. Musto*

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