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APPENDIX D

BACKGROUND MATERIALS

February 1, 2022

Supreme Court of Florida

500 South Duval Street
Tallahassee, Florida 32399-1925

CHARLES T. CANADY
CHIEF JUSTICE
RICKY POLSTON
JORGE LABARGA
C. ALAN LAWSON
CARLOS G. MUÑIZ
JOHN D. COURIEL
JAMIE R. GROSSHANS
JUSTICES

JOHN A. TOMASINO
CLERK OF COURT

SILVESTER DAWSON
MARSHAL

June 11, 2021

Mr. Joshua E. Doyle
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Rule Regulating the Florida Bar 3-5.2

Dear Mr. Doyle:

At the direction of the Court, I am writing you to request that The Florida Bar consider amending Rule Regulating the Florida Bar 3-5.2 (Emergency Suspension and Interim Probation or Interim Placement on the Inactive List for Incapacity Not Related to Misconduct).

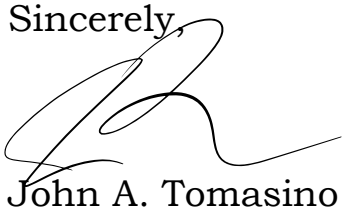
As you know, Rule Regulating the Florida Bar 3-7.2 (Procedures on Criminal or Professional Misconduct; Discipline on Determination or Judgment of Guilt of Criminal Misconduct; Discipline on Removal from Judicial Office) pertains to felony determinations or judgments of guilt, both of which only occur at the conclusion of the criminal matter. Without an appropriate rule modification, an attorney may remain eligible to practice law during the pendency of a felony case while the attorney may also be unwilling or unable to respond fully in disciplinary proceedings. Therefore, in a continuing effort to protect the public, the Court

requests that The Florida Bar consider amending rule 3-5.2 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.

Please file your petition to amend the Rules Regulating the Florida Bar with my office by October 11, 2021. If you should determine that more time is required to consider this issue, please submit a request for extension of time with my office indicating when your petition can be filed.

Thank you in advance for your consideration of this matter, and please do not hesitate to contact me or the Court's liaison to the Bar, Chief Justice Canady, if you have any questions.

Sincerely,



John A. Tomasino

JAT/DW/sb

cc: Chief Justice Charles Canady, Liaison to The Florida Bar
Diane West, Supreme Court Director of Central Staff

September 8, 2021

VIA ELECTRONIC MAIL

Robin I. Bresky, Esq., Chair
Board of Governors Disciplinary Procedure Committee
c/o Elizabeth Clark Tarbert, Esq., Florida Bar Committee Liaison
ETarbert@floridabar.org

Re: Proposal to Amend Rule 3-5.2 of the Rules Regulating the Florida Bar

Dear Chair Bresky:

The Executive Council of the Criminal Law Section of The Florida Bar (EC), comprised of judges, prosecutors, public and private criminal defense lawyers and academicians, recently met and discussed the proposed amendments to Rule 3-5.2 of the Rules Regulating The Florida Bar. The EC voted unanimously to oppose the proposed amendments denying a lawyer against whom a felony charge is "instituted" even a modicum of due process. Therefore, as explained below, the Criminal Law Section urges your Committee to modify the proposed language to the rule.[1]

First, pursuant to the existing rule, a lawyer who has been suspended on an emergency basis has the right to a hearing to terminate or modify the suspension. However, the proposed amendment to subsection (b) creates a new category of emergency suspensions – an "Emergency Suspension by Institution of Felony Charge." But unlike all other emergency suspensions, the proposed amendments to subsections (h) and (i) *deny* a lawyer suspended as a result of a felony charge the right to a hearing. *See* Proposed Amendment to Rule 3-5.2(h) ("The lawyer may move at any time to dissolve or amend an emergency order by motion filed with the Supreme Court of Florida, *unless the emergency suspension is on the basis of a felony charge* . . . .") (emphasis added). In *Fuentes v. Shevin*, the United States Supreme Court stated:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard . . . ."

[1] The sense of the EC was to oppose the new rule relating to institution of a felony charge in its entirety, as it appeared that the present rule regarding emergency suspensions sufficiently protects both the lawyer's clients and the community. The Criminal Law Section strongly urges that the Supreme Court reconsider whether a new rule is necessary and rather merely clarify and emphasize that the filing of a felony information or indictment against a lawyer may in appropriate situations be a basis for The Florida Bar seeking an emergency suspension under the present rule regarding emergency suspensions.

407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233, 17 L. Ed. 531 (1863)). Consistent with this established precedent, the Criminal Law Section strongly suggests that the "felony charge" carve-outs set forth in the proposed amendments to subsections (h) and (i) be removed. All lawyers, regardless of the basis for an emergency suspension, are entitled to the protections of due process – which includes, at a minimum, the right to a hearing. And affording this due process safeguard to all lawyers also protects a client's right to counsel of his or her choice. Indefinite suspensions of lawyers with no opportunity to be heard will have a substantial negative impact on the clients of those lawyers – especially if the suspension could have otherwise been terminated had a hearing been conducted.[2]

Second, the proposed amendment to subsection (b) states that the emergency suspension process will begin after the Bar receives notice that "a felony charge has been instituted." The Criminal Law Section is concerned that the word "instituted" is ambiguous and therefore the Section suggests the following change:

> The Florida Bar will file a "Notice of Institution of Felony Charge" . . . in the Supreme Court of Florida on receiving notice that a felony charge has been ~~instituted~~ formally filed by way of an indictment or information in state or federal court against a member of the bar. A copy of the indictment~~,~~ or information~~, or other equivalent charging document~~ must be attached to the notice.

(Suggested changes shown by underline/strike through).

On behalf of the Criminal Law Section, we appreciate your consideration of this matter. If you have any questions regarding this letter or would like to further discuss the Section's concerns with the proposed amendments to Rule 3-5.2, please feel free to contact me.

Sincerely,

JASON B. BLANK
Criminal Law Section, Chair

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[2] If the proposed rule amendment is not changed to provide a lawyer *accused* of committing a felony crime an opportunity to a hearing to dissolve the suspension, this will mean that a lawyer who steals money from a client and does not get charged with a crime has *more due process* than a lawyer who is accused with a crime that does not even involve moral turpitude or one in which there is not an actual victim.

November 10, 2021

VIA ELECTRONIC MAIL

Robin I. Bresky, Esq., Chair
Board of Governors Disciplinary Procedure Committee
c/o Elizabeth Clark Tarbert, Esq., Florida Bar Committee Liaison
ETarbert@floridabar.org

Re: Proposal to Amend Rule 3-5.2 of the Rules Regulating The Florida Bar

Dear Chair Bresky:

As agreed, the Executive Council of the Criminal Law Section of The Florida Bar (EC) hereby submits its proposed amended Rule 3-5.2 of the Rules Regulating The Florida Bar relating to emergency suspension of an attorney based on a felony charge. This proposed amended Rule includes the amendments recommended in our September 8, 2021, letter and recommends additional amendments. To aid the Disciplinary Procedure Committee and the Board of Governors in its consideration of the Criminal Law Section's proposal, we are providing *infra* the thought process and analysis that led to our proposal.[1]

We continue to harbor the same concerns regarding the Disciplinary Procedure Committee's second proposal for the amendment to Rule Regulating The Florida Bar 3-5.2 that we expressed in our September 8, 2021, letter. As the CLS wrote then, its executive council "voted unanimously to oppose the proposed amendments denying a lawyer against whom a felony charge is 'instituted' even a modicum of due process." Using our previous proposal as a starting point, we offer the modifications to the DPC's proposed language attached to this letter. We explain our reasons for the modifications below.

Due process. We aimed to strike a balance between the need for an expedient determination of whether to impose an emergency suspension and the due process rights of an attorney.[2] The Supreme Court of Florida has recognized that attorneys in disciplinary proceedings have due process rights. *See Fla. Bar v. Committe*, 916 So. 2d 741, 745 (Fla. 2005) (citing *Fla. Bar v. Rubin*, 709 So. 2d 1361, 1363 (Fla. 1998)). The Supreme Court has stated:

> Procedural due process requires both fair notice ***and*** a real opportunity to be

[1] I would be remiss if I failed to mention that this letter and the proposed Rule are the product of a working group comprised of: Hank Coxe, Past President of The Florida Bar; Warren Lindsey and David Rothman, past members of the Board of Governors of The Florida Bar; Michael Ufferman, CLS EC member; Scott Richardson, Past Chair of the Florida Board of Bar Examiners; and Scott's son, Adam Richardson, a talented appellate attorney.

[2] Although the Bar has the burden of proving its case by *clear and convincing evidence,* the government's threshold burden to charge by information or indictment is *probable cause,* as discussed later in this letter.

> heard. *See* [*Dep't of Law Enforcement v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991).] ... [T]he opportunity to be heard must be "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); ...

Keys Citizens for Responsible Gov't v. Fla. Keys Aqueduct Auth., 795 So. 2d 940, 948 (Fla. 2001) (emphasis added). However, "due process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (cleaned up).

The Board's second proposed amendment would require notice to the attorney but not provide the attorney any opportunity to respond to the threat of an emergency suspension. This would violate due process. Subsection (b)(1) of our proposal gives the attorney the opportunity to be heard by allowing him or her to furnish a response for The Florida Bar to consider in deciding whether to escalate the matter to the Supreme Court. Subsection (b)(3) would also allow the attorney to be heard during a hearing before a Supreme Court-appointed referee before the referee makes a recommendation to the Court on whether the Court should impose an emergency suspension. However, despite these opportunities, our proposal would create tight deadlines—ten days for a response and thirty days for the referee's recommendation following his or her appointment—so that the Supreme Court could quickly decide the matter. Thus, our proposal protects both the public and the due process rights of the attorney.

The need to provide minimal due process to the attorney is all the more important considering how low the state's burden is to initiate a prosecution: "A charging document is no more than an accusation, the merits of which will be determined at trial, and the threshold of proof to levy a criminal charge is probable cause, not proof beyond a reasonable doubt." *State v. Gonzalez*, 212 So. 3d 1094, 1096 (Fla. 5th DCA 2017) (cleaned up). Additionally, the decision to prosecute is usually made ex parte, with no opportunity for the accused to challenge the factual basis for the charge or provide exculpatory information.

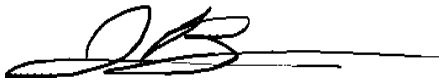
Application to only serious felonies. We are concerned that the Board's proposed amendment applies to all felony charges. Felony offenses have proliferated over the past several decades. Not all felony offenses involve conduct that "caus[es] great public harm." R. Reg. Fla. Bar 3-5.2(a)(1). Because the general aim of an emergency suspension is to avoid great public harm, we believe that a felony charge against a member of the bar should also have to satisfy the standard contained in subsection (a)(1). In our proposal, subsection (b)(2) would allow The Florida Bar to screen felony charges for those that clearly do not present the threat of great public harm.[3] For those matters that require further action, the referee process

would aid the Court in determining whether a felony charge is so serious that an emergency suspension is warranted, and the second sentence in subsection (a)(3) would guide the referee's determination in that regard.

Potential delegation issue. The Board's proposal creates a potential delegation issue. The state constitution expressly assigns to the Supreme Court the "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of person's admitted." Fla. Const. art. V, § 15. Thus, the Supreme Court has stated, "The responsibility of disbarring, ***suspending*** or otherwise disciplining lawyers who are admitted to practice in Florida rests with this Court alone." *Fla. Bar v. McCain*, 330 So. 2d 712, 714 (Fla. 1976) (emphasis added) (citing Fla. Const. art. V, § 15). The Court has also stated that those powers vested in the Court by the constitution "are not delegable and cannot be abdicated in whole or in part by the courts." *In re Alkire's Estate*, 198 So. 475, 482 (Fla. 1940); *see also State v. Leyva*, 65 So. 3d 1137, 1139 (Fla. 3d DCA 2011) ("Separation of powers principles prohibit a court from delegating or assigning the judicial power to a coordinate branch of the government in this state." (citation omitted)). Providing no screening or review of a felony charge against an attorney before the matter reaches the Supreme Court allows a state attorney to initiate the emergency-suspension process and, potentially, influence the decision to impose one to a constitutionally intolerable degree.[4] Our proposal attempts to mitigate that delegation issue.

The opportunity to participate in this important process is sincerely appreciated.

Sincerely,



JASON B. BLANK
Criminal Law Section, Chair

[3] This provision dovetails well with Standing Board of Governors Operational Policy (SBP) 15-55, which currently addresses in detail the procedures and policies regarding possible "Deferral of Disciplinary Investigations During Civil, Criminal and Administrative Proceedings." Significantly, SBP 15-55(c) also addresses situations calling for immediate action by the Bar involving misappropriation of funds from a client or third party or by a lawyer acting in a fiduciary capacity.

[4] It should be noted that "the decision to prosecute is an executive function." *Office of State Attorney, Fourth Jud. Cir. of Fla. v. Parrotino*, 628 So. 2d 1097, 1099 n.2 (Fla. 1993).

RULE 3-5.2 EMERGENCY SUSPENSION AND INTERIM PROBATION OR INTERIM PLACEMENT ON THE INACTIVE LIST FOR INCAPACITY NOT RELATED TO MISCONDUCT

(a) Petition for Emergency Suspension Not Relating to Felony Charge Causing Great Public Harm.

(1) *Great Public Harm*. ~~On petition of The Florida Bar, authorized by its president, president-elect, or executive director, supported by 1 or more affidavits demonstrating facts personally known to the affiants that, if unrebutted, would establish clearly and convincingly that a lawyer appears to be causing great public harm, the~~The Supreme Court of Florida may issue an order suspending the lawyer on an emergency basis on petition of The Florida Bar, authorized by its president, president-elect, or executive director and supported by 1 or more affidavits demonstrating facts personally known to the affiants that, if unrebutted, would establish clearly and convincingly that a lawyer appears to be causing great public harm.

(2) *Discipline by Foreign Jurisdiction*. ~~On petition of The Florida Bar, authorized by its president, president-elect, or executive director, supported by a certified copy of an order of a foreign disciplinary jurisdiction suspending or disbarring a lawyer from the practice of law, the~~The Supreme Court of Florida may issue an order suspending the lawyer on an emergency basis on petition of The Florida Bar, authorized by its president, president-elect, or executive director and supported by a certified copy of an order of a foreign disciplinary jurisdiction suspending or disbarring a lawyer from the practice of law under ~~rule~~ this chapter. ~~See subdivision (*l*) of rule 3-7.2.~~

(3) *Formal Complaint, Answer, and Defenses.* A petition for emergency suspension ~~will~~ also constitutes a formal complaint. The respondent ~~will have~~has 20 days after docketing by the Supreme Court of Florida of its order granting the bar's petition for emergency suspension in which to file an answer and any affirmative defenses to the bar's petition.

(b) Emergency Suspension Relating to Felony Charge Causing Great Public Harm.

(1) *Request for Response*. On The Florida Bar's receipt of copies of documents formally charging a Florida Bar member by indictment or information with a felony in this or any other state or federal court which if proven by clear and convincing evidence would appear to be causing great public harm or appear to have caused great public harm, the bar will immediately require that the respondent respond and, within 10 days of notification, respondent shall respond in writing to the allegations raised in the charging documents.

(2) *Notice of Institution of Felony Charge Causing Great Public Harm*. If upon review of the charging documents and the response, or if no response is received, based on the charging documents alone, the bar determines emergency suspension is warranted to prevent great public harm or because the felony charged has caused or appears to have caused great public harm, The Florida Bar will file a "Notice of Institution of Felony Charge Causing Great Public Harm" attaching:

(A) a copy of the indictment or information and any additional materials related to the criminal charge(s) in the possession of the Bar; and

(B) either the respondent's response to the bar's request or the bar's documentation indicating that the respondent did not respond after the bar's request for a response notifying the respondent of the charge and the obligation to respond in writing within 10 days.

(3) *Appointment of Referee*. If the respondent files a response, the Supreme Court of Florida will promptly appoint or direct the appointment of a referee. The referee shall immediately conduct a hearing and make a recommendation within 30 days of appointment as to whether the Supreme Court of Florida should issue an emergency suspension order. The referee shall consider the totality of the circumstances regarding the felony charge, including, but not limited to, the nature of the charge, the respondent's response, and the potential impact that the charge will have on (i) the respondent's duties to his or her existing clients, (ii) the legal community and judicial system, and (iii) the public.

(4) *Emergency Suspension Order*. The Supreme Court of Florida may issue an order suspending the respondent on an emergency basis upon filing of the notice, response, and the referee's recommendation. If suspended, the respondent will remain suspended until further order of the Supreme Court of Florida.

(5) *Motion for Dissolution*. The lawyer may move to dissolve or amend an emergency order by motion filed with the Supreme Court of Florida only after the case is dismissed by the prosecutor or the court or there has been an amendment to the indictment or information, or other court document that reduces the charge to a misdemeanor. The motion must include evidence of the dismissal or copy of the amended indictment or information. The filing of the motion will not stay the operation of an order of emergency suspension entered under this rule. The Supreme Court of Florida may dissolve or amend the emergency suspension order as the court deems appropriate.