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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULE
REGULATING THE FLORIDA BAR 3-5.2
(FELONY CHARGE SUSPENSION)

CASE NO. SC22-

THE FLORIDA BAR'S PETITION TO AMEND RULE REGULATING THE FLORIDA BAR 3-5.2 (FELONY CHARGE SUSPENSION)

The Florida Bar (the bar) petitions this Court for an order amending the Rules Regulating the Florida Bar and states:

Jurisdictional Statement

This petition has been authorized by the Board of Governors of The Florida Bar (Board of Governors) under R. Reg. Fla. Bar 1-12.1.

Explanation

The bar proposes amendments to Rule Reg. Fla. Bar 3-5.2 at this Court's request as set forth in the June 11, 2021 letter from Clerk John A. Tomasino, attached to this petition in Appendix D. This Court requested that the bar consider amending this rule "to provide for a temporary suspension in those cases in which an attorney has been charged with a felony by an indictment or information in state or federal court" by letter dated June 11, 2021, from Clerk John A. Tomasino, attached in Appendix D. In reviewing this Court's request, the board's Disciplinary Procedure Committee expressed concerns over whether respondents will obtain due

process, as respondents could be suspended without a full hearing either in the underlying criminal case or through the disciplinary process.

The bar's Criminal Law Section also expressed serious reservations about the proposal, noting that it voted unanimously to oppose the bar's original draft, by letter dated September 8, 2021, attached in Appendix D. The Criminal Law Section proposed adding some procedural safeguards to the bar's original proposal in a draft dated November 10, 2021, attached in Appendix D. The bar used the section's proposal as the basis for the proposal contained in this petition. Despite the additional changes, which provide some procedural safeguards, the board continues to have concerns. The proposal was not approved unanimously; Board of Governors members spoke and voted in opposition, expressing due process concerns. In light of those concerns, the board hopes that this Court will not order suspension as a matter of course and, rather than viewing suspension as a default position, hopes the Court will review the issue of whether individual respondents will be subject to an emergency suspension due to a felony charge on a case-by-case basis.

Amendments

This section provides information regarding development of these rules proposals as required by Part III of this Court's administrative order number AOSC 06-14 of June 14, 2006 in *In Re: Guidelines for Rules Submissions*. The following required information is provided: an explanation of each amendment; the reasons for each recommended change; the source of the proposal; the names of groups or individuals who commented or collaborated on a proposal during its development; and voting records of pertinent committees and the Board of Governors; and dissenting views within the Board of Governors. Changes to conform to the *Guidelines* above are not noted.

CHAPTER 3 RULES OF DISCIPLINE

Rule 3-5.2 Emergency Suspension and Interim Probation or Interim Placement on the Inactive List for Incapacity Not Related to Misconduct

Explanation:

The rule is reorganized to put all like provisions with the subject matter to which it refers. The substantive change requested by this Court creates new subdivision (b), which allows the Court to order an emergency suspension when a lawyer has been charged with a felony in state or federal court. The proposal is based on a submission by the Criminal Law Section and provides that the bar must request a lawyer to respond to allegations in the documents charging the lawyer with a felony that, if proved, would establish the lawyer has caused or is causing great public harm. The bar will then file a notice of institution of felony charge on review of the charging documents and response if the bar determines emergency suspension is warranted. The Court will appoint a referee in cases where the respondent filed a response, who will conduct a hearing within 30 days to recommend whether the Court should issue an emergency suspension order. The rule provides for consideration of the nature of the charge, the response, and the potential impact on existing clients, legal community, judicial system, and the public. The Court may order an emergency suspension if the lawyer does not respond to the bar or if the Court determines suspension is appropriate after receiving a referee recommendation. The emergency suspension may be dissolved only after the case is dismissed or reduced to a misdemeanor.

Reasons:

This Court requested that the bar consider amending this rule "to provide for a temporary suspension in those cases in which an attorney has been charged with a felony by an indictment or information in state or federal court" by letter dated June 11, 2021, from Clerk John A. Tomasino, attached in Appendix D. The purpose of the amendment is to protect the public. Lawyers charged with felonies currently often remain eligible to practice law during the pendency of their criminal proceedings. In reviewing this Court's request, the board's Disciplinary Procedure Committee expressed concerns over whether respondents will obtain due

process, as they could be suspended without a hearing in the underlying criminal case and with a hearing in the disciplinary process that is limited to a review of the lawyer's response (or lack of response) to the bar's inquiry regarding the felony charge and whether the felony charge itself, if proved, would establish that the lawyer has caused or is causing great public harm.

The bar published an initial draft (not attached to this petition), to which the bar's Criminal Law Section responded. The section provided its own draft to the bar for consideration, expressing its concerns over whether sufficient due process would be given to bar members charge with crimes. The bar ultimately adopted most of the section's proposal. The vast majority of the differences between the section's November 10, 2021 proposal and the bar's proposal contained in this petition are a reorganization of the rule and conformance to this Court's *Guidelines for Rules Submissions, supra.* However, despite additional procedural safeguards, some members of the Board of Governors continued to express due process concerns, both speaking and voting against the proposal.

In light of those concerns, the board hopes that this Court will not order suspension as a matter of course and, rather than viewing suspension as a default position, hopes the Court will review the issue of whether individual respondents will be subject to an emergency suspension due to a felony charge on a case-by-case basis.

Source:
Referral from the Supreme Court of Florida.

Background Information – Member Commentary / Committee Action:

- Disciplinary Procedure Committee approved 5-0 on November 23, 2021.
- The bar's chief financial officer agreed with de minimus impact assessment on August 24, 2021.

- Rules Committee approved 6-0 with style edits on December 6, 2021.
- Program Evaluation Committee approved 20-0 on a strategic basis on September 30, 2021.

Board Action:

Board of Governors approved on voice vote with objection on January 21, 2022.

Official Notice of Amendments

Under R. Regulating Fla. Bar 1-12.1(g), formal notice of intent to file all the proposals in this petition was published in the January 1, 2022 printed issue of the bar *News*. A copy of the published notice from the print and Internet versions of the bar *News* is included with this petition, in Appendix C. This Internet notice can also be found at the following link, published on the bar's website on December 8, 2021:

https://www.floridabar.org/the-florida-bar-news/amendments-to-bar-rules-concerning-emergency-suspension-where-a-lawyer-is-charged-with-a-felony/

Other Pending Amendments

There are proposed amendments to the Rules Regulating The Florida Bar in 4 other petitions presently pending before this Court:

In re: Amendments to Rules Regulating the Florida Bar- Chapter 23 Registered Online Service Provider Program, Case No. SC19-2077, filed December 12, 2019;

In re: Amendments to the Rules Regulating The Florida Bar - Biennial Petition, Case No. SC20-1467, filed October 5, 2020;

In re: Amendments to Rule Regulating The Florida Bar 4-5.5, Case No. SC21-1379, filed October 1, 2021; and

In re: Amendments to Rules Regulating The Florida Bar 3-7.6 and 3-7.10 (Civil Mediation), case number pending, filed February 1, 2022.

The proposals in 3 of these 4 petitions are unrelated to this petition, do not address the same rules, and may be considered independent of this petition.

This petition proposes amendments to Rule Reg. Fla. Bar 3-5.2, which also is the subject of proposed amendments in *In re: Amendments to the Rules Regulating The Florida Bar - Biennial Petition,* Case No. SC20-1467, filed October 5, 2020. The biennial petition proposes amendments to current subdivision (g) which, if adopted, would create an exception to a motion for dissolution of an emergency suspension where the bar has demonstrated through hearing or trial that the bar is likely to prevail on the merits of any of the alleged violations of the Rules Regulating The Florida Bar. That proposal is not included in this petition as it is a separate matter. If the Court were to add it, it would appear in new subdivision (a)(6) under the bar's proposed reorganization of the rule. The only substantive differences in the 2 petitions are:

- the biennial's proposal to amend current subdivision (g) to create an exception as noted above, which is not included in this petition;
- this petition's proposed new subdivision (b) regarding emergency suspension on felony charges;
- the bar's proposed reorganization the rule so that each major subdivision (emergency suspension, emergency suspension relating to felony charges, interim probation, interim placement on the inactive list for incapacity not related to misconduct, and freezing trust accounts) contains all subdivisions specific to it.

Contents of Appendices

The complete text of all proposals is included in Appendix A to this petition, in legislative format (i.e., deleted language struck through, shown first, followed by new language underlined).

A separate 2-column presentation follows in Appendix B, which includes extracted text of affected rules with proposed amendments in legislative format and an abbreviated recitation of the reasons for the changes.

The print and Internet versions of the notice of intent to file this petition are provided in Appendix C.

Appendix D contains the June 11, 2021 letter from this Court's Clerk, John A. Tomasino, referring this issue to the bar, and communications from the bar's Criminal Law Section regarding the proposal as discussed above.

Comments in Response to Amendments

No comments were received by the bar in response to publication of the official notice of filing the petition. The comments to the bar during the amendments process by the Criminal Law Section have been provided in Appendix D.

Oral Argument Not Requested

The bar does not seek oral argument regarding these amendments unless this Court orders oral argument or bar members file comments that require additional response or appearance by the bar.

Effective Date Request

As to all amendments in this filing, the bar requests that any changes be made effective 60 days from the date of this Court's order so that the bar can educate its members regarding any amendments.

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

Respectfully submitted,

/s/ Joshua E. Doyle

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CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Bookman Old Style type.

/s/ Joshua E. Doyle

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CERTIFICATE OF READ-AGAINST

I certify that the Rules Regulating the Florida Bar set forth within this petition have been read against the most recent copy of *Thomson Reuter's Florida Rules of Court*.

/s/ Joshua E. Doyle

Joshua E. Doyle
Executive Director
Florida Bar Number 25902