IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 05-1684

In Re:

AMENDMENTS TO RULES
REGULATING THE FLORIDA
BAR--RULE 3-7.2
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COMMENT ON PROPOSED AMENDMENTS TO RULES REGULATING THE FLORIDA BAR--RULE 3-7.2

The undersigned, William D. Matthewman, Esq., hereby files this Comment on the Proposed Amendments to Rule 3-7.2, Rules Regulating The Florida Bar, and would respectfully submit the following:

I. Introduction

1. Undersigned counsel is a member of The Florida Bar and is a Florida Bar Board Certified Criminal Trial Attorney.

2. This Comment relates solely to the proposed amendments to Rule 3-7.2 of the Rules Regulating The Florida Bar. Specifically, the proposed amendments discussed below should not be approved for the following reasons:

II. Proposed Rule 3-7.2(b)'s Treatment of a "Determination of Guilt" as "Conclusive Proof of Guilt of the Criminal Offense(s) Charged" Should be Rejected In Cases Where an Attorney Has Entered a No-Contest Plea and Adjudication Has Been Withheld

3. Under Proposed Rule 3-7.2(b), a "determination of guilt" is deemed to be "admissible" and "conclusive proof of guilt of the criminal offenses charged." This is problematic since Proposed Rule 3-7.2(a)(2) over-broadly defines "Determination of Guilt" as including:

> ...those cases in which the trial court in the criminal proceeding enters an order withholding adjudication of the respondent's guilt of the offense(s) charged, those cases in which the convicted attorney has entered a plea of guilty to criminal charges, those cases in which the convicted attorney has entered a no contest plea to criminal charges, those cases in which the jury has returned a verdict of guilty of criminal charges, and those cases in which the trial judge in a bench trial has rendered a verdict of guilty of criminal charges.

3. Treating an attorney's no-contest plea followed by a withhold of adjudication as "admissible" and "conclusive proof of guilt of the criminal offense(s) charged" is fundamentally unfair and violates Florida law. "A nolo plea means 'no contest,' not 'I confess.'" Garron v. State, 528 So.2d 353, 360 (Fla. 1988). In Kelly v. Dept, of Health & Rehab. Svcs., 610 So.2d 1375 (Fla. 2d DCA 1992), the Second District Court of Appeal stated:

> ...A no contest plea, on the other hand, represents only an accused's unwillingness to contest charges against him, and does not constitute an admission of guilt and may not be used as direct evidence of guilt in a civil suit or in an administrative proceeding [citations omitted].

Id. at 1377. See also, Wyche v. Fla. Unemp. Appeals Com'n, 469 So.2d 184, 186 (Fla. 3d DCA 1985) (no contest plea does not establish misconduct in employment under Section 443.101(1) or violation of a criminal law under Section 443.101(9)(a)).

5. Although this Court recently ruled that a defendant's plea of no contest followed by a withhold adjudication served as a prior conviction for purposes of sentencing guidelines, Montgomery v. State, 897 So.2d 1282 (Fla. 2005), the law remains that a plea of no contest represents only an unwillingness to contest a charge and does not constitute an admission of guilt and may not be used as direct evidence of

guilt in a civil suit. Vinson v. State, 345 So.2d 711, 715 (Fla. 1977); Chesebrough v. State, 255 So.2d 675, 676-77 (Fla. 1971), cert denied 406 U.S. 976 (1972).

6. Adopting a rule which mandates that an attorney's no-contest plea followed by a withhold of adjudication is "admissible" and is "conclusive proof of guilt of the criminal offense(s) charged," as Rule 3-7.2(b) proposes, is simply unfair. There are many reasons why an attorney might plead no contest to a criminal offense and obtain a withhold of adjudication, such as financial reasons, family reasons, or other reasons. Such no-contest plea is not an admission of guilt and should not be deemed "conclusive proof of guilt" as Proposed Rule 3-7.2(b) contemplates.

7. Certainly, if an attorney pleads "guilty" to a criminal offense and is adjudicated guilty, that may be deemed as "conclusive proof of guilt of the criminal offense(s) charged" under Proposed Rule 3-7.2(b). This is so because where a judgment of conviction is based upon a guilty plea, a defendant is estopped from denying his guilt of the subject offense in a subsequent civil action. Kelly v. Dept. of Health & Rehab. Svcs., supra, 610 So.2d at 1377; Paterno v. Fernandez, 569 So.2d 1349 (Fla. 3d DCA 1990); Lora v. Dept. of State, Div. of Licensing, 569 So.2d 840 (Fla. 3d DCA 1990).

8. But, where an attorney pleads no contest to a criminal offense and adjudication is withheld, such plea should never be deemed as "conclusive proof of guilt of the criminal offense(s) charged" as improperly proposed by Rule 3-7.2(b).

III. Proposed Rule 3-7.2(b) and 3-7.2(a)(1) and (2) Should Make Some Allowance For an Attorney's Direct Appeal Rights

9. Proposed Rule 3-7.2(b), when considered in conjunction with Proposed

Rule 3-7.2(a)(1) and 3-7.2(a)(2), fails to take into account the fact that, at the time of a disciplinary hearing, an attorney may be on direct appeal from a jury verdict of guilty of criminal charges, or from a bench trial resulting in a verdict of guilty of criminal charges, or from an adjudication of guilt. Accordingly, it would be unfair and premature to treat such a verdict or adjudication as "conclusive proof of guilt of the criminal offense(s) charged" until such time as the direct appeal has resulted in an affirmance of the verdict or adjudication.

10. Accordingly, some language should be inserted into the Proposed Rule to the effect that a guilty verdict or adjudication shall not be treated as conclusive proof of guilt of the criminal offense(s) charged "until such time as any direct appeal taken by the attorney has been finally determined by the appellate court."

IV. Proposed Rule 3-7.2(e)'s Required Notice By Members of Determination or Judgment of Guilt of All Criminal Charges Should Apply Only to Felony Charges

11. Proposed Rule 3-7.2(e) adds a notice requirement under which Florida Bar members must notify the Executive Director of The Florida Bar within 10 days of entry of a determination or judgment for "any criminal offense." It is submitted that this notice requirement is over-broad and should be limited to "any felony criminal offense." Misdemeanor offenses should be excluded from the mandatory reporting requirement of Proposed Rule 3-7.2(e). There is no sufficient basis, rationale or justification to require such an intrusive reporting requirement of minor misdemeanor offenses.

12. As this Court well knows, there are varied types of misdemeanor offenses under Florida law. For example, Fla. Stat. 322.16(5) makes operating a motor vehicle in violation of drivers license restrictions a misdemeanor offense; Fla. Stat. 823.02

criminalizes building a bonfire; Fla. Stat. 823.12 makes smoking in an elevator a misdemeanor; and, Fla. Stat. 327.72 criminalizes many types of minor boating violations. Further, many city and county ordinances criminalize all types of petty and obscure offenses, including drinking alcoholic beverages in public and other petty offenses. Should an attorney who, for example, attends a football game or parade and is criminally cited for drinking an alcoholic beverage in public, and who enters a no-contest plea and pays a nominal fine to simply dispose of the charge, really have to report such plea within 10 days to the Executive Director of The Florida Bar? The notice requirement is simply too broad and should be modified to apply only to felony criminal offenses.

V. The Definitions of "Determination of Guilt" and "Convicted Attorney" Are Vague, Confusing and Circular

13. Proposed Rule 3-7.2(a)(2) defines "Determination of Guilt" as, in part, "...those cases in which the convicted attorney has entered a plea of guilty to criminal charges, those cases in which the convicted attorney has entered a no-contest plea to criminal charges..." Yet, Proposed Rule 3-7.2(a)(3) then goes on to define "convicted attorney" as:

> (3) *Convicted Attorney.* For the purposes of these rules, "convicted attorney" shall mean an attorney who has had either a determination or judgment of guilt entered by the trial court in the criminal proceeding.

14. It is hard to decipher what precisely these two subsections mean when considered together. Proposed Rule 3-7.2(a)(2) defines "Determination of Guilt," in part, by reference to "convicted attorney." Yet, Proposed Rule 3-7.2(a)(3) defines

"convicted attorney," in part, by reference to "determination of guilt." It is respectfully submitted that these definitions are vague, ambiguous and circular. Such imprecise definitional standards should not be authorized by this Honorable Court.

VI. The Notice Requirement of Proposed Rule 3-7.2(e) Must Be Given An Effective Date

15. Since Proposed Rule 3-7.2(e)'s notice requirement is new, and places an affirmative duty on Florida Bar members to report, an effective date should be explicitly established so that it is clear that Florida Bar members do not have to report determinations or judgments that occurred prior to adoption of the Rule. If an explicit effective date is not established, Florida Bar members will be unsure whether determinations or judgments entered years or months ago must be reported.

16. Accordingly, Proposed Rule 3-7.2(e) should begin by stating, "For any Judgment of Guilt" or "Determination of Guilt of a member of The Florida Bar occurring on or after January 1, 2006,[1] the member of The Bar shall within 10 days..." [2]

VII. Conclusion

17. Although The Florida Bar certainly has a legitimate interest in investigating criminal felony convictions of its members and taking appropriate action, certain aspects

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[1] Or any other date selected by this Honorable Court.

[2] In fact, it is respectfully suggested that an effective date for the entirety of Proposed Rule 3-7.2 be specifically stated so that clerks and trial judges [See Proposed Rule 3-7.2(d)] and other persons are aware that this Rule only applies to determinations or judgments entered after the Rule's effective date, and not to determinations or judgments entered prior to enactment of this Rule.

of the Proposed Rule, as specified above, are unfair, inconsistent with Florida law, and simply go too far. It is respectfully submitted that the Proposed Rule should not be approved as proposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on this 4th day of May, 2006 upon John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300.

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By: ____________________________
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