IN THE SUPREME COURT OF FLORIDA

FLORIDA BOARD OF BAR EXAMINERS RE AMENDMENTS TO RULES 2-13.1 AND 3-11 OF THE RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR	)	Case No. SC20-___

PETITION TO AMEND RULES 2-13.1 AND 3-11 OF THE RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR

The Florida Board of Bar Examiners petitions the Court for approval of amendments to Rules 2-13.1 and 3-11 of the Rules of the Supreme Court Relating to Admissions to the Bar. The purpose of the proposed amendments is to address outdated language in each rule.

Rule 2-13.1 discusses how long a person is ineligible to reapply for admission to the Bar after disbarment. Rule 2-13.1 provides that a person who has been disbarred is ineligible to reapply for five years, but a person who resigned while disciplinary proceedings were pending is ineligible only for three years. The Rules Regulating The Florida Bar have not recognized disciplinary resignation since 2006. As a result, Rule 2-13.1's reference to, and ineligibility period for, attorneys who "resigned pending disciplinary proceedings" is obsolete and should be changed.

Rule 3-11 directs the board to consider an applicant's record of conduct when determining whether an applicant meets the character and fitness standards

for admission. The rule also lists a number of items that "may be cause for further inquiry" before the board makes its recommendation on admission. The list, which was adopted in 1991, contains two phrases that are outdated today: "evidence of mental or emotional instability" and "evidence of drug or alcohol dependency." Fla. Bar. Admiss. R. 3-11(j)-(k). Neither of these phrases reflect current medical terminology and the board proposes that they be brought current.

Appendix A contains the proposed amendments in legislative format, and Appendix B contains a two-column chart with the proposed amendments and summaries for the reasons for each amendment.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this matter under Article V, Section 15 of the Florida Constitution and Rule 1-12.

PROPOSED AMENDMENT TO RULE 2-13.1

1. Current Rule

Rule 2-13.1 currently reads:

2-13.1 Disbarred or Resigned Pending Disciplinary Proceedings. A person who has been disbarred from the practice of law, or who has resigned pending disciplinary proceedings and whose resignation from practice has been accepted by the Supreme Court of Florida, in proceedings based on conduct that occurred in Florida for the disbarment or resignation, will not be eligible to apply

for readmission for a period of 5 years from the date of disbarment, or 3 years from the date of resignation, such other time as is set forth in any Florida rules of discipline, or longer period set for readmission by the Supreme Court of Florida. If the person's disbarment or disciplinary resignation is based on conduct that occurred in a foreign jurisdiction, then the person will not be eligible to apply for admission or readmission to The Florida Bar until the person is readmitted in the foreign jurisdiction in which the conduct that resulted in discipline occurred. Readmission must occur in the foreign jurisdiction in which the conduct occurred even if Florida imposed discipline prior to the imposition of discipline in the other jurisdiction and even if the person would otherwise be eligible for readmission under the terms of any Florida discipline.

2. Proposed Amendments

The board proposes to amend Rule 2-13.1 to remove all references to disciplinary resignation, as follows:

2-13.1 Disbar<u>ment</u>~~red or Resigned Pending Disciplinary Proceedings~~. A person who has been disbarred from the practice of law~~, or who has resigned pending disciplinary proceedings and whose resignation from practice has been accepted by the Supreme Court of Florida,~~ in proceedings based on conduct that occurred in Florida for the disbarment ~~or resignation,~~ will not be eligible to apply for readmission for a period of 5 years from the date of disbarment, ~~or 3 years from~~

~~the date of resignation,~~ such other time as is set forth in any Florida rules of discipline, or longer period set for readmission by the Supreme Court of Florida. If the person's disbarment ~~or disciplinary resignation~~ is based on conduct that occurred in a foreign jurisdiction, then the person will not be eligible to apply for admission or readmission to The Florida Bar until the person is readmitted in the foreign jurisdiction in which the conduct that resulted in discipline occurred. Readmission must occur in the foreign jurisdiction in which the conduct occurred even if Florida imposed discipline prior to the imposition of discipline in the other jurisdiction and even if the person would otherwise be eligible for readmission under the terms of any Florida discipline.

3. Rationale

Rule 2-13.1 refers to disciplinary resignation as distinct from disbarment, and allows someone who resigned pending disciplinary proceedings a shorter time period before reapplying than someone who has been disbarred. This distinction has been obsolete for more than 10 years and should be corrected.

Before 2006, a prior version of Rule 3-7.12 of the Rules Regulating the Florida Bar ("Bar Rule 3-7.12") allowed for disciplinary resignation. *See Amendments to Rules Regulating The Fla. Bar*, 795 So. 2d 1, 24 (Fla. 2001) (setting forth last version of rule before it was deleted). The disciplinary resignation rule was deleted on October 6, 2005, effective January 1, 2006. *See*

Appendix E (excerpt from Rules Regulating The Florida Bar showing rule history and date of deletion).

In 2012, the Court adopted the current Bar Rule 3-7.12, which addresses disciplinary revocation. *See In re Amendments to Rules Regulating The Florida Bar*, 101 So. 3d 807, 825 (Fla. 2012).

Under the current Bar Rule 3-7.12, a disciplinary revocation is to be treated as a disbarment. R. Regulating Fla. Bar 3-7.12 ("Disciplinary revocation is tantamount to disbarment in that both sanctions terminate the license and privilege to practice law and both require readmission to practice under the Rules of the Supreme Court Relating to Admissions to the Bar."). The idea that a disciplinary resignation or revocation is tantamount to disbarment has been part of the Court's Bar discipline jurisprudence for two decades. *See Fla. Bar v. Hale*, 762 So. 2d 515, 517 (Fla. 2000) (holding that disciplinary resignation is "tantamount to disbarment"); *see also* R. Regulating Fla. Bar 3-7.12 Comment (explaining that the "tantamount to disbarment" language in the rule comes from the *Hale* decision).

Because disciplinary resignation is no longer an option under the Rules Regulating the Florida Bar, there is no reason for the references to it to remain in Rule 2-13.1. Further, because the Court's case law and the current version of Bar Rule 3-7.12 are clear that disciplinary revocation is tantamount to disbarment, Rule 2-13.1 need not refer to disciplinary revocation separately.

PROPOSED AMENDMENT TO RULE 3-11

1. Current Rule

Rule 3-11 currently reads:

3-11 Disqualifying Conduct. A record manifesting a lack of honesty, trustworthiness, diligence, or reliability of an applicant or registrant may constitute a basis for denial of admission. The revelation or discovery of any of the following may be cause for further inquiry before the board recommends whether the applicant or registrant possesses the character and fitness to practice law:

(a) unlawful conduct;

(b) academic misconduct;

(c) making or procuring any false or misleading statement or omission of relevant information, including any false or misleading statement or omission on the Bar Application, or any amendment, or in any testimony or sworn statement submitted to the board;

(d) misconduct in employment;

(e) acts involving dishonesty, fraud, deceit, or misrepresentation;

(f) abuse of legal process;

(g) financial irresponsibility;

(h) neglect of professional obligations;

(i) violation of an order of a court;

(j) evidence of mental or emotional instability;

(k) evidence of drug or alcohol dependency;

(l) denial of admission to the bar in another jurisdiction on character and fitness grounds;

(m) disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction; or

(n) any other conduct that reflects adversely on the character or fitness of the applicant.

2. Proposed Amendments

The board proposes to amend sections (j) and (k) of Rule 3-11 to replace outdated terminology, as follows:

3-11 Disqualifying Conduct. A record manifesting a lack of honesty, trustworthiness, diligence, or reliability of an applicant or registrant may constitute a basis for denial of admission. The revelation or discovery of any of the following may be cause for further inquiry before the board recommends whether the applicant or registrant possesses the character and fitness to practice law:

[…]

(j) evidence of ~~mental or emotional instability~~ a mental disorder that may impair the ability to practice law;

(k) evidence of ~~drug or alcohol dependency~~ a substance use disorder that may impair the ability to practice law;

[…]

3. Rationale

Rule 3-11 has two parts. First, the rule generally notifies applicants that past conduct "manifesting a lack of honesty, trustworthiness, diligence, or reliability … may constitute a basis for denial of admission." Second, the rule notifies applicants of specific categories that "may be cause for further inquiry" before the board makes its character and fitness recommendation. Those categories include "evidence of mental or emotional instability" and "evidence of drug or alcohol dependency." Fla. Bar Admiss. R. 3-11(j)-(k).

The current version of Rule 3-11 was adopted in April 1991. *Fla. Bd. of Bar Exam'rs re Amendment of Rules of the Supreme Court Relating to Admissions to the Bar*, 578 So. 2d 704, 706 (Fla. 1991) (adopting what was then Article III, Section 2(b)). The rule was based on a Code of Recommended Standards for Bar Examiners, which had been "adopted by the policy-making bodies of the American Bar Association, National Conference of Bar Examiners, and the Association of American Law Schools." *Id.* The purpose of listing categories of what may require further investigation was to "better advise applicants of the factors

considered by the Board in determining an applicant's moral character and fitness to be an attorney." *Id.*

The terms "mental or emotional instability" and "drug or alcohol dependency" in Rule 3-11(j) and (k) may have been correct medical terminology in April 1991, but are outdated today. Neither term appears in the current (fifth) edition of the Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), which was published in 2013. The DSM-5 is the "handbook used by health care professionals in the United States and much of the world as the authoritative guide to the diagnosis of mental disorders." American Psychiatric Association, *DSM-5*: Frequently Asked Questions, https://bit.ly/3bEHfeP (explaining that DSM-5 "contains descriptions, symptoms, and other criteria for diagnosing mental disorders" and "provides a common language" for doctors and others to communicate about mental disorders).

DSM-5 uses the phrase "mental disorders" instead of "mental instability" or "emotional instability." *See* Appendix E at 20 (excerpts from DSM-5). It also has abandoned a prior convention of classifying substance-related conditions as "abuse" or "dependence," which the manual had done in prior versions. *Id.* at 815. DSM-5 refers to "substance use disorders," which can be mild, moderate, or severe. *Id.* at 483-84, 815. Substance use disorders include all disorders relating

to use of alcohol, illegal drugs, and inappropriate use of prescription drugs. *Id.* at 481, 483-84.

Further, the board proposes that the phrase "that may impair the practice of law" be included in Rules 3-11(j) and (k). Including that phrase will reinforce that the board's investigative focus is on conduct that may relate to the eligibility requirements for practicing law, a point that the board has made in changes to the Florida Bar Application and in its communications with applicants. *See generally* Fla. Bar Admiss. R. 3-10.1 (listing essential eligibility requirements). The term "substance use disorder," standing alone, encompasses disorders, such as tobacco use disorders, that the board does not investigate because they do not raise the same public protection concerns as disorders relating to illegal drug or alcohol use. *See* Ex. 1 at 503-509, 571-577 (DSM-5 excerpts regarding tobacco use disorder, caffeine-related disorders). Similarly, the term "mental disorder" includes dozens of disorders in the DSM-5 that the board generally does not investigate, and would investigate only if the applicant claimed that the disorder was a factor in illegal behavior or some other disqualifying conduct.

The proposed reference to impairment in Rule 3-11(j) and (k) is therefore consistent with the board's investigative approach and the purpose for adopting the rule, which was to "better advise applicants" about what information could require further investigation. *Amendment*, 578 So. 2d at 706.

EFFECTIVE DATE OF PROPOSED RULE AMENDMENTS

If the Court adopts the proposed rule amendments, then the board requests that the amendments become effective immediately upon adoption.

PUBLICATION IN THE FLORIDA BAR NEWS

If the Court determines that publication in The Florida Bar News is appropriate, the board has included a proposed notice in Appendix C.

CONCLUSION

For the foregoing reasons, the board respectfully requests that the Court adopt the proposed amendments to Rule 2-13.1 and Rule 3-11 of the Rules of the Supreme Court Relating to Admissions to the Bar.

Dated: June 10, 2020

Respectfully submitted,

FLORIDA BOARD OF BAR EXAMINERS
DAVID C. REEVES, CHAIR

Michele A. Gavagni
Executive Director

By:/s/ James T. Almon
James T. Almon
General Counsel
Florida Bar #017173
Florida Board of Bar Examiners
1891 Eider Court
Tallahassee, FL 32399-1750
(850) 487-1292
almonjt@flcourts.org

CERTIFICATE OF SERIVCE

I certify that a true and correct copy of the foregoing Petition has been served electronically this 10th day of June, 2020, to the following:

Joshua E. Doyle
jdoyle@floridabar.org
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

Dean Kevin Cieply
kcieply@avemarialaw.edu
Ave Maria School of Law
1025 Commons Circle
Naples, FL 34119

Dean Leticia Diaz
ldiaz@barry.edu
Barry University School of Law
6441 East Colonial Drive
Orlando, FL 32807-3650

Interim Dean Nicky Boothe Perry
Nicky.bootheperry@famu.edu
Florida A&M University College of Law
201 Beggs Ave.
Orlando, FL 32801

Dean Peter Goblerud
pgoplerud@fcsl.edu
Florida Coastal Law School

8787 Baypine Road
Jacksonville, FL 32256

Dean Antony Page
apage@fiu.edu
Florida International University College of Law
University Park, GL 495
Rafael Diaz-Balart Hall (RDB), Suite 1055
Miami, FL 33199

Dean Erin O'Hara O'Connor
eoconnor@law.fsu.edu
Florida State University
College of Law
425 West Jefferson Street
Tallahassee, FL 32306-1601

Interim Dean Debra Moss Vollweiler
vollweiler@nova.edu
Nova Southeastern University,
Shepard Broad Law Center
3305 College Avenue
Ft. Lauderdale, FL 33314

Dean Michèle Alexandre
Dean & Professor of Law
malexandre@law.stetson.edu
Stetson University College of Law
1401 61st Street, South
Gulfport, FL 33707

Dean Tamara F. Lawson
tlawson@stu.edu
St. Thomas University School of Law
16400 N.W. 32nd Avenue
Miami, FL 33054

Dean James McGrath
mcgrathj@cooley.edu
Thomas M. Cooley Law School
Tampa Bay Campus
9445 Camden Field Pkwy
Riverview, FL 33578

Dean Laura Rosenbury
rosenbury@law.ufl.edu
University of Florida
Fredric G. Levin Law Center
Post Office Box 117620
Gainesville, FL 32611

Dean Anthony E. Varona
avarona@law.miami.edu
University of Miami School of Law
Post Office Box 248087
Coral Gables, FL 33124

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that the type used in this petition is 14-point Times New Roman.

/s/ James T. Almon
James T. Almon