

# **MEMORANDUM**

TO: HENRY M. COXE, III, PRESIDENT OF THE FLORIDA BAR

FROM: JUDGE WILLIAM VAN NORTWICK, JR. AND  
JUDGE PETER D. BLANC ON BEHALF OF THE SUPREME  
COURT COMMISSION ON PROFESSIONALISM

RE: PROPOSED RULE OF DISCIPLINE 3-5.4

DATE: SEPTEMBER 7, 2006

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Proposed Rule of Discipline 3-5.4 was the result of an 18-month long process of debate and discussion by the Supreme Court Commission on Professionalism with the assistance of the Florida Bar's Committee on Professionalism. The process started with a broad discussion of professionalism problems in civil litigation at a retreat of the entire Commission and Committee. The subject was delegated to the Judicial Subcommittee, composed of judges, lawyers and law professors, where the concept of the rule was developed and drafted over three different meetings or retreats. At each stage, the progress with the proposed rule was reported and discussed in meetings of the Commission and Committee.

The proposed rule arose from numerous complaints by trial lawyers that episodes of incivility and unprofessional behavior were increasing. The proposed rule is an effort to respond to a common concern of those lawyers that: "Judges just don't do enough either to enforce professionalism standards or to address unprofessional conduct." The rule also attempts to address a common judicial response to the Bar's complaint of lack of judicial control of the courtroom to the effect that: "Bar grievances are too harsh a sanction for such conduct and contempt is too time-consuming, cumbersome, frequently too harsh, and often ends in reversal or disqualification."

Through an analysis of existing authority, the Commission concluded that trial judges need no additional authority to effectively address professionalism issues even in light of concerns raised. Instead, it was the intent of the Commission to create an additional tool for trial judges to use to address unprofessional conduct based only upon existing authority. The rule was intended to specify a process which would allow trial judges to address unprofessional conduct in a manner less burdensome and time-consuming than a contempt proceeding while at the same time affording due process standards that would go beyond minimum requirements. In addition to providing notice

and opportunity to be heard, paragraph (c)(3) of the rule requires an initial warning and an opportunity to cure.

A common question about the proposed rule, and a point of discussion during its development was: “If the rule creates no additional authority, then why do we need it?” The Commission concluded that most trial judges, like most lawyers, are rule-oriented. The proposed rule defines an easy-to-follow process that requires notice and opportunity to be heard, as well as a cautionary warning to those who might be in violation.

It is the hope of the Commission that notice of the trial judge’s adoption of the Bar’s Guidelines for Professional Conduct and notice of the judge’s intention to enforce those guidelines as specified in paragraph (c)(1) of the rule would, in and of itself, be a deterrent to unprofessional conduct. However, by going beyond notice and setting up a process for enforcement, the rule creates a roadmap for trial judges to rely on when enforcement becomes necessary.

### **Responses to Initial Concerns**

Although the rule clearly provides notice and opportunity to be heard, due process concerns have been raised. Comparison of the proposed rule to Florida Rule of Criminal Procedure 3.830, which defines the essence of due process in direct criminal contempt proceedings, shows many similarities. However, in response to some of the concerns raised, language from F.R.Cr.P. 3.830 could be substituted for some of the proposed language of the rule without changing the rule’s substance. Three changes for consideration are as follows:

1. Rule 3-5.4 (c)(4) which reads, *“although a separate proceeding is not required, the lawyer involved has been given an opportunity to argue against the fine or referral”* could be changed to the following language:

*“although a separate proceeding is not required, the lawyer involved shall be given an opportunity to present evidence of excusing or mitigating circumstances.”*

2. Rule 3-5.4 (e) which reads, *“Any fine or referral issued pursuant to this rule shall be by written order and shall specify the basis for the fine or referral.”* could be changed to the following language:

**(e) Procedure for Fine or Referral.** *Any fine or referral issued pursuant to this rule shall be pronounced in open court and shall be followed by a written order specifying the basis for the fine or referral. . . .*

3. The rule makes no reference to right of appeal. Although this is consistent with the rules relating to contempt, it has apparently created some concern. To address that concern, the proposed rule could include a paragraph (j) which would read as follows:

*(j) **Appeal.** The appeal of orders entered pursuant to this rule shall be governed by the Florida Rules of Appellate Procedures.*

There have also been questions concerning whether the proposed rule covers only conduct witnessed by the judge. See 3-5.4 (c) **Types of Conduct Eligible for Referral**. Of course, for a finding of direct criminal contempt pursuant to F.R.Cr.P. 3.830, the court must see or hear the conduct constituting the violation committed in its presence. In other words, the conduct takes place in open court. That requirement has not been included in the proposed rule because the Commission anticipated that professionalism violations that take place during the discovery process, in deposition and elsewhere, might be an appropriate subject for this rule. When compared to contempt, such a violation would be more akin to indirect criminal contempt, taking place outside of the judge's presence. The requirements for finding indirect criminal contempt found in F.R.Cr.P. 3.840 contain notice and procedural provisions more extensive than the proceeding for direct contempt. Under the proposed rule, it is clear that an alleged violation outside of the court's presence would require notice and opportunity to be heard. If it is believed the rule should expressly include a requirement for notice consistent with indirect criminal contempt, however, then Proposed Rule of Discipline 3-5.4 would have to be further revised or limited to incidents that occur in open court in the presence of the trial judge.

Some have expressed concern that an attorney may be required to report to his or her liability carrier a fine or referral entered pursuant to the proposed rule. Florida Lawyers Mutual Insurance Company, the liability carrier endorsed by The Florida Bar, requires that: "As a condition of coverage, if during the policy period an insured first becomes aware of an Incident Claim and Suit that may be covered by the Policy, the Insured must within the policy period: (1) deliver to us immediately, written notice of any incident, claim or suit and provide to us the fullest information available. . . ." That provision would not seem to require a report to an attorney's liability carrier and is consistent with 3-5.4 (f) **Effect of Fine or Referral** which states in part that, ". . . a fine or issuance of a referral . . . pursuant to this rule shall not in and of itself constitute a disciplinary sanction."

The Florida Lawyers Mutual Insurance Company application for coverage and the renewal application both ask the following question: "Has a lawyer in the firm: . . . (2) ever been the subject of an admonishment, reprimand, or other disciplinary action by any bar association, court, or administrative agency." Unless this provision is limited to admonishment and reprimands that constitute "disciplinary action," this provision may well cover fines or referrals made pursuant to the proposed rule. In such event, however, the provision would also cover admonishment for attorneys being late, unprepared, or even asking improper questions in the presence of a jury.

Because of the number of different committees, sections, and Bar organizations being asked for input on the proposed rule, it is impossible for Commission members to appear in person before each group to address these issues. It is the hope of the Supreme Court Commission on Professionalism that the information herein clarifies the

intent of the proposed rule and addresses some of the concerns that have been raised. If the Commission can provide further information, please don't hesitate to contact the Center for Professionalism.

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PETER D. BLANC, Circuit Judge

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