Barry Law Review

Volume 19
Issue 2 *Spring 2014*

Article 2

2014

"Doomed Social Engineering?" Ethics and Professionalism Related to Sexual Orientation: The Florida Experience

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"DOOMED SOCIAL ENGINEERING?"—

ETHICS AND PROFESSIONALISM RELATED TO SEXUAL ORIENTATION: THE FLORIDA EXPERIENCE

Judge Robert W. Lee[*]

In July 2013, almost 300 County Court Judges[1] of the State of Florida attended their annual conference in Naples, Florida, for two-and-a-half days of continuing judicial education. During one plenary session,[2] the judges from across the state listened receptively to a presentation involving issues pertaining to runaway LGBT[3] teenagers and the appropriate judicial response. In another plenary session, the judges discussed issues concerning the treatment of transgender individuals in the court system. Both presentations seemed unremarkable and noncontroversial. And yet, just twenty years before, Florida lawyers faced a significant clash of values concerning how LGBT people should be treated by attorneys and in the court system, including accusations that The Florida Bar was engaged in "doomed social engineering."[4]

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1. Florida is comprised of sixty-seven counties. As of July 2013, the state of Florida had 322 County Court Judges. FLA. STAT. § 34.022 (Lexis 2012). Generally, Florida County Court Judges have jurisdiction in misdemeanor cases, violations of municipal and county ordinances, and all actions at law and equity in which the matter in controversy does not exceed the sum of $15,000.00. *Id.* §§ 34.01(1)(a), (4) (2012). Florida County Court Judges are frequently, however, designated to handle work falling within the jurisdiction of a circuit judge. *Id.* § 26.57 (2012).

2. Conference of County Court Judges of Fla., 2013 Annual Education Program (2013).

3. In this article, the author, with apologies to any offended, will use the abbreviation "LGBT" to refer to lesbian, gay, bisexual and transgender persons, as well as any other person who may be questioning, queer, confused, intersexed, etc. The author believes the abbreviation LGBT has become sufficiently widely accepted and understood without need for further elaboration or unwieldy characterization.

4. Richard N. Friedman, Letter to the Editor, *Discrimination*, FLA. BAR NEWS, Nov. 15, 1992, at 3.

INTRODUCTION

In 1993, the Florida Supreme Court[5] approved[6] Rule 4-8.4(d) of the Florida Rules of Professional Conduct which specifically provides that an attorney shall not:

> engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.[7]

Just over a year later, the Florida Supreme Court further approved[8] Canon 3B(5) of the Florida Code of Judicial Conduct:

> A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct[9] manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age,

5. Under Florida law, the Florida Supreme Court has the exclusive authority to regulate the conduct of attorneys and judges in their roles as attorneys and judges. FLA. CONST. art. V, §§ 2(a), 15. The Court does not, however, have "constitutional authority" over the employment practices of lawyers. The Florida Bar re: Amendments to Rules Regulating The Florida Bar, 624 So. 2d 720, 722 (Fla. 1993).

6. *Id.* at 722. The rule took effect January 1, 1994. *Id.*

7. *See* 4 Fla. Jur. 2d *Attorneys at Law* §103 (2008) (discussing the rule as defining "what constitutes misconduct"); Timothy P. Chinaris, *Professional Responsibility Law in Florida: The Year in Review 1995*, 20 NOVA L. REV. 223, 248 n.144 (1995) (quoting rule).

8. *In re* Code of Judicial Conduct, 643 So. 2d 1037, 1039–40 (Fla. 1994). The decision was issued on September 29, 1994 and took effect January 1, 1995. *Id.* at 1037, 1040. The first two sentences were modeled after the language proposed as part of the American Bar Association Model Code of Judicial Conduct. *Id.* at 1037–38. The final sentence, however, was added by the Florida Supreme Court upon suggestion. The opinion is silent as to the party offering the suggestion, whether it was The Florida Bar or one of the more than dozen persons who filed individual comments. *Id.* at 1037, 1039–40. *See* Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 NOVA L. REV. 793, 831 (2000) (discussing the extension of the judicial canons in Florida to cover prejudice and bias based on sexual orientation). For a discussion of a situation involving sexual orientation and when it might be an issue in a legal proceeding, taking the case out of the Judicial Canons, *see* Marisa Gonzalez, Note, *If You Can't Fix It, You've Got to Stand It:* Lofton v. Department of Children and Family Services *and the Florida Adoption Statute's Discrimination Against Homosexuals and Foster Children*, 7 WHITTIER J. CHILD & FAM. ADVOC. 277, 292–93, 318–20 (2008). For a discussion of the adoption of the canon from the Model Code, *see* Sanaz Alempour, Note, *Judicial Recusal & Disqualification: Is Sexual Orientation a Valid Cause in Florida?* 32 NOVA L. REV. 609, 610 (2008).

9. In the commentary to Rule 3B(5), "conduct" is explained as including gestures, facial expression and body language. FLA. CODE OF JUDICIAL CONDUCT CANON 3B(5) cmt. (1994). *See Code of Judicial Conduct*, 643 So. 2d at 1048 (setting forth the commentary as adopted by the Florida Supreme Court).

> sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.[10]

The primary impetus of the Florida Supreme Court's action was a report from its Racial and Ethnic Bias Study Commission concluding that women and minorities continued to face many obstacles in the practice of law.[11] At the same time, Miami attorney Frank Scruggs, joined by almost sixty other attorneys, including Florida Governor Lawton Chiles, submitted a written request to The Florida Bar seeking the promulgation of specific "anti-bias rules."[12] At least one other Supreme Court special committee had similarly considered the issue.[13] Ultimately as a result, as explained hereinafter, the Bar concluded that such obstacles could better be overcome if members of the Bar were subject to "specific rules prohibiting discriminatory practices."[14] Similarly, the Florida Supreme Court referred the possibility of related amendments to the judicial canons to its Committee on Standards of Conduct Governing Judges.[15] The addition of sexual orientation to the rules and canons, however, would come only after months of divisive public debate.[16]

THE FLORIDA BAR AND SEXUAL ORIENTATION BEFORE THE 1990S

Until 1978, no person could be a member of The Florida Bar who was a known or "admitted" homosexual.[17] In 1978, the Florida Supreme Court considered a case in which an attorney acknowledged his sexual orientation in response to a question

10. FLA. CODE OF JUDICIAL CONDUCT CANON 3B(5) (1994).

11. The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 624 So. 2d 720, 721 (Fla. 1993). *See also* Fla. Bar v. Frederick, 756 So. 2d 79, 87 (Fla. 2000) (noting that the concern to protect women and minorities from discrimination was intended to expand the meaning of the prior rule, not restrict it); Mark D. Killian, *Governors Begin Debating Rules to Ban Discrimination*, FLA. BAR NEWS, Jun. 1, 1992, at 7 [hereinafter Killian I] (noting that the professed "need for the rule flows from the Supreme Court's Racial and Ethnic Bias Study Commission report which found that institutional bias permeates the legal profession, threatening the foundation of the court system"); *Anti-Bias Rules, Retention Campaigns, Budget Fill 1992*, FLA. BAR NEWS, Jan. 1, 1993, at 11 [hereinafter *Anti-Bias Rules*] ("[t]here had been no question that ethnic, racial, and gender bias had been problems in the legal system."). *See* Nicole Lancia, *New Rule, New York: A Bifocal Approach to Discipline and Discrimination*, 22 GEO. J. LEGAL ETHICS 949, 955 (2009) (discussing the Florida report).

12. *Board to Vote on Anti-Bias Rule Comments*, FLA. BAR NEWS, Nov. 15, 1992, at 15 [hereinafter *Board to Vote*]. This procedure is permitted by Rule 1-12.1(f), R. Regulating Fla. Bar (1992) (in lieu of proceeding through The Florida Bar Board of Governors, a group of "50 members in good standing" may file a petition to amend a rule directly with the Florida Supreme Court).

13. Anti-Bias Rules, supra note 11, at 11.

14. Amendments to Rules, 624 So. 2d at 721.

15. Supreme Court to Consider Changes to Judicial Code, FLA. BAR NEWS, Jun. 1, 1993, at 1 [hereinafter Supreme Court to Consider].

16. *See infra* text accompanying notes 85–203.

17. *In re* Florida Bd. of Bar Exam'rs, 358 So. 2d 7, 10 (Fla. 1978). The routine exclusion of LGBT persons from professions was, of course, not limited to law. *See* STACY BRAUKMAN, COMMUNISTS AND PERVERTS UNDER THE PALMS: THE JOHNS COMMITTEE IN FLORIDA 1956–1965, 4–5, 121 (2012) (discussing the effort to "remove homosexuals from state agencies, particularly schools); ARTHUR GUY MATHEWS, IS HOMOSEXUALITY A MENACE? 155, 164–65 (1957) (urging local, state and federal governments to remove "all of the homosexuals [. . .] from office," even if they have the ability to do the job); KEN WORTHY, THE NEW HOMOSEXUAL REVOLUTION 7, 116 (1965) (expressing concern that homosexuals already "have taken over" some professions, and are taking the place of "normal" persons in college, "closing [. . .] more and more career-doors to the normal boy or girl").

from the Board of Bar Examiners.[18] In keeping with long-held practice, The Florida Bar was prepared to deny the applicant's admission.[19] The Florida Supreme Court, however, found no "rational connection between homosexual orientation and fitness to practice law."[20] Nevertheless, Justice Joseph Boyd dissented, bluntly declaring that no one should be able to become a member of The Florida Bar "whose sexual life style contemplates routine violation of a criminal statute."[21] Prior to this date, The Florida Bar on several occasions revoked the membership of persons who had committed homosexual acts.[22]

Notwithstanding the 1978 decision, by 1981 The Florida Bar was continuing to question applicants about their private sexual conduct.[23] For instance, in one case, The Bar discovered that an applicant may have been removed from military service consideration because of his homosexuality.[24] The Board of Bar Examiners questioned the applicant, who acknowledged his "continuing sexual preference for men," but who would not respond to inquiries dealing with specific sexual activity.[25] The Florida Supreme Court expanded on its 1978 ruling by holding that "[p]rivate noncommercial sex acts between consenting adults are not relevant to prove fitness to practice law," with a caveat dealing with "nonconsensual sex or sex involving minors."[26] Once again, Justice Boyd dissented, this time joined by Justice James Alderman.[27] They argued that the Court should place no reins on the authority of the

18. 358 So. 2d at 8.

19. *Id.*

20. *Id.* at 9. In doing so, the Florida Supreme Court relied on language in a concurring opinion eight years prior that "[t]he present record contains no evidence scientific, medical, pathological or otherwise suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar." *Id.* at 10, *quoting* Fla. Bar v. Kay, 232 So. 2d 378, 380 (Fla. 1970) (Ervin, C.J., concurring). Just five years prior, homosexuality was still classified as a mental illness. *See* MICHAEL SHELTON, FAMILY PRIDE: WHAT LGBT FAMILIES SHOULD KNOW ABOUT NAVIGATING HOME, SCHOOL, AND SAFETY IN THEIR NEIGHBORHOODS *xx* (2013).

21. 358 So. 2d at 10 (Boyd, J., dissenting). Justice Joseph Boyd was elected to the Florida Supreme Court in 1968 and began to sit in 1969. While on the Court, he was known for reading his Bible as the "first thing" he would do each day "upon arrival at the court." W. MANLEY & C. BROWN, JR., THE SUPREME COURT OF FLORIDA, 1917-1972, 320–21 (2006). He believed that the Bible set forth the "basic norms for human conduct." *Id.* at 321. Boyd viewed "liberals" as "his principal foe." *Id.* at 324. He served on the court until 1987. *Id.* at 320, 325. Justice Boyd's strong views against gay persons were expressed just a year after entertainer Anita Bryant led a successful referendum on June 7, 1977 to repeal Dade County's ordinance that protected lesbian and gay individuals from employment discrimination. *See* ANITA BRYANT, THE ANITA BRYANT STORY 125 (1977). The singer commented that the repeal effort "overwhelmingly" demonstrated the Florida voters' "revulsion toward homosexuality becoming an acceptable, normal life-style." *Id. See also* BRIAN MCNAUGHT, EDITOR'S NOTE, ON BEING GAY 4 (1988) ("[f]ollowing the Dade County vote, there was a spate of progay civil rights ordinances which were either overturned or rejected").

22. *See, e.g.*, Fla. Bar v. Kay, 232 So. 2d 378 (Fla. 1970) (attorney convicted of engaging in public homosexual activity); Kimball v. Fla. Bar, 465 F. Supp. 925 (S.D. Fla. 1979) (attorney who had been convicted of engaging in public homosexual activity in 1956 unsuccessfully sought federal court intervention to have Bar membership restored).

23. *See* Florida Bd. of Bar Exam'rs *re* N.R.S., 403 So. 2d 1315 (Fla. 1981).

24. *Id.* at 1316.

25. *Id.*

26. *Id.* at 1317.

27. *Id.* at 1317–19 (Boyd & Alderman, JJ., dissenting). Justice Alderman was not yet sitting on the Florida Supreme Court when the previous decision was issued in 1978. *See In re* Florida Bd. of Bar Exam'rs, 358 So. 2d 7, 10 (Fla. 1978).

Board of Bar Examiners to question applicants about private sexual conduct, and further noted that the record in the underlying case demonstrated that the applicant might still be involved with homosexual conduct with "no intention of changing his ways."[28]

The next year, the Florida Supreme Court authorized an attorney who had been disbarred for twenty-five years as the result of public, albeit consensual, homosexual activity to apply for readmission.[29] Because of the lengthy passage of time, however, the Court required that the attorney retake and pass the entire Bar examination as a condition of readmission.[30]

SETTING THE STAGE FOR THE ANTI-DISCRIMINATION PROPOSALS

As the 1990s began, the public attitude in general towards LGBT people continued to change for the positive, with increased protections in the area of employment.[31] The addition of sexual orientation to The Florida Bar's anti-discrimination proposal was arguably fomented by many other issues percolating through the state at that time.[32]

In late 1991, the Public Interest Law Section of The Florida Bar sought approval from the Bar to lobby the Florida Legislature to change a state law preventing homosexuals from adopting.[33] The Board of Governors denied the request, citing the question as one "of deep philosophical or emotional division among a substantial segment of the Bar."[34] After threats of the Section leaving the Bar, the chair-elect of the Public Interest Law Section and the President-elect of the Bar met in May 1992 in an attempt to amiably work out their differences.[35] At that time, the Public Interest Law Section, which had grown to 257 members, considered doing its advocacy work through an outside, non-Bar affiliated nonprofit organization to avoid conflicts with the Bar.[36] The Public Interest Law Section believed it was uniquely positioned to address these types of issues because its members were the attorneys who typically had experience in trying these cases; and as a result, the Section could be helpful on any anti-discrimination efforts.[37]

28. 403 So. 2d at 1319 (Boyd & Alderman, JJ., dissenting).

29. *In re* Petition of Kimball, 425 So. 2d 531 (Fla. 1982).

30. *Id.* at 534.

31. ERIC MARCUS, IS IT A CHOICE? *xiii*, 103 (1999). By 1994, only four communities in Florida provided protection of some extent based on sexual orientation: Alachua County, Palm Beach County, Key West, and Miami Beach. PAUL HAMPTON CROCKETT, GAY LAW 101: WHAT FLORIDA'S GAYS AND LESBIANS NEED TO KNOW ABOUT THE LEGAL SYSTEM 95 (1994).

32. Richard N. Friedman, Letters, *Discrimination*, Fla. Bar News, Nov. 15, 1992, at 3.

33. David W. Young, Letter to the Editor, *Section Lobbying*, FLA. BAR NEWS, Apr. 1, 1992, at 2; Gary Blankenship, *Bar, Public Interest Law Section Work Things Out*, FLA. BAR NEWS, Jun. 1, 1992, at 9 [hereinafter Blankenship I]; Terl, *supra* note 8, at 851–53 (discussing the issue of sexual orientation as addressed by the Public Interest Law Section).

34. Young, *supra* note 33, at 2. The decision of the Board of Governors to deny permission to lobby was subsequently upheld by the Florida Supreme Court. *See* Blankenship I, *supra* note 33, at 9.

35. Blankenship I, *supra* note 33, at 9.

36. *Id.*

37. *See* Mark D. Killian, *PILS Wants to File Brief on Proposed Bias Rules*, FLA. BAR NEWS, Oct. 1, 1992 at 15 [hereinafter Killian II]; *Hanlon Says PILS Small but Important*, FLA. BAR NEWS, Oct. 15, 1992, at 34.

The Family Law Section of the Bar was also beginning to reach out to LGBT members. At the annual Family Law Section luncheon in 1992, the incoming chair discussed the creation of a "Gay and Lesbian Committee" within the Section.[38] One attorney responded with a letter to the *Florida Bar News* that "it was a disgrace to even entertain the idea," and that the Bar "should put a stop to this small group within the Bar Association who are trying to drag us down to their level and have us give support to certain deviates in our society."[39] The attorney was concerned that gays and lesbians would "infiltrate other committees and push their agenda."[40] Clearly exasperated, the attorney asked, "[w]hen will it stop?"[41]

This letter drew a sharp response from another attorney who criticized the prior letter writer and argued in support of the incoming chair's proposal:

> As professionals who have an active role in all areas of the law—legislation, enforcement, interpretation, clarification—it is our responsibility to have open minds and to approach all members of our society as potentially deserving individuals who have rights and responsibilities. [. . .] As a section, we are to address all the family law issues, not just ones that appeal to us or that were envisioned by earlier generations acting under a different set of social mores. Gay and lesbian issues deserve the same discussion and advocacy as issues brought forth by the stereotypical mom and dad with two children and a white picket fence. The idea that the section should not include a Gay and Lesbian Committee is outdated and puts family law practitioners into legal blinders.[42]

Notwithstanding the original letter writer's frustration, the Family Law Section created the Committee.[43]

At the same time, the American Bar Association was welcoming its first delegate from the National Lesbian and Gay Law Association,[44] triggering criticism from some Florida attorneys.[45] A former President of The Florida Bar, Patrick Emmanuel, publicly resigned his membership from the ABA, citing as one of his reasons the accommodation to lesbian and gay lawyers.[46]

38. Richard B. Kay, Letter to the Editor, *Gay/Lesbian Committee*, FLA. BAR NEWS, Aug. 1, 1992, at 2.
39. *Id.*
40. *Id.*
41. *Id. See also* Richard B. Kay, Letter to the Editor, *Committee Opposed*, FLA. BAR NEWS, Feb. 1, 1993, at 2 (by supporting the discussion of LGBT issues, the Family Law Section is helping to "los[e] the battle to maintain some semblance of morality in our society").
42. Ellen G. Shipman, Letter to the Editor, *Family Issues*, FLA. BAR NEWS, Aug. 15, 1992, at 2.
43. Letter, *Council Responds*, FLA. BAR NEWS, Feb. 1, 1993, at 2. The Council noted that the Gay and Lesbian Issues Committee was created "with the hope that issues related to this sensitive area can be better-addressed by providing this forum for discussion." *Id.*
44. Patrick G. Emmanuel, Letter, *ABA Abortion*, FLA. BAR NEWS, Oct. 1, 1992, at 39. For a discussion of the issue of sexual orientation as addressed by the ABA, *see* Terl, *supra* note 8, at 818–19.
45. Martha Jean Eichelberg, Letter, *Bias Rule*, FLA. BAR NEWS, Oct. 15, 1992, at 3.
46. Emmanuel, *supra* note 44, at 39. Another member stated that he discontinued his membership in the ABA because he "concluded that the organization no longer represented me, my interests, nor the values I respect." C. Wesley G. Currier, Letter, *Bar Ideas*, FLA. BAR NEWS, Dec. 1, 1992, at 3.

Another area of controversy was the AIDS epidemic and the need for legal services for this disadvantaged community.[47] Perhaps in response to fear of AIDS expressed in the *Florida Bar News*,[48] one of the members of The Florida Bar Board of Governors, Theodore Struhl, a Miami physician, educated the Board on the topic of AIDS at the Board's May 1993 meeting.[49] Dr. Struhl grimly advised the Board that AIDS, then considered a death sentence, was a disease generally ravaging women and minorities.[50] He further reminded the Board, however, that AIDS could not be contracted through "casual contact."[51] Nevertheless, many attorneys viewed AIDS as a reason to avoid certain groups, including homosexuals.[52]

In addition to the issues involving the Bar directly, many attorneys also found themselves challenging an initiative effort by the American Family Association (AFA) to amend the Florida Constitution.[53] If the electorate passed the AFA initiative, any local or state laws or regulations providing protections based on sexual orientation would be repealed and banned.[54] The nascent Miami-based Gay and Lesbian Lawyers Association (GALLA) was instrumental in putting together a team to successfully fight the initiative in the courts.[55] Ultimately, the Florida Supreme Court struck the initiative from the ballot for violating state law involving initiative proposals.[56]

Outside of the Bar, other situations arose that brought attention to, and some would argue empowered, the LGBT community.[57] In 1993, the State of Florida released voluminous records pertaining to the work of a State Committee—the Johns Committee—which three decades before had taken upon itself the duty to root out and eliminate homosexuals from state employment, including state schools.[58] As one researcher noted, the release of these documents revealed to Floridians "a chapter in the state's history that most saw as appalling."[59] The researcher further stated that:

47. Video Shows Lawyers Helping AIDS Victims, FLA. BAR NEWS, Apr. 15, 1993, at 8; Lawyers Sign Up for AIDS Network, FLA. BAR NEWS, Oct. 1, 1993, at 47.

48. *See* Friedman, *supra* note 4, at 3 (suggesting that attorneys are rightfully concerned that hiring a homosexual might lead to the spreading AIDS in the law office). For a discussion of Friedman's letter concerning fear of the spread of AIDS in the workplace, *see infra* text accompanying note 146.

49. See AIDS Hitting Hard at Women and Minorities, FLA. BAR NEWS, July 1, 1993, at 18.

50. *Id.*

51. *Id.*

52. *See* Friedman, *supra* note 4, at 3; *infra* text accompanying note 146; Robert L. Guyer, Letters, *Clean Living*, FLA. BAR NEWS, Aug. 1, 1993, at 2 (stating that AIDS results from a violation of the "Biblical moral code"). One attorney who was living with AIDS responded with "gratitude that those with attitudes like Mr. Guyer's are not making the bulk of policy in this country, this state, or the Bar." Allan H. Terl, Letter to the Editor, *AIDS*, FLA. BAR NEWS, Sept. 1, 1993, at 2.

53. *See In re* Advisory Opinion to the Attorney General – Laws Related to Discrimination, 632 So. 2d 1018, 1019 (Fla. 1994).

54. *Id.* at 1020 ("[r]epeals all laws inconsistent with this amendment"). If adopted, the constitutional provision would bring into question the effect of even Bar "rules" dealing with sexual orientation.

55. *Id.* at 1018. For a further discussion of GALLA, *see infra* text accompanying notes 85–87, 180–81, 190–91.

56. 632 So. 2d at 1021. For a discussion of the process of initiative review in Florida, *see* Robert W. Lee, *Pre-Election Initiative Review in Florida: A Framework for Analysis*, 69 FLA. B.J. 14, Mar. 1995, at 14–20 (citing *Laws Related to Discrimination* case on several occasions).

57. *See* Braukman, *supra* note 17, at 2.

58. *Id.*

59. *Id.*

> The opening of the records itself became a sensation, as journalists flocked to the state archives in Tallahassee to comb through documents, find the most eye-popping quotes from interrogation transcripts, and tell the stories of those most egregiously victimized by the committee. Their reporting focused on the [. . .] most outrageous and unconstitutional practices, as well as what looked like to modern eyes like brazen racism and homophobia.[60]

At the same time, the voters of Tampa repealed an effort by the municipal government to expand civil rights protections to gays and lesbians.[61] By 1993, the case challenging the repeal effort had made its way to the Florida Supreme Court.[62] Moreover, the civil rights of LGBT persons were prominently in the news as thousands of persons from Florida planned for and attended the March on Washington the same year.[63] Finally, the issue of hate crimes against LGBT persons was more widely reported as the Florida Legislature amended the hate crimes law in 1991 to also cover sexual orientation.[64]

THE FLORIDA BAR AND THE INITIAL PROPOSALS

At a meeting of The Florida Bar Board of Governors in May 1992, the Board received its preliminary report from the Implementation Committee for Opportunities for Minorities in the Profession, although the recommendations were not unanimous.[65] The proposal sought rules prohibiting "judges and lawyers from exhibiting racial, gender, and ethnic discrimination."[66] Sexual orientation, however, was not addressed in the original proposals.[67] The Chair noted an unsettled divide in the Committee.[68] Opponents of the proposed rule doubted whether the actual evidence demonstrated that discriminatory conduct necessitated any rule change.[69] They also argued that sufficient laws already existed to address discrimination and to provide related remedies. Discriminatory conduct is already illegal, and remedies now exist to adequately compensate victims who can prove they are discriminated against.[70] Moreover, opponents claimed that the danger of false claims of discrimination could be used as a "coercive tool" against law firms to promote minorities to partnership.[71] Finally, they expressed concern that the proposed rule

60. *Id.*
61. Tampa Gay Rights Ordinance Referendum to be Reviewed, FLA. BAR NEWS, Jan. 15, 1993, at 30.
62. *Id.* The issue before the Supreme Court addressed whether the recall effort should have even been placed on the ballot, as questions had been raised concerning voters' signatures during the petition drive. *Id.*
63. Tao Woolfe & William E. Gibson, *South Florida Gays to Join 1 Million Expected in Capitol*, S. FLA. SUN SENTINEL, Apr. 25, 1993, *available at* http://articles.sun-sentinel.com/1993-04-25/news/9302070939_1_gay-pride-march-lesbian-task-force-emily-vetter#.UidOktju32U.email (last visited April 17, 2014).
64. *Hate Crimes on the Rise Under New Definitions*, FLA. BAR NEWS, Aug. 1, 1993, at 20–21.
65. Killian I, s*upra* note 11, at 7.
66. *Id.*
67. *Id. See also* Don Lacy, Letter to the Editor, *Disabled*, FLA. BAR NEWS, Jun. 15, 1992, at 2.
68. Killian I, *supra* note 11, at 7.
69. *Id.*
70. *Id.*
71. *Id.*

would "violate First Amendment rights" and "not pass constitutional muster by virtue of being an abridgement of free speech."[72] The Committee did not, however, express similar reservations concerning the proposed canon involving judicial conduct.[73] The meeting ended with the parties agreeing to continue working on the proposals.[74]

Soon after the first proposals were made known to Florida attorneys through the *Florida Bar News*,[75] a few attorneys began to publicly respond. One of the first to respond was an attorney who complimented The Florida Bar on its "progressiveness," but who also objected that the proposal did not include the disabled, "[w]hy cannot The Florida Bar also protect the disabled at the same time that it is trying to eliminate discrimination based upon racial, gender, and ethnic considerations?"[76] Another attorney responded that he had not experienced any discrimination as an attorney who had used a wheelchair for thirty-two years, and he did not believe that The Florida Bar should try to "cure our personal problems."[77] Still another worried that Bar dues might be used to compensate those claiming discriminatory conduct.[78]

THE FLORIDA BAR AND THE FINAL PROPOSAL

The Bar Board of Governors met again on August 1, 1992.[79] At this meeting, the Board would agree to add sexual orientation as one of the prohibited categories of discrimination.[80] Although the Board voted to forward the anti-bias proposal to the Florida Supreme Court for action, the Board also added the entire proposal to its September 1992 meeting agenda for further discussion.[81] While the discussion was lengthy, the rule appeared to be on its way to approval by the Board for submission to the Florida Supreme Court.[82] The area of dispute was enforcement involving employment discrimination claims.[83] One faction wanted The Florida Bar to be able to investigate accusations of discrimination, while another faction believed The

72. *Id.*
73. *Id.*
74. Killian I, *supra* note 11, at 7.
75. Gary Blankenship, *Board Okays, Sends to Court Anti-Bias Rule*, FLA. BAR NEWS, Aug. 15, 1992, at 4 [hereinafter Blankenship II] (noting that proposal was announced in July 1 edition of the *Bar News*).
76. Lacy, *supra* note 67, at 2.
77. William M. Hereford, Letters, *Personal Problems*, FLA. BAR NEWS, Aug. 1, 1992, at 2.
78. Henry P. Trawick, Jr., Letters, *Thought Control*, FLA. BAR NEWS, Aug. 1, 1992 at 2.
79. Blankenship II, *supra* note 75, at 1.
80. *Id.*
81. *Id.* at 1, 4. The meeting was held on September 24–25, noticed in the *Florida Bar News* on Sept. 15, 1992. Mark Killian, *Bar Board of Governors to Meet in North Florida*, FLA. BAR NEWS, Sept. 15, 1992, at 3. The notice advised that the rule proposal would be discussed at the meeting.
82. Blankenship II, *supra* note 75, at 1.
83. *Id.*; Gary Blankenship, *Governors Debate Discrimination, Remedies*, FLA. BAR NEWS, Aug. 15, 1992, at 10. *See also* John A. Truesdell, Letters, *Bias Rules*, FLA. BAR NEWS, Sept. 15, 1992, at 2 (noting that the "proclaimed intention" of the rule is to go "beyond the judicial process to employment"); R. Layton Mank, Letters, *Bias Rule*, Fla. Bar NEWS, Oct. 1, 1992, at 2 (arguing that while the goals of the proposal are "commendable," The Florida Bar has no authority to discipline lawyers for their employment practices).

Florida Bar should not act unless an outside agency had made a finding of discrimination.[84]

At the meeting, Victoria S. Sigler,[85] a member of the Gay and Lesbian Lawyers Association (GALLA), spoke.[86] GALLA had wanted a voice at the Board meeting, and Sigler had agreed to attend the meeting to raise the issue of sexual orientation.[87] In outing herself,[88] she described her own experiences and urged the Board to add sexual orientation to the list of groups protected from discrimination, noting that "America has always protected the rights of individuals[,] and we have always protected diversity."[89] She further argued that "[m]eaningful access to the courts means unbiased access."[90] Board member Stuart Grossman then made the motion to include sexual orientation as one of the protected groups and stated:

> Can't they be free of this kind of bigotry? [. . .] Would the use of the term "queer" or "gay" be appropriate in talking with any kind of witness, or lawyer, or judge? Can we possibly leave this out, having voted against bias?
>
> This is not condoning a style of life, that frankly I don't think people make conscious decisions to have. It makes sure this new rule bolts down all that parameters for what we know to be right.[91]

Perhaps recognizing the changing cultural norms,[92] the Board approved Grossman's motion by a vote of thirty-one to eight, and the proposal to submit to the Florida Supreme Court was thought then to be finalized.[93] The Bar's final proposed version defined as "prejudicial to the administration of justice" engaging in conduct, which included, "to knowingly, or through callous indifference, disparage, humiliate or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, or age."[94]

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84. Blankenship II, *supra* note 75, at 4; Killian II, *supra* note 37, at 15.

85. Victoria Sigler would go on to become the first openly LGBT person to serve on the state court bench in Florida. Loann Halden, *Victoria Sigler Climbs the Judicial Ladder*, THE WEEKLY NEWS, Apr. 20, 2000, at 2.

86. Blankenship II, *supra* note 75, at 5.

87. Telephone Interview with Victoria S. Sigler, Circuit Judge, Florida Eleventh Judicial Circuit (Sept. 16, 2013).

88. *Id.*; Jan Pudlow, *The Invisible Minority Came out at the Diversity Symposium*, FLA. BAR NEWS, Apr. 30, 2007, at 8.

89. Pudlow *supra* note 88 at 8; Blankenship II, *supra* note 75, at 5.

90. Blankenship II, *supra* note 75, at 5.

91. *Id.* at 4.

92. *See* Robert Batey, *Atticus Finch, Boris A. Max, and the Lawyers Dilemma*, 12 TEX. WESLEYAN L. REV. 389, 394 n.39 (2005).

93. Blankenship II, *supra* note 75, at 5.

94. *Amendments to Rules*, So. 2d 720, 721 (Fla. 1993). One commentator explained that "the rule would make uttering a racial slur, making a comment demeaning to women, or discriminating because of sexual preference a disciplinary offense." Killian II, *supra* note 37, at 15. The Board also approved proposed rule 4-8.7 pertaining to discrimination, but the Florida Supreme Court would eventually disapprove this rule. The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 624 So. 2d 720, 722 (Fla. 1993). The text of proposed rule 4-8.7 read as follows:

Before the next Board of Governors meeting convened, The Florida Bar Committee on Equal Opportunity in the Profession met and was brought up to date on the anti-bias proposal.[95] Members of the Board of Governors present at the meeting advised the Committee Members that the proposed anti-bias rule had been approved, but that the Board had declined to require that the Bar take responsibility for investigating claims of employment discrimination, relying instead on government agencies to take this role.[96] The proposal would consider an outside agency's finding of discrimination to be a presumed violation of the anti-bias rule.[97] The Board failed, however, to address situations in which no agency would address a particular type of discrimination, such as sexual orientation.[98] Nevertheless, the Board felt the proposal was stronger by making it clear that even though the rule did not specifically include the word "employment," the Board intended "to cover employment in the rule by barring discrimination 'in the course of the practice of law.'"[99] At least one Committee member suggested that the proposal include a "comment" expressing the Board's intent when the proposed rule was submitted to the Florida Supreme Court.[100] A "comment" to a Florida rule of court is a published explanation or elaboration of the rule.[101] As with a rule, any related comment must also be approved by the Florida Supreme Court.[102] The Board agreed that comments to the proposed rule would be addressed at its September 1992 Board meeting.[103]

Perhaps not surprisingly, the information about the proposed rule published in the *Florida Bar News* provoked many written responses, most of which opposed the proposed rule.[104] One commentator referred to the "angered" response of the

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> If a lawyer has been adjudicated or held to have committed, in the course of the practice of law, a prohibited discriminatory practice by a final order of an agency or court of competent jurisdiction, after all appellate rights have been exhausted, such conduct shall be subject to discipline under these Rules Regulating The Florida Bar.
>
> The finding of the agency or court making the determination shall be filed by the lawyer subject thereof with the executive director of The Florida Bar within 60 days of the entry thereof, and shall be admissible as prima facie evidence of a violation of these rules.

Id.

95. Gary Blankenship, *Committee Endorses Bias Rule Compromise*, FLA. BAR NEWS, Oct. 1, 1992, at 1.

96. *Id.*

97. Board to Vote, supra note 12, at 15.

98. *See* Friedman, *supra* note 4, at 3 ("[T]he proposed Bar rules require an outside agency or court to first find discrimination. As a practical matter it is not likely that there will be very many instances of sexual preference discrimination cases that will come before the Bar.").

99. *Id.*

100. *Id.*

101. *See* Amendment to the Rules Regulating the Florida Bar, 875 So. 2d 448, 452 (Fla. 2004) ("[t]he comment to the rule is amended to provide guidance"); *In re* Family Law Rules of Procedure, 663 So. 2d 1049, 1053–54 (Fla. 1995) ("comments to the rules are included for explanation and guidance only and are not adopted as an official part of the rules"); *In re* Amendment to Florida Rules of Judicial Administration, 550 So. 2d 457, 457 (Fla. 1989) (same).

102. *See* Reichman v. State, 497 So. 2d 293, 296 (Fla. 1st DCA 1986) (Barfield, J., concurring) (referring to the Supreme Court's disapproval of a proposed committee note); The Florida Bar re: Rules of Criminal Procedure, 482 So. 2d 311, 312 (Fla. 1985) (declining to approve a proposed committee note).

103. Gary Blankenship, *Bar Tables Proposed Anti-Bias Rule Comments*, FLA. BAR NEWS, Oct. 15, 1992, at 5 [hereinafter cited as Blankenship III].

104. *See infra* text accompanying notes 105–116. *See also* John B. Thompson, Letter, *Bias Rule*, Jan. 1, 1993, at 2 (referring to the "large volume of letters from members of The Florida Bar nearly unanimously expressing

membership.[105] While some objections focused on the entire rule itself,[106] the great majority of the complaints were focused on the inclusion of sexual orientation as a protected class.[107]

Objections to the inclusion of sexual orientation in the anti-bias rule trended along several arguments. One of the first objections raised was that the term "sexual orientation" was not defined in the proposed rule; and as a result, the rule could require an attorney to condone certain sexual practices the attorney found offensive.[108] One attorney asserted that he would not accept "unnatural sexual acts involving misuse of the human body by oral or anal intercourse, or other such practices."[109] As another attorney complained:

> What will this rule require of Florida lawyers? What sort of employee attitude and obnoxious conduct will one be forced to tolerate? Will discrimination against homosexuals in a social context be subject to the closest scrutiny and weighed to determine if it is "prejudicial to the administration of justice?" In this brave and bizarre new world, one can only wonder what will be next.[110]

This line of objection led to the invocation of those unlikely hyperbolic comparisons that often accompany discussions to provide legal protections to LGBT individuals.[111] One attorney expressed his perhaps feigned sense of hopelessness:

> Thanks to our Board of Governors, discrimination may soon be *verboten* against rapists, pedophiles and necrophiles. Let's not discriminate against those practicing incest or bestiality lest we be somehow less worthy of practicing law. Does our Board of

misgivings about the Bar's new 'anti-bias' rule."). One exception was a comment from one practicing attorney noting that if The Florida Bar "is to have any use at all, it should be to ensure that all honest attorneys, rich, poor, black, white, Indian, Hispanic, male, female, straight, gay, lesbian, young, old, or licensed resident aliens from Mars, receive the same opportunities and respect as all other attorneys." Karen T. Brandon, Letter, *Gender Handbook*, FLA. BAR NEWS, Oct. 15, 1992, at 3.

105. Mark D. Killian, *YLD Reaffirms Proposed Anti-Bias Rule Support*, FLA. BAR NEWS, Nov. 1, 1992, at 27 [hereinafter cited as Killian III].

106. Teresa J. Reid Rambo, Letter, *Bias Rules*, FLA. BAR NEWS, Sept. 15, 1992, at 2 (claiming that the proposed rule is poorly drafted); William J. Flynn, Letter, *Gender Handbook*, Fla. Bar News, Sept. 1, 1992, at 2 (calling the entire rule a "joke" and "unenforceable.").

107. *See infra* text accompanying notes 108–117.

108. John Risca Williams, Letter, *Bias Rule*, FLA. BAR NEWS. Sept. 1, 1992, at 2; *see also* Reid Rambo, *supra* note 106, at 2 (complaining that the entire rule is comprised of undefined terms). One commentator later expressed the contrary viewpoint, that the list of protected classes was sufficient to "particularize" the rule beyond a general proscription of conduct. Batey, *supra* note 92, at 394 n.39.

109. Williams, *supra* note 108, at 2.

110. Truesdell, *supra* note 83, at 2. Although Truesdell asserted that the "main thrust of the rule is right," with the exception of sexual orientation, he nevertheless also accused the Bar Board of Governors as presenting a "new high in racial hypersensitivity." Another attorney later commended Truesdell's response. William C. Davell, Letter, *Bias Rule*, FLA. BAR NEWS, Oct. 15, 1992, at 3.

111. *See, e.g.*, Stuart Golberg, *No Comment*, Progressive, Sept. 2013, at 5 (referring to a New Hampshire partisan who postulated that gay marriage laws would result in the legalization of plural marriages and bestiality).

> Governors personal agenda also wish to protect those Satanists who might sacrifice the occasional virgin?[112]

Even one member of the Board of Governors worried whether the rule could be used to discipline a lawyer who expressed views against "voodooism and Satanism."[113]

Another objection was that the rule would violate an attorney's First Amendment rights of freedom of religion and freedom of speech by prohibiting an attorney from expressing opprobrium for homosexual conduct or declining to hire a homosexual person.[114] One attorney, calling the proposal "downright offensive garbage," argued that attorneys have the constitutional right to associate with those who do not "assault their religious beliefs."[115] Still another attorney noted that if he had to choose between being a Christian and being an attorney, he would choose to stay with his Christian beliefs.[116]

A further objection recognized the long-held position of the armed forces barring openly LGBT members from serving,[117] as well as other Florida laws which treat LGBT persons differently from other minorities.[118] Those attorneys defending compliance with these laws would arguably run afoul of the anti-bias rule.[119]

A final objection was political in nature, arguing that the Florida Bar was pursuing a "liberal" agenda,[120] while bowing to "political correctness."[121] One attorney urged the Bar to devote "less time on homosexuals, discrimination, social issues," and the like.[122] Another attorney accused the Bar of being "struck with schizophrenia" for drafting "something so blatantly liberal as the 'anti-bias' rules,"[123] while another referred to "social engineering provoked by a small, amorphous but vocal group."[124]

Thanks in no small part to the public criticism, the Board of Governors began to feel the pressure to reconsider its decision.[125] As the September 24, 1992, meeting approached, individual Board members received many personal communications

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112. Charles E. Butler III, Letter, *Bias Rule*, FLA. BAR NEWS, Oct. 15, 1992, at 3. Another attorney complained that "Femme-Nazis have infiltrated the last bastion of intellectual freedom." Currier, *supra* note 46, at 3. For an argument invoking pedophilia as a sexual orientation, see *infra* text accompanying note 166.

113. Blankenship III, *supra* note 103, at 5.

114. Williams, *supra* note 108, at 2. The author asserted, however, that he supported the anti-bias rule being extended to other named categories. He did not explain why the First Amendment would not apply to those categories as well. *See also* Blankenship III, *supra* note 103, at 5 (referring to "concerns about First Amendment issues"); Friedman, *supra* note 4, at 3 (stating that "concerns about [. . .] religious opinions should not be dismissed lightly.").

115. L. Floyd Price, Letter, *Bias Rule*, FLA. BAR NEWS, Oct. 1, 1992, at 2.

116. Dale L. Price, Letter, *Bias Rules*, FLA. BAR NEWS, Sept. 15, 1992, at 2 ("I am placed in the position of choosing between losing my freedom of religious expression and association or terminating my law practice.").

117. Williams, *supra* note 108, at 2; Truesdell, *supra* note 83, at 2.

118. Truesdell, *supra* note 83, at 2 (noting the bans on gay adoption and gay marriage in the Florida Statutes).

119. *Id.*; Williams, *supra* note 108, at 2.

120. William A. Oughterson, Letter, *ABA Abortion*, FLA. BAR NEWS, Oct. 1, 1992, at 39.

121. Currier, *supra* note 46, at 3; Thompson, *supra* note 104, at 2. *See* John Hume, Letter, *Free Speech*, FLA. BAR NEWS, Apr. 1, 1993, at 2 (commending a federal judge for withstanding "political correctness" by ruling against allowing a lesbian and gay group from marching in the New York City St. Patrick's Day Parade).

122. Oughterson, *supra* note 120, at 39.

123. Eichelberg, *supra* note 45, at 3.

124. Friedman, *supra* note 4, at 3.

125. Killian III, *supra* note 105, at 27.

expressing grave concerns about the proposed rule.[126] Board Member Walter Campbell noted that he had "received numerous letters and numerous comments from my constituents, all who feel The Florida Bar should not be legislating in our rules regarding conduct over sexual preference."[127] Campbell, who earlier had supported the addition of sexual orientation to the rule, made a motion to reconsider the addition.[128] He argued that the original vote had divided The Bar; and further, because inclusion of sexual orientation was made based on a request actually received at the prior Board meeting, the Board had no fair notice then to consider the request with deliberation.[129] While several other Board members spoke in support of Campbell's motion for reconsideration, it failed by a single vote, eighteen to nineteen.[130] All the women on the Board of Governors present voted against reconsideration,[131] as did the two representatives from the Young Lawyers Division.[132]

The Board's Ad Hoc Committee on Discrimination also presented proposed comments at the September 1992 meeting for Board consideration.[133] The Committee's intention was to make clear that attorneys acting in accordance with existing law could not face Bar discipline.[134] The comments arose from a concern that under the proposed rule, those attorneys representing the military or the government could face sanctions because "military law prohibits homosexuals from serving and state law prohibits homosexuals from adopting."[135] Some also feared that without the comments, the rule could provide an impetus for complaints being brought against attorneys for conduct involving the attorney's personal life.[136] More than one Board member questioned whether this type of exemption should be in the actual rule itself, rather than merely a comment.[137] Unlike the addition of sexual orientation to the proposed rule, members of the Board raised sufficient questions

126. Gary Blankenship, *Board Stands Firm on Sexual Orientation Anti-Bias Rule*, FLA. BAR NEWS, Oct. 15, 1992, at 8 [hereinafter cited as Blankenship IV]. *See also* Killian III, *supra* note 105, at 27 ("a number of Board members received complaints from constituents angered with the addition of sexual orientation to the rule.").

127. Blankenship IV, *supra* note 126, at 8. Campbell later went on to become a Democratic member of the Florida State Senate. *Skip Campbell*, WIKIPEDIA, *available at* http://en.wikipedia.org/wiki/Skip_Campbell (last visited Sept. 26, 2013).

128. Blankenship IV, *supra* note 126, at 8.

129. *Id.*

130. *Id.*; Blankenship III, *supra* note 103, at 5; *Anti-Bias Rules*, *supra* note 11, at 11 (noting that the Board "rejected by one vote whether to reconsider its vote to include sexual orientation in the list.").

131. Blankenship IV, *supra* note 126, at 8. These included, among others, Patricia A. Seitz, who would go on to become a federal district court judge, and Edith G. Osman, who would go on to become a President of The Florida Bar. *See Coral Gables Attorney Named Federal Judge*, S. FLA. SUN SENTINEL, Sept. 30, 1998, *available at* http://articles.sun-sentinel.com/ 1998-09-30/ news/ 9809300097_1_coral-gables-seitz-president-clinton#.UieFkCPg 8IE.email (last visited Sept. 4, 2013); Kendra Brodin, *Edith Osman Interview*, Women Lawyers Online (2011), *available at* http://www.womenlawyersonline.com/2010/07/edith-osman-interview/ (last visited April 17, 2014).

132. Mark D. Killian, *YLD Reaffirms Proposed Anti-Bias Rule Support*, FLA. BAR NEWS, Nov. 1, 1992, at 27 [hereinafter cited as Killian IV].

133. Blankenship III, *supra* note 103, at 5.

134. *Id.*

135. *Id. See also Board to Vote*, *supra* note 12, at 15.

136. Blankenship III, *supra* note 103, at 5.

137. *Id.*

about the comments to cause the Board to vote to refer the comments for revision.[138] The matter was placed on the Board's November 1992 agenda.[139]

Just over two weeks later, the matter came before the Young Lawyers Division of The Florida Bar.[140] The Division's two representatives on the Board of Governors had voted in support of adding sexual orientation to the rule, and they had also voted against its reconsideration.[141] At the Young Lawyers Division meeting, they advised the members present that they would continue to oppose reconsideration unless they received different instructions from the Division.[142] On this issue, the Young Lawyers Division did not oppose the two representatives' position.[143] However, because the comments had been tabled at the Board of Governors meeting, no clear position had crystallized concerning the employment practices of individual attorneys. One of the Division's representatives stated that he was concerned about coercing attorneys to act against their "strong religious convictions" against hiring homosexual persons.[144]

Not until after these meetings were the first public comments published concerning the issue of AIDS.[145] Up until this time, those criticizing the proposed rule had avoided this subject. However, on November 15, 1992, the *Florida Bar News* published a letter from attorney Richard N. Friedman who expressed concern that homosexuals could conceivably bring AIDS into the workplace:

> While AIDS has crossed over into the heterosexual community, the vast majority of AIDS cases are demographically within the homosexual community. Scientists are not absolutely certain as to how AIDS is spread and people have rightful concerns about association with a member of a group which espouses a sexual lifestyle that is more prone to a syndrome that always brings certain death.[146]

Friedman was perhaps also the first attorney to have his comment published on what might be called the "yuck" factor as a reason to not extend the rule to LGBT persons.[147] He proffered that:

> [M]any heterosexuals simply feel uncomfortable in a workplace with homosexuals who manifest their sexual preference, and that can result in poor work performance amongst various employees in

138. *Id.*
139. *Id.*; *Board to Vote*, *supra* note 12, at 15. For reasons not readily apparent, the Board of Governors meeting for November was held in Washington, D.C.
140. Killian III, *supra* note 105, at 27.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *See* Mark A. Gager, Letters, *Safeguarding Rights*, FLA. BAR NEWS, Dec. 1, 1992, at 3.
146. Friedman, *supra* note 4, at 3; *see also* Guyer, *supra* note 52, at 2 ("AIDS is almost exclusively a disease of drug addicts, homosexuals, prostitutes and adulterers.").
147. Friedman, *supra* note 4, at 3.

> the same way that a heterosexual person who is, for example, overly promiscuous might cause an uneasy situation to exist in the workplace resulting in lower productivity.[148]

Friedman's letter was in contradistinction to that of Mark A. Gager, one of the few attorneys who wrote in favor of the proposed rules.[149] Gager argued that:

> Sexism and bigotry must end. We must by our own example free our minds and our profession of the ignorance and fear which causes hatred. How can we do our jobs properly if in our own office we foster archaic prejudices and obsolete stereotypes? . . .We may not always approve or like the gender, race, creed, or lifestyle of our clients and coworkers, but our duty is not to sit in judgment. Our obligation is not to "wash our hands" of a person who is different from us. Our job is to do our job and do it zealously and in good conscience. For if we do not then we will not stand up for people who we think are unsavory. Then we will not stand up for people who are labeled by stereotypes and prejudice. Then after civil rights have been completely eroded we may be too weak to stand up for people who were once considered mainstream, but are now oppressed.[150]

As the November meeting approached, an ad hoc committee of the Board of Governors attempted to draft comments that would address the many concerns raised at the October Board meeting.[151] Perhaps surprisingly, the Board of Governors approved the comments at the November meeting without lengthy debate.[152] The

148. *Id.*
149. Gager, *supra* note 145, at 3.
150. *Id.* The attorney also alluded to the unwillingness of others to support the Jews during the Holocaust. *Id.*
151. Gary Blankenship, *Anti-Bias Rules Sent to High Court*, FLA. BAR NEWS, Dec. 1, 1992, at 1 [hereinafter Blankenship V].
152. *Id.* The proposed comment to Rule 4-8.4(d), relating to misconduct related to discrimination, read as follows:

> Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes, without limitation, the prohibition against certain discriminatory conduct committed by a lawyer while engaged in the practice of law. Such conduct, when directed towards litigants, jurors, witnesses, court personnel, or other lawyers whether based on race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, or age, subverts the administration of justice and undermines the public's confidence in our system of justice, as well as traditional notions of equality. Accordingly, where such conduct is not otherwise protected or authorized by applicable law or rules of evidence, such as when a lawyer is examining a witness or adducing admissible evidence or matter that may lead to admissible evidence, discipline under the Rules Regulating The Florida Bar is appropriate.
>
> Unlike rule 4-7.8, this rule does not require a prior finding by a court or an agency as a condition of enforcement by The Florida Bar.Subdivision (d) of this rule does not prohibit a lawyer from representing a client as may be permitted by applicable law, such as, by way of example, representing a client accused of committing discriminatory conduct or impeaching the credibility of witnesses or challenging fitness in custody or adoption proceedings.

chair of the committee noted that he believed the group drafted the comments by considering every possible interpretation of the rules.[153] The comments noted a safe harbor for an attorney—if discriminatory conduct does not violate law, it cannot serve as a basis for attorney discipline.[154] A contingent of the Board wanted to make the rules stronger than those proposed by the committee by clearly specifying that "lawyers could not discriminate in the running of their practices, including in hiring, firing, promotions, and pay."[155] The Board ultimately, however, approved the proposed comments, with a single disapproving vote.[156] All in all, the Board felt the rule and comments adequately specified what conduct was improper, and attorneys who "act like lawyers" in representing their clients would not be disciplined.[157] The proposed rule and comments were thereupon referred to the Florida Supreme Court for consideration.[158]

In keeping with Florida Bar procedures,[159] the entire proposed rule was published in the *Florida Bar News* on December 1, 1992, soliciting responses from any interested party.[160] Publication of the notice provoked another wave of responses.[161] Although the Rules specifically provided that these comments were to be "served on the executive director of The Florida Bar,"[162] many of them were instead submitted to the *News* and subsequently published as letters to the editor.[163] Not until June 1993, however, did the Florida Supreme Court call for comments to the similar proposed changes to the judicial canons.[164]

The new wave of comments provided additional arguments against the proposed rule.[165] One attorney argued that pedophilia was "a sexual orientation;" and as a

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Official Notice: Bar Proposes Anti-Bias Rules, FLA. BAR NEWS, Dec. 1, 1992, at 4 [hereinafter *Official Notice*].

153. Blankenship V, *supra* note 151, at 1.

154. *Id.*

155. *Id.* at 5.

156. *Id.* This almost unanimous approval of the comments did not, however, mean that the Board was nearly unanimous in its approval of the underlying rule. Even at this meeting, some Board members continued to doubt "the constitutionality of the rules as explained in the comments." *Id.* For a discussion of previous arguments pertaining to the constitutionality of the proposed rule, see *supra* text accompanying notes 72, 114–15.

157. Blankenship V, *supra* note 151, at 1.

158. *Id.*

159. RULES REGULATING THE FLA. BAR, Rule 1-12.1(g) (1992):

> Notice of intent to file a petition to amend these Rules Regulating The Florida Bar shall be published in The Florida Bar News at least 30 days before the filing of the petition. The notice shall set forth the text of the proposed amendments, shall state the date the petition will be filed and shall state that any comments or objections must be filed within 30 days of filing the petition. A copy of all comments or objections shall be served on the Executive Director of The Florida Bar and any persons who may have made an appearance in the matter.

Id. See also The Florida Bar Re: Amendments to Rule Regulating the Florida Bar, 587 So. 2d 1121, 1124–25 (Fla. 1991) (setting forth and approving language of rule); Henry P. Trawick, Jr., Letter to the Editor, *Social Engineering*, FLA. BAR NEWS, Dec. 1, 1993, at 2 [hereinafter Trawick] (criticizing the process).

160. The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 624 So. 2d 720, 721 (Fla. 1993). *Official Notice*, *supra* note 152, at 4.

161. *See infra* text accompanying notes 166–169.

162. RULES REGULATING THE FLA. BAR, Rule 1-12.1(g) (1992).

163. *See infra* text accompanying notes 165–169; Thompson, *supra* note 104, at 2; Robert G. Kerrigan, Letter to the Editor, *Gender Bias*, FLA. BAR NEWS, Feb. 1, 1993, at 2.

164. *Supreme Court to Consider*, *supra* note 15, at 1, 10.

165. George R. Dekle, Sr., Letter to the Editor, *Anti-Bias Rule*, FLA. BAR NEWS, Jan. 15, 1993, at 2.

result, "suspected pedophiles" must be allowed to remain on a jury if the rule were adopted.[166] He continued that the right to use peremptory challenges in general would be eliminated.[167] The attorney believed the issue was really one of mere etiquette, and therefore the rule was unnecessary because "you cannot legislate morality."[168] Another attorney mentioned the possibility of "Gay Bar and Pedophile Bar associations," wondering if those organizations were already in the process of being created.[169]

By January 1, 1993, before the report proposing the rule had even been formally presented to the Florida Supreme Court,[170] one attorney filed a lawsuit in the Eleventh Judicial Circuit of Florida to have the rule declared unconstitutional.[171] He noted his belief that most attorneys in the state would support his lawsuit because of the numerous letters published in the *Florida Bar News* "nearly unanimously expressing misgivings" concerning the rule.[172]

The first printed complaint in the *Florida Bar News* mentioning transgender persons appeared in February 1993.[173] Here the attorney, after giving tongue-in-cheek accolades to the Bar for addressing the "very serious business" of "name-calling," asked whether it were improper to refer to a "transvestite" judge as "she."[174] The same attorney further wondered how an attorney could avoid discipline if it were not clear to the attorney if the person was a man or a woman.[175]

THE FLORIDA SUPREME COURT AND THE APPROVED RULES

The Florida Bar did not submit its petition unilaterally.[176] It was joined by the group of attorneys who had originally initiated the petition process.[177] While both groups agreed that sexual orientation should be covered by the rule, they disagreed

166. *Id.*

167. *Id. See* Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 13 n.41 (1997) (noting that the Florida rule does not "expressly mention peremptory challenges").

168. Dekle, *supra* note 165, at 2.

169. James W. Middleton, Letter to the Editor, *Rainbow Bar?* FLA. BAR NEWS, Apr. 1, 1993, at 2. The main gist of Middleton's letter, however, was dissatisfaction with the creation of an African-American Bar Association in Florida, which divided Florida attorneys into "us" and "them." *Id.*

170. Under Florida Supreme Court procedures, a petition is not filed with the Florida Supreme Court immediately upon the Bar's providing official notice of the rule. RULES REGULATING THE FLORIDA BAR, Rule 1-12.1(g) (1992), (referring to notice of "intent" to file petition). In this case, the notice provided that the petition would be filed "on or about January 4, 1993." *Official Notice*, *supra* note 152, at 4.

171. Thompson, *supra* note 104, at 2.

172. *Id.* The Florida Supreme Court later summarily upheld the constitutionality of the rule against a vagueness challenge. Fla. Bar v. Von Zamft, 814 So. 2d 385, 388 (Fla. 2002); *see* 4 Fla. Jur. 2d *Attorneys at Law* §118 (West 2014) (briefly discussing *Von Zamft*).

173. Kerrigan, *supra* note 163, at 2.

174. *Id.*

175. *Id.*

176. Mark D. Killian, *Supreme Court Hears Bias Rules Arguments*, FLA. BAR NEWS, Apr. 15, 1993, at 3 [hereinafter Killian V].

177. *Id.* For a discussion of the initiation of the petition process, *see supra* text accompanying note 12. *See* Suellyn Scarnecchia, *State Responses to Task Force Reports on Race and Ethnic Bias in the Courts*, 16 HAMLINE L. REV. 923, 947 (1993) (explaining the process of how the petition was submitted jointly in Florida). Other groups similarly expressed support in public speeches in favor of the rule amendments, such as the Equal Opportunities in the Profession Committee. *See Bar Panel Recommends Goals for Hiring Minority Lawyers*, FLA. BAR NEWS, June 15, 1993, at 16.

as to how the employment discrimination rule should be enforced.[178] Supreme Court review, however, was not limited to the joint petition. The court received twenty-two briefs and written comments from interested parties, six in favor of the proposals and sixteen opposed.[179] One of the briefs filed in favor of the proposal was that of the Gay and Lesbian Lawyers Association,[180] the group that was instrumental in having sexual orientation added to the proposal.[181]

The Florida Supreme Court set oral argument for April 5, 1993.[182] The Court heard not only from the group of petitioners and the Board of Governors, but also several interested parties.[183] The proponents of the rules set out their primary argument: The rules relied primarily on constitutional arguments, as well as an attorney's duty to zealously represent a client.[184] Those appearing against the rules "argued the rules infringe on lawyers' constitutional rights, could chill zealous advocacy, and are overbroad."[185] Frank Scruggs, the attorney who had begun the petition process,[186] argued that "25 years after the assassination of Dr. Martin Luther King, Jr., the nation should not still be debating discrimination."[187] Alan Dimond, President of The Florida Bar, dismissed claims that the rule would violate an attorney's First Amendment rights by arguing that the rule was limited in scope to lawyers acting as lawyers.[188] As a result, he argued the rule would survive First Amendment scrutiny.[189] Rosemary B. Wilder, a Miami attorney, presented an oral argument on behalf of GALLA, the LGBT lawyers group.[190] She responded to concerns about the potential vagueness of the proposal by arguing that "the Florida Supreme Court can easily determine what is discrimination and misconduct and what is not."[191]

Attorney Robert M. Brake, however, argued specifically against the sexual orientation and marital status portions of the rule, noting that attorneys have a

178. Killian V, *supra* note 176, at 3. The Bar sided with New Jersey, New York, Minnesota, and California, all of which required an agency finding of discriminatory conduct before Bar discipline could be imposed. *Id.* The petitioner group, however, sided with Vermont, the District of Columbia, and Michigan, which authorized their Bars to "prosecute discrimination claims." *Id. See also* Mark D. Killian, *Court Approves Anti-Bias Rules*, FLA. BAR NEWS, July 15, 1993, at 1 [hereinafter Killian VI] ("The petitioners wanted the Bar to investigate alleged employment discrimination. The Board of Governors proposed having the Bar act only after another agency had made a final finding of discrimination by a lawyer."); Scarnecchia, *supra* note 177, at 947 (noting how the two groups submitted competing proposals concerning employment discrimination, but were in agreement as to the actual anti-bias rule).

179. Killian V, *supra* note 176, at 3. "Those objecting to the anti-bias rules included groups as diverse as the Center for Law and Religious Freedom and the Florida Chapter of the American Civil Liberties Union." *Id.*

180. *Id. See* Blankenship II, *supra* note 75, at 5.

181. *See supra* text accompanying notes 85–90.

182. Killian V, *supra* note 176, at 1, 3.

183. Because of the amount of speakers desiring to speak in opposition to the proposal, each opposing speaker was given only a very brief time to make a statement. *See* Trawick, *supra* note 159, at 2 (noting that he was given only ninety seconds to make his argument).

184. Killian V, *supra* note 176, at 1.

185. *Id.*

186. *See* Killian VI, *supra* note 178, at 1; *see also supra* text accompanying note 12.

187. Killian V, *supra* note 176, at 3.

188. *Id.* at 1, 3.

189. *Id.*

190. *Id.* at 1, 3. *See supra* notes 85–87 and accompanying text (discussing GALLA).

191. Killian V, *supra* note 176, at 3.

"constitutional right to believe the conduct is wrong, speak and write that it is wrong, and in the right of privacy and association, not associate with persons who engage in that sort of conduct."[192] He raised the specter that under the rules, attorneys would not be able to disassociate themselves from Nazis and members of the Ku Klux Klan.[193] Attorney Douglas K. Silvis believed that the expansion of racial discrimination protection to include sexual orientation would circumscribe his religious tenets, including the sharing of his faith, and stated "[i]t would be wrong for me to be in a law or business practice with people who do not share my religious convictions because of the spiritual accountability that goes along with the legal principle of accountability of partners."[194]

On July 1, 1993, the Florida Supreme Court issued its decision on the rule case.[195] The Bar's proposal differed from that ultimately approved by the Court. The Court rejected completely proposed Rule 4-8.4(h) dealing with employment discrimination, providing four reasons for doing so.[196] First, the Court believed it did not have the constitutional power to regulate the area of employment, even if it involved attorneys.[197] Second, the Court found that federal and state law already set forth a procedure for handling discrimination claims.[198] Third, the proposed rule provided no "clearcut standards" to determine misconduct.[199] And fourth, the rule would cost too much to implement.[200] Three of the Justices disagreed with this part of the ruling, believing instead that the Florida Supreme Court does have constitutional authority to regulate a lawyer's employment practices.[201] In sum, these three Justices argued that "if all qualifying factors for a position are present, one cannot refuse to hire simply because of a person's 'status,' a totally irrelevant consideration. This is right and we should say so."[202]

As for the anti-bias portion of the proposal, Rule 4-8.4(d), the Florida Supreme Court unanimously approved the rule with two minor variations.[203] First, the Court specifically limited application of the rule to conduct "in connection with the practice of law," and second, the Court expanded the reach of the rule to "any basis" of bias, specifically adding "socioeconomic status, employment, or physical characteristic."[204] Hearkening back to the argument made by Victoria Sigler when

192. *Id.*
193. *Id.*
194. *Id.*
195. *See* The Florida Bar re: Amendments to Rules Regulating the Florida Bar, 624 So. 2d 720, 720 (Fla. 1993). *See* Terl, *supra* note 8, at 830–31 (discussing Supreme Court decision).
196. *Amendments to Rules*, 624 So. 2d at 722. *See also* Killian VI, *supra* note 178, at 1 ("The court rejected both proposed employment discrimination rules."); Terl, *supra* note 8, at 831.
197. *Amendments to Rules*, 624 So. 2d at 722. *See also* Killian VI, *supra* note 178, at 3 (discussing the Court's rationale).
198. *Amendments to Rules*, 624 So. 2d at 722.
199. *Id.*
200. *Id.*
201. *Id.* at 723–24 (Barkett, C.J., concurring). Justice Rosemary Barkett was joined by Justices Leander Shaw and Gerald Kogan.
202. *Id.* at 724. *See* Killian VI, *supra* note 178, at 3 (discussing view of dissenting Justices).
203. *Amendments to Rules*, 624 So. 2d at 722.
204. *Id. See also* Killian VI, *supra* note 178, at 1, 3 (quoting the rule as approved by the Florida Supreme Court).

she first proposed adding sexual orientation to the rule,[205] the Supreme Court briefly explained its reasoning for approving Rule 4-8.4(d):

> A judicial system cannot survive public confidence in its evenhanded administration of justice. As officers of the court, lawyers involved in the system have a significant impact upon the public's perception of the system's objectivity. A system of justice that tolerates expression of bias by lawyers cannot maintain public confidence in the discharge of its responsibilities to assure equal justice.[206]

The Court also dismissed First Amendment objections by noting that the limitation of the rule to "conduct in connection with the practice of law" sufficiently protected an attorney's First Amendment rights.[207]

The Supreme Court's ruling was analyzed as front-page news in the July 15, 1993 issue of the *Florida Bar News*.[208] Florida attorneys were advised in a fairly conspicuous subheading that the "[r]ules now provide sanctions for attorneys who discriminate in legal proceedings, but stop short of regulating practices."[209] While the proponents of the rule amendments were not completely satisfied with the decision, they did recognize it as a major milestone against discriminatory conduct.[210] Alan Dimond, who had been President of the Bar at the time the case was argued, viewed the Court's decision as a "public declaration against discrimination," bringing Florida courts into "the national forefront in the fight for equal justice."[211] Patricia Seitz, the new President of the Bar, predicted that notwithstanding the opposition from some lawyers, now that the anti-bias rule was adopted, Florida lawyers would fall in line and work towards a non-discriminatory system of justice.[212]

Not all members agreed with Seitz. One attorney quickly responded to the decision by arguing that the new rule was "pernicious" because it will limit the ability of a lawyer to use necessary "dramatic tools" to represent their clients.[213] In an unusual move apparently aimed at ameliorating this attorney's concerns, the editor

205. *See supra* text accompanying notes 85–90.

206. *Amendments to Rules*, 624 So. 2d at 721. *See also* Killian VI, *supra* note 178, at 1 (summarizing the Court's rationale); Lonnie T. Brown, Jr., *Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy*, 22 REV. LITIG. 209, 218–19 & n.31 (2003) (discussing rationale in Florida).

207. *Amendments to Rules*, 624 So. 2d at 721. *See* Robert A. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 2026 (2003) (referring to "otherwise protected speech" that "can merit disciplinary action"). *See also supra* note 172 (discussing unsuccessful vagueness challenge). *See generally* Andrew E. Taslitz and Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996).

208. Killian VI, *supra* note 178, at 1.

209. *Id.*

210. *Id.* at 3.

211. *Id.*

212. *Id.* As earlier noted, Seitz later became a federal district court judge. *See supra* note 131.

213. Harry D. Lewis, Letter, *Disparagement Rule*, FLA. BAR NEWS, Aug. 1, 1993, at 2 (arguing that "discrimination based on moral degeneracy" might be proper and "richly deserved" in a given case).

of the *Florida Bar News* responded by noting that "[r]elevant remarks in furtherance of zealous representation are allowed, as set out in the comments to the rule."[214] Two months later, another attorney expressed condescending frustration with the reach of the rule when he noted cynically that he "was somewhat disheartened that lawyers are still allowed to disparage, humiliate, and discriminate when it is *relevant* to the proof of any legal or factual issue in dispute."[215] He further suggested that the creation of minority bar associations was in itself a violation of the rule, and that he could not use the gender-based rules of etiquette he had learned as a child.[216] This was followed by a letter from another attorney who accused the Florida Supreme Court of "approv[ing] social engineering in the guise of legal ethics."[217]

Supporters of the rule responded. A Stetson University law student, who identified himself as a "white heterosexual,"[218] responded with a clear defense of the rule, specifically arguing that an attorney's:

> [T]houghts and opinions are his own. However, under the amendment, he may not act with impunity on attitudes of bias which adversely impact on those in the legal system. [. . .] To the extent "political correctness" seeks equal application of justice for all legal practitioners and litigants, as embodied in the amendment, so be it. It is time our society and our legal profession celebrate our diverse society and acknowledge that it is a violation of principles of humanity and justice to tolerate unequal treatment based on bias against race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment or physical characteristic.[219]

On September 29, 1994, more than a year after approval of the attorney conduct rule, the Florida Supreme Court further approved the amendment to Canon 3B(5) governing judicial conduct, to take effect January 1, 1995.[220] The language was modeled after the language proposed as part of the American Bar Association Model Code of Judicial Conduct.[221] However, upon a suggestion from a petitioner, the Supreme Court added a final sentence not appearing in the Model Code to make clear a judge could consider anything relevant to the proceeding before the judge without violating the Canon.[222]

214. *Id.*
215. Douglas M. Fraley, Letter, *Discrimination*, FLA. BAR NEWS, Oct. 1, 1993, at 2.
216. *Id.*
217. Trawick, *supra* note 159, at 2.
218. Michael T. Dolce, Letter, *Bias Amendment*, FLA. BAR NEWS, Nov. 1, 1993, at 4.
219. *Id.*
220. *In re* Code of Judicial Conduct, 643 So. 2d 1037, 1039–40 (Fla. 1994). *See* Terl, *supra* note 8, at 831 (discussing amendment).
221. *Code of Judicial Conduct*, 643 So. 2d at 1037–38.
222. *Id.* at 1037, 1039–40.

ENFORCEMENT OF THE RULE AND CANON

Violation of the anti-disparagement rule[223] may subject a Florida attorney to discipline.[224] Since the rule was promulgated twenty years ago, however, only seven Florida reported cases[225] have discussed the rule while mentioning sexual orientation,[226] and only two more out of state.[227] One commentator has defined Florida's anti-disparagement rule as being within the realm of "civility,"[228] and noted that traditionally a mere isolated breach of a civility rule will not garner Bar discipline.[229] Nevertheless, the rule, which is broader in scope than most states,[230] has served as a model for other jurisdictions.[231]

In practice, the scope of conduct governed by the rule, although extensive,[232] has not raised much dispute. One commentator referred to the Florida rule as regulating conduct "in the course of client representation."[233] Although the Florida Supreme Court had added a qualifier on the rule that it was limited in scope to an attorney's

223. Although the Florida rule has long been referred to as the "anti-discrimination rule," it has also been referred to, perhaps more precisely, as the "anti-disparagement rule." *See* Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 878 (2003); Lewis, *supra* note 213, at 2.

224. 4 Fla. Jur. 2d *Attorneys at Law* §103 (2008).

225. Fla. Bar v. Ratiner, 46 So. 3d 35 (Fla. 2010); Fla. Bar v. Kleppin, 2010 WL 6983305 (Fla. 2010); *In re* Amendments to the Rules Regulating the Fla. Bar, 24 So. 3d 63 (Fla. 2009); Fla. Bar v. Abramson, 3 So. 3d 964 (Fla. 2009); Amendment to the Rules Regulating the Fla. Bar, 875 So. 2d 448 (Fla. 2004); Fla. Bar v. Frederick, 756 So. 2d 79 (Fla. 2000); Fla. Bar v. Schramm, 668 So. 2d 585 (Fla. 1996).

226. Under Florida Bar procedures, not every disciplinary action against an attorney is released for publication or otherwise made public. *See In re* Fuller, 930 A.2d 194, 195, 199 (D.C. 2007) (referring to a difference between Florida Bar discipline and D.C. Bar discipline).

227. Winston v. Boatright, 649 F.3d 618, 631 (7th Cir. 2011) (noting that the Florida rule prohibits discrimination in selection of jurors); *In re* Fuller, 930 A.2d at 197 & n.3 (D.C. 2007) (attorney admitted in both Florida and District of Columbia received reciprocal D.C. punishment as a result of Florida violation of rule 4-8.4(d) when attorney erroneously referred to his client as a quadriplegic).

228. David A. Grenardo, *Making Civility Mandatory: Moving from Aspired to Required*, 11 CARDOZO PUB. L., POL'Y & ETHICS J. 239, 255 n.90 (2013) ("Florida uses Rule 4-8.4 to enforce civility").

229. *Id.* at 255, *quoting* John T. Berry, former Director of the Center of Professionalism at the University of Florida College of Law. *See id.* at 243 n.14, 256 n.91. *See also In re* Code for Resolving Professionalism Complaints, 116 So. 3d 280, 280–81(Fla. 2013) (noting that in terms of attorney discipline, "Florida has traditionally followed a more passive, academic approach," but proposing a new more "active" approach).

230. Brown, *supra* note 206, at 281 n.273 (explaining that Florida's anti-bias rule "goes even further with regard to the categories protected and the scope of the conduct prohibited").

231. *Comm'n on Gender Fairness in the Courts Rep.*, *reprinted in* 72 N.D. L. REV. 1115, 1146 n.51 (1996) (referring to the Florida rule as a "possible model" for North Dakota attorneys). *See* Kuehn, *supra* note 207, at 1997 & n.122, 1998 & nn. 123–26, 2026 & nn. 255, 258 (discussing the "increasing number of states" to adopt professional conduct rules prohibiting attorneys from discriminating based on sexual orientation); Steven Richman, *Professional Ethics and Bias in the Profession*, N.J. LAW., Dec. 2001, at 37, 43 (wondering whether New Jersey will "move towards the approach of Florida"); Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 ALBANY L. REV. 153, 157 & n.18 (2000) (comparing the Florida rule to that of New York).

232. *See* Heather M. Kolinsky, *Just Because You Can Doesn't Mean You Should: Reconciling Attorney Conduct in the Context of Defamation with the New Professionalism*, 37 NOVA L. REV. 113, 128 (2012) (referring to the rule as being "broadly written"). States not having language referring to sexual orientation have, however, found disparagement based on sexual orientation to be a violation of general professional conduct rules. *See, e.g.*, *In re* Hammer, 718 S.E.2d 442, 444 (S.C. 2011) (attorney who asked about witness's sexual orientation and HIV status, not relevant to the proceeding, violated South Carolina general professionalism rules).

233. Ashley Kissinger, *Civil Rights and Professional Wrongs: A Female Lawyer's Dilemma*, 73 TEX. L. REV. 1419, 1453–54 (1995). *See also* Kuehn, *supra* note 207, at 1998.

conduct "in connection with the practice of law,"[234] the Court later construed the "practice of law" beyond merely being involved in an active court proceeding.[235] In *The Florida Bar v. Frederick*,[236] an attorney was accused of misconduct involving coercive actions towards a client.[237] Hearkening back to the debate surrounding the proposal of the rule,[238] the attorney argued that the conduct was beyond the scope of Rule 4-8.4(d) because the conduct did not involve a pending court case.[239] The Supreme Court rejected this narrow construction of the practice of law, noting that it involved an attorney's conduct concerning not only clients, but non-clients who might have some relationship to a legal situation involving the attorney.[240]

In several cases, the Florida Supreme Court has applied the rule to conduct that it found to be disparaging, although not specifically dealing with sexual orientation. [241]A review of these cases, however, suggests what type of misconduct may trigger discipline if the disparagement involves sexual orientation. In the first case reported based singularly on Rule 4-8.4(d) since the promulgation of the rule, *The Florida Bar v. Uhrig*, the attorney sent an opposing party a letter which, among other things, referred to the party's "body odor."[242] The Court found that this was done merely to disparage the person in violation of the rule.[243] In another case a few years later, an attorney was reprimanded for mailing an opposing party various religious items completely irrelevant to the case handled by the attorney.[244] Similarly, the Court found no purpose for this letter, other than to humiliate the other party.[245]

The first reported case specifically addressing ethnicity was decided in 2001, *The Florida Bar v. Martocci*.[246] In this case, the attorney used several derogatory comments against an opposing party, including telling her to "go back to Puerto Rico."[247] The Florida Supreme Court imposed a penalty which included two years' probation.[248] Three years later, the Court considered a case in which an attorney had

234. The Florida Bar re: Amendments to Rules Regulating The Florida Bar, 624 So. 2d 720, 722 (Fla. 1993). This was precisely the position argued by the Bar – that attorneys are free "to do whatever they like outside the practice of law." Killian V, *supra* note 176, at 3. *See also* Robert R. Kuehn, *Shooting the Messenger: The Ethics of Attacks on Environmental Representation*, 26 HARV. ENVTL. L. REV. 417, 451 (2002) (discussing limitation of Florida rule to "conduct in connection with the practice of law"); Terri R. Day & Scott L. Rogers, *When Principled Representation Tests Antidiscrimination Law*, 20 W. NEW ENG. L. REV. 23, 33 & n.36 (1998) (discussing the Florida rule).

235. *See generally* Fla. Bar v. Frederick, 756 So. 2d 79 (Fla. 2000).

236. *Id.* at 79.

237. *Id.* at 87.

238. *See Board to Vote*, *supra* note 12, at 15 (referring to those who "worried the comments, as drafted, were too broad and could be used against lawyers for activities outside the practice of law").

239. *Frederick*, 756 So. 2d at 86.

240. *Id.*

241. *See* Fla. Bar v. Uhrig, 666 So. 2d 887 (Fla. 1996); Fla. Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001); Fla. Bar v. Forrester, 916 So. 2d 647 (Fla. 2005); Fla. Bar v. Knowles, 99 So. 3d 918 (Fla. 2012).

242. *Uhrig*, 666 So. 2d at 888. *See* Timothy P. Chinaris, *Professional Responsibility: 1996 Survey of Florida Law*, 21 NOVA L. REV. 231, 258–59 (1996) (discussing *Uhrig*).

243. *Uhrig*, 666 So. 2d at 888.

244. Fla. Bar v. Buckle, 771 So. 2d 1131, 1132 (Fla. 2000).

245. *Id.*

246. *Martocci*, 791 So. 2d at 1074.

247. *Id.* at 1075.

248. *Id.* at 1078.

falsely referred to a person as a "child molester" and a "pedophile."[249] The Court found such conduct violated the rule.[250] Most recently, the Court found an attorney to have violated Rule 4-8.4(d) when she, among other things, referred to her former client's immigration status.[251]

The few cases reported suggest, as previously noted, that The Florida Bar not only forwards only cases of serious or repeated misconduct to the Florida Supreme Court,[252] but also receives fewer referrals for these violations.[253] When no other misconduct is apparent, a public reprimand has been the most common form of discipline.[254] However, when disparagement is coupled with other misconduct, the attorney has received a probationary term and, in some instances, suspension from the practice of law.[255]

The Florida Supreme Court has recently adopted[256] a new set of professionalism rules establishing Local Professionalism Committees to more informally address complaints that typically would not have been pursued by The Florida Bar.[257] In adopting the rule, the Court recognized that previous efforts to address professionalism have not been as aggressive as may be needed to curb the rise in unprofessional conduct among Florida attorneys.[258] Isolated incidents of disparagement that in the past might not have been pursued through the formal disciplinary process now have a new avenue of redress.[259]

Canon 3B(5) has similarly not raised much dispute. On three occasions since its promulgation, the Florida Judicial Ethics Advisory Committee (JEAC)[260] has referred to the Canon when issuing an opinion. In the first case involving a request for an opinion under a very general set of facts, the JEAC noted that opinions concerning a judge's conduct under the canon were difficult to offer because the JEAC would have to know the specific conduct at issue giving rise to the request for an advisory opinion.[261] This request involved a general request concerning the religious beliefs of prospective jurors.[262] The Committee intimated that sometimes a line of questioning might violate the rule, but declined to offer an opinion due to the general nature of the request.[263]

249. Fla. Bar v. Forrester, 916 So. 2d 647, 649 (Fla. 2005).
250. *Id.* at 654.
251. Fla. Bar v. Knowles, 99 So. 3d 918, 920 (Fla. 2012).
252. *See supra* text accompanying note 229.
253. Telephone Interview with Alan A. Pascal, Bar Counsel, The Florida Bar (Sept. 20, 2013).
254. Fla. Bar v. Buckle, 771 So. 2d 1131, 1134 (Fla. 2000); Fla. Bar v. Uhrig, 666 So. 2d 887, 888 (Fla. 1996).
255. Fla. Bar v. Martocci, 791 So. 2d 1074, 1078 (Fla. 2001) (public reprimand and two years' probation); *Forrester*, 916 So. 2d at 654–55 (suspension); *Knowles*, 99 So. 3d at 925 (suspension).
256. *In re* Code for Resolving Professionalism Complaints, 116 So. 3d 280, 282 (Fla. 2013).
257. Fla. Code for Resolving Professionalism Complaints (2013), adopted in *In re* Code, 116 So. 3d at 282–84.
258. *In re* Code, at 281.
259. *See supra* text accompanying notes 229 (discussing need for repeated misconduct before Florida Bar discipline is available).
260. In Florida, the Judicial Ethics Advisory Committee provides "written advisory opinions to inquiring judges concerning the propriety of judicial and non-judicial conduct." Petition of the Comm. on Standards of Conduct Governing Judges, 698 So. 2d 834, 835 (Fla. 1997).
261. Fla. Jud. Ethics Advisory Comm., Op. 99–8 (1999).
262. *Id.*
263. *Id.*

In a subsequent JEAC case, a judge desired to serve on a non-profit organization which had as its goal to "study race relations."[264] The JEAC relied on the canon in buttressing its opinion that a judge could in fact serve on such an organization, because the judge's role is to serve "without bias or prejudice."[265] The JEAC further noted all specified categories in the canon, including sexual orientation.[266]

In the final case, the JEAC considered a request that candidates for judicial office sign a diversity pledge provided by the Cuban American Bar Association that the candidate "proudly pledge[s] to treat all who come before the Court, be they litigants, attorneys, jurors or witnesses, equally with respect, regardless of their race, gender, ethnicity, national origin, religion, or sexual orientation."[267] The candidate was also asked to pledge that the candidate's "staff will always do the same."[268] The JEAC found that this portion of the pledge was consistent with a judge's obligations under Canon 3B(5).[269]

CONCLUSION

In 1992 and 1993, the LGBT community in Florida was at the forefront of many controversial issues facing not just the legal community, but also the citizenry at large. The majority of LGBT persons still feared leaving the closet because of the possibility of losing employment, as well as family, friends, and a place to live.[270] Now more than twenty years after the anti-bias rule debate began, being out of the closet is not an impediment to success for many LGBT professionals.[271] Similarly, in the legal field, while most LGBT attorneys believe discrimination is still common in the legal profession, the great majority of LGBT attorneys themselves claim not to have experienced discrimination.[272] Fewer and fewer LGBT persons remain in the closet.[273] The presence of LGBT persons in society at large is becoming more commonplace.[274] Nevertheless, LGBT persons continue to face publicly expressed opprobrium,[275] although it is now often quickly condemned.[276]

264. Fla. Jud. Ethics Advisory Comm., Op. 2004–32 (2004).
265. *Id.*
266. *Id.*
267. Fla. Jud. Ethics Advisory Comm., Op. 2008–14 (2008).
268. *Id.*
269. *Id.* The JEAC, however, found that other portions of the pledge had to be amended to avoid violating that portion of the Canons which requires a judge to be impartial. *Id.*
270. CROCKETT, *supra* note 31, at 94 (referring to the early 1990s, Crockett noted that LGBT persons "are still only marginally tolerated by many in this society, and constantly 'bashed' on many levels").
271. *See* MARCUS, *supra* note 31, at 108. In 1980, writer Brian McNaught pointed out that for many LGBT persons, the closet remained the only viable option if someone wanted to retain "steady employment." MCNAUGHT, *supra* note 21, at 19.
272. *See* Lancia, *supra* note 11, at 963 n.133 (noting that in 2006, twenty-one percent of attorneys attending a LGBT-related national legal conference reported workplace discrimination based on sexual orientation).
273. Michael Ehrhardt, *About the Inner Sanctum of the Self*, GAY & LESBIAN REV. (Sept.–Oct. 2013), http://www.glreview.org/article/about-the-inner-sanctum-of-the-self/ (interview with author Colm Toibin). SHELTON, *supra* note 20, at *ix*.
274. Pudlow, *supra* note 88, at 8 (referring to the presence of LGBT persons as becoming "ho hum").
275. SHELTON, *supra* note 20, at *xix* (referring to the "backlash against the LGBT community").
276. *See* John Corvino, WHAT'S WRONG WITH HOMOSEXUALITY? 121–22 (2013) (referring to Senator Rick Santorum's public comment equating LGBT relationships with bestiality, a comment facing "swift and sharp"

In the Florida legal community, few reported cases of disparagement based on sexual orientation suggest a maturation of society and a real sensitivity among legal practitioners that public expressions of bias are unacceptable.[277] Nevertheless, the possibility of termination from employment continues to be legally permissible for many LGBT persons working in the legal profession in Florida, as neither the State government,[278] nor most private employers, provide protection to sexual orientation as a class.[279] The LGBT community should take some comfort, however, that discriminating against a person based on that person's sexual orientation is now definitively contrary to the "prevailing professional norms" in the Florida judicial system,[280] and that The Florida Bar and Local Professionalism Committees stand by ready to seek enforcement of the anti-disparagement rule when called upon to do so.[281]

retort); Ira Winderman, *Hardaway: I Hate Gays*, SOUTH FLA. SUN SENTINEL (Feb. 15, 2007), http://articles.sun-sentinel.com/2007-02-15/sports/0702140983_1_hardaway-s-comments-gay-people-gay-teammate (reporting on a radio statement made by the basketball player, which he had to quickly retract).

277. Telephone Interview with Alan A. Pascal, *supra* note 253.

278. *See* MARCUS, *supra* note 31, at 107. Although many counties and municipalities in Florida have ordinances prohibiting employment discrimination based on sexual orientation, Florida still has no statewide law banning such discrimination. *See Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN (Jun. 19, 2013), http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf; *Employment Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Sept. 12, 2013), http://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws; *Sexual Orientation Discrimination: Your Rights*, NOLO LAW FOR ALL, *available at* http://www.nolo.com/legal-encyclopedia/sexual-orientation-discrimination-rights-29541.html (last visited Sept. 26, 2013). *See also* Lancia, *supra* note 11, at 954–55 (referring to similar rules in Maryland, Virginia and the District of Columbia, and noting that because these jurisdictions do not have laws preventing LGBT discrimination in employment, the rule standing alone would not prevent law firms from having policies not to hire LGBT persons).

279. Brown, *supra* note 206, at 304 n.362 (noting that "sexual orientation" as a category is "typically unprotected" in an employer's "anti-discrimination policy statement").

280. *See* Winston v. Boatright, 649 F.3d 618, 631 (7th Cir. 2011).

281. Telephone Interview with Alan A. Pascal, *supra* note 253.