GENERAL COUNSEL'S
LITIGATION STATUS REPORT

(as of September 15, 2008)

[* *indicates additions to summary since last report*]

Case:	Eliot Bernstein....Iviewit Corporation...and Patent Interest Holders v. Appellate Division First Departmental Disciplinary Committee [N.Y.]...The Florida Bar, Lorraine Christine Hoffman, Eric Turner, John Anthony Boggs, Kenneth Marvin, Thomas Hall...Virginia State Bar *et al.*
Case No.:	07 Civ 11196 (SAS)
Court:	United States District Court for the Southern District of New York
Date Filed:	December 12, 2007
Bar Counsel:	Barry S. Richard, Greenberg Traurig, Tallahassee
Bar Staff Liaison:	Paul F. Hill, General Counsel
Opposing Counsel:	Eliot Bernstein, *Pro se*
Presiding Judge:	Shira A. Scheindlin

Summary:

Pro se plaintiff and others seek damages (in multiple counts each asking for $500 million) and injunctive and declaratory relief stemming – as to the various Florida Bar defendants shown above – from the Bar's dismissal of a grievance that Bernstein filed against an attorney who had represented him and then allegedly misappropriated his intellectual property. Plaintiff seeks a jury trial. Many other lawyers, judges and various states' lawyer disciplinary officials are co-defendants in this extensive interstate scenario. Service on The Florida Bar and all other defendants was authorized by the trial judge after consideration of plaintiffs' allegations of conspiracy "to profit illicitly from plaintiffs' inventions and to murder Bernstein's family" involving "a highly respected law firm, various prominent attorneys, and a preeminent jurist."

On May 30, 2008 The Florida Bar defendants moved to dismiss the amended complaint, noting that plaintiffs are essentially asking a federal court to review decisions made by The Florida Bar, acting as an agent of The Florida Supreme Court. Further, the motion argued, the decision whether to initiate disciplinary proceedings is solely within the discretion of The Florida Bar, subject only to the review by the Florida Supreme Court – no private right of action against the Bar exists in any person for the failure to institute disciplinary proceedings. The motion stressed that the amended complaint must therefore be dismissed with prejudice for failure to state a claim; as well as for lack of personal jurisdiction over the

Bar defendants, and their absolute immunity from financial liability. Numerous other defendants filed similar pleadings seeking dismissal.

*On August 14, 2008, in a 50-page order, the trial judge dismissed all claims against The Florida Bar and *all Bar-related defendants on the basis of Eleventh Amendment and quasi-judicial immunity.

Case:	Anna L. Brown v. The Florida Bar, The Supreme Court of Florida, R. Fred Lewis, *et al.*
Case No.:	2:08-CV-308-FTM-29SPC (JNB)
Court:	United States District Court, Middle District of Florida
Date Filed:	March 11, 2008
Bar Counsel:	Barry S. Richard, Greenberg Traurig, Tallahassee
Bar Staff Liaison:	Paul F. Hill, General Counsel
Opposing Counsel:	Brett Alan Geer, Tampa
Presiding Judge:	John E. Steele / Magistrate Sheri Polster Chappell

Summary:

Plaintiff Brown is a female African American attorney who has been the subject of two disciplinary proceedings, and previously sued the Bar for damages in 2006. Brown's first discipline involved allegations of conflict of interest in her representation of two criminal defendants, in which the Supreme Court suspended her for 90 days. The second case – still ongoing – involves allegations that Brown intentionally engaged in conduct prejudicial to the administration of justice. In Brown's prior federal litigation against the Bar, the Middle District of Florida dismissed the action, finding that the Bar is entitled to both Eleventh Amendment and absolute immunity – not only in suits for damages, but also those seeking declaratory and injunctive relief. The Eleventh Circuit affirmed.

In this new filing Brown alleges the Eleventh Circuit's action stems from unconscious or institutional bias favoring the Bar, or bias or bad faith against her. She claims there are no checks or balances regarding any aspect of attorney discipline in Florida and that applicable rules and law have been constructed by the Supreme Court in an inappropriate alliance with the Bar. As to her current discipline, Brown alleges the grievance committee is prosecuting her based on race and gender, and that her right to due process was violated by the Bar in its continued prosecution, and by the Supreme Court in overturning the referee's factual findings and recommendations without any basis.

Brown claims her motion for rehearing in her first disciplinary matter should have tolled the finality of her suspension, yet the Supreme Court's order denied her a property interest and the right of due process, and thwarted any vindication of her rights under state law. Her complaint seeks an immediate emergency injunction of the continued suspension of her law license from her first discipline, and similar relief in enjoining her other ongoing disciplinary proceedings. She further seeks a declaration that her right to procedural due process was violated by the Bar continuing to prosecute her as the official arm of the same court in which she was tried and in which her sole appellate rights and remedies lay. Additionally, Brown

seeks a declaration as to whether the fact that she can never obtain an award for attorneys' fees under law for defending insubstantial claims or contentions pursued by the Bar, due solely to her status as an attorney, constitutes a violation of the Fourteenth Amendment. Brown's fourth count seeks a declaration of various due process violations against her, claiming the Supreme Court's obtuse and novel construction of the rules for which it judged her guilty – overturning the referee's determination of her innocence – amounted to an ex post facto adjudication. Finally, as to her alleged money damages in dealing with the consequences and proceedings related to her actual suspension from the practice of law, Brown seeks a declaratory judgment that the Bar is not immune under the Eleventh Amendment because the judicial branch of the state government provides no taxpayer-generated funds in any way to help defray the costs of operating The Florida Bar.

On April 7, 2008 the Bar moved to dismiss Brown's complaint, noting this action is barred by the Eleventh Amendment to the United States Constitution because she is essentially requesting relief based on matters stemming from state law. The motion further urges dismissal pursuant to the *Rooker-Feldman* doctrine because Brown is seeking review of the decisions of a state court and attempting to collaterally challenge the judgment and actions of the Florida Supreme Court and its agents – some still ongoing. The Bar also argued that the complaint fails to state a claim for which relief can be granted and fails to state the necessary elements for declaratory or injunctive relief. Finally, the motion noted that Florida's disciplinary proceedings offer adequate opportunity for review of Brown's constitutional challenges. The Supreme Court defendants also filed a separate motion to dismiss on April 7.

On April 14, 2008 Brown moved for a preliminary restraining order, claiming she is threatened with irreparable injury in her second disciplinary case because it is being prosecuted with a bad faith motive wherein she has no right or legal recourse for recovery of her attorneys' fees, unlike any other licensed professional in Florida. She asserts that the Bar has engaged in lengthy deliberate prosecutorial delay and exposing her to greater discipline. She further claims the Supreme Court has fixed matters so that the Bar does not have to plead or prove that her conduct was actually prejudicial to the administration of justice.

Also on April 14 Brown filed a memorandum of law opposing both the Bar's and the Supreme Court defendants' motions to dismiss and supporting her motion for temporary injunctive relief. The memo reiterated that disparate treatment is the crux of her federal claims, alleging that animus is directed at her based on her assertion of her civil rights – and registering these other observations:

> The gravamen of Ms. Brown's complaint is that the State Court operates an attorney disciplinary system that is uniquely separate and fundamentally different from the manner in which the State proceeds against other professional licensees, and that these differences result in unequal treatment under law for attorneys as a class, and for Ms. Brown individually. The way the system is set up produces biased results that favor the Bar as the "official arm" of the State Court, at the expense of licensees.
> ***
> With all due respect, this methodology reveals a judicial activism driven by a conflicted, political interest. It is analogous to a Father reviewing a case prosecuted by his earnest but dull-witted Son for violation of a law that the Father (State Court) and Son (Bar) had co-written. The fact that a hearing officer ruled against Son's case will not prevent Father from correcting it on appeal. This is bound to occur in a system that is familial, vertically-integrated, and conflicted. The State Court's review becomes political because it has an interest in not having the Bar look incompetent. Ms. Brown contends that the State Court makes ad hoc findings and conclusions out of expedience or necessity, to legitimize threadbare Bar prosecutions having little elemental connection with the language or intent of the Rule(s) at issue, to achieve a result the Bar desires, and/or to keep the Bar from appearing incompetent.
> ***
> The systemic failures occur because the Bar is the "official arm" of the State Court. Together the two are a monolith; there is no separation of power within the system to balance it. Caprice is enabled because of the lack of participation in the entire process by the other two branches of state

> government, as regards the making of rules (State Court with the Bar), the prosecuting of rules (State Court through the Bar) and the interpreting of rules (State Court in assisting the Bar). In business parlance, the disciplinary apparatus of the State Court is "vertically integrated."2 In short, the system is rigged against the accused attorneys. The State Court's basic answer to these allegations is that this Court has no business inquiring into such matters. Ms. Brown, however, sees the freight train rolling onto the track again, so she has applied to this forum seeking a declaration against it, and/or to enjoin it. She asserts that her property interests were deprived through improper, discriminatory practices for illegitimate reasons, and that they will be again, and that this Court has jurisdiction over her claims regarding that.

Further, on April 14, Judge Merryday – district judge in the Tampa Division to whom this case was initially assigned – issued a *sua sponte* order transferring the matter to the Ft. Myers Division. The order noted Brown's prior and similar lawsuit against the Bar in that division, and cited local rules favoring assignment of such cases to the same judge to whom the original case was assigned. Accordingly, the matter was transferred to Ft. Myers and Judge Steele, with his consent.

On April 28, 2008 the Supreme Court defendants responded in opposition to plaintiff's motion for preliminary restraining order; the Bar adopted that response and reiterated portions of its prior motion to dismiss via a May 1 filing.

On May 16, 2008 the trial judge entered an order asking for supplemental memoranda from each party on the issue of whether the bad faith exemption to the *Younger / Middlesex* abstention doctrine applies to this case. Brown's memo of May 30 alleges that a transcript of her second disciplinary case establishes that the referee in that proceeding will not permit her to pursue any constitutional claims in that case. She additionally argues that denial of her right to a rehearing in her first discipline, "biased judicial activism," and reprisals for her "courage to challenge...systemic flaws" all manifest bad faith. Separate filings by the Supreme Court and the Bar argue that Brown has not alleged facts or provided evidence to support bad faith or extraordinary circumstances.

*On August 20, 2008 Brown filed an amended complaint, adding an additional count seeking a *declaration that Florida's mandatory bar is an unconstitutional closed shop labor organization. The *filing claims that "there is no constitutional, executive, or legislative basis for the existence of the *Florida Bar" and that 'its very existence is a violation and usurpation of the separation of powers *doctrine." She adds: "The simple question for this Court is: Can a mandatory state bar constitutionally *exist with a State where the so-called 'right-to-work' prohibition against closed shops is part of the state *constitution?"

*On September 2, 2008 – because of Brown's amended complaint – Judge Steele denied as moot her *motion for preliminary injunction as well as the Bar's and Supreme Court's separate motions to dismiss.

*On September 9, the Supreme Court defendants moved to dismiss Brown's amended complaint. The *Florida Bar filed a separate motion to dismiss on September 15, noting: this action is barred by the *Eleventh Amendment to the United States Constitution; the court should dismiss the amended complaint *due to the Rooker-Feldman doctrine in that Brown seeks federal court review of a state court decision; *and that dismissal is further warranted under the Younger abstention doctrine because Brown asks the *court to essentially interfere with an ongoing bar disciplinary proceeding. The Bar's motion also argues *that the amended complaint fails to state a claim for which relief can be granted, in its lack of the *necessary elements for both declaratory and injunctive relief. Finally, the motion claims that Brown's *new count presents neither a bona fide need for a declaration nor any concrete controversy – Florida's *"right to work" does not grant a right or property interest in any particular occupation, and it is well-*settled that integrated state bars are constitutional.

Case:	Bill Corbin v. State of Florida, Florida House of Representatives...Florida Supreme Court, Florida Bar, John F. Harkness, Jr., John Anthony Boggs *et al.*
Case No.:	07-251-CA, 1D08-2596
Court:	Fourteenth Judicial Circuit, Calhoun County; First District Court of Appeal
Date Filed:	December 17, 2007
Bar Counsel:	Barry S. Richard, Greenberg Traurig, Tallahassee
Bar Staff Liaison:	Paul F. Hill, General Counsel
Opposing Counsel:	Bill Corbin, *Pro se*
Presiding Judge:	Reynolds

Summary:

Corbin – a Florida Bar member disbarred in 2001 – challenges that disciplinary action and essentially all its participants, to include Bar disciplinary staff attorneys and auditors, as well as the Florida Supreme Court, plus complainants and numerous other state governmental officials. This filing follows several attempts for relief from the state Supreme Court and at least two unsuccessful certiorari petitions to the U.S. Supreme Court. Corbin's 176-page complaint seeks various sorts of declaratory and injunctive relief, claiming state and federal civil rights violations, defamation, wrongful injunction, malicious prosecution, abuse of process, inverse condemnation of real property, due process taking, tortious interference with advantageous business relationships, third-party contract breach, invasion of privacy, and loss of consortium. Corbin asks for a jury trial and expects compensatory and punitive damages, plus attorneys' fees.

On January 11, 2008, The Florida Bar moved to dismiss Corbin's complaint with prejudice, arguing that his requested relief could not be granted by a circuit court, when only the Supreme Court has authority to review actions taken by the Bar in the course of lawyer disciplinary proceedings and all Bar defendants are otherwise entitled to absolute immunity. The motion further noted that all of Corbin's claims are time barred, founded upon statements made and actions taken in the course of matters that terminated in 1998. Further, the Bar argued that Corbin's various demands for relief must be dismissed with prejudice because they cannot be amended to state a claim, and dismissal with leave to amend would therefore be futile. Finally, the motion notes that Corbin's complaint fails to comply with Fla.R.Civ.P. 1.110(b) because it is hardly a short and plain statement of jurisdictional grounds or ultimate facts showing that the pleader is entitled to relief. Other defendants filed similar motions to quash service, dismiss the complaint, stay discovery, or for other protections.

On March 31, 2008 Judge Reynolds issued an order dismissing Corbin's first amended complaint and striking an unauthorized second amended complaint, but with leave to amend. The order added that any third amended complaint not include certain parties – presumably The Florida Bar – who Corbin said were necessary to see that reforms were instituted if the injustices of which he complains were proven. The order further specified that any new complaint shall set forth a separate count as to each individually named defendant.

On May 28, 2008 Corbin petitioned the First District Court of Appeal for writs of certiorari, prohibition, mandamus, all writs relief, and a stay of Judge Reynolds' March 31 order. Among other claims, the petition maintained that Judge Reynolds was improperly assigned this case because he was a named witness in the matter. On June 16, the 1st DCA denied Corbin's various petitions per curiam. Corbin moved for rehearing *en banc* on June 30 but that motion was denied on August 6.

*On July 9, 2008 the Bar moved to dismiss Corbin's third amended complaint for failure to comply with *the court's March 31 order as to specificity and failure to obtain court permission to assert any claims *against the Bar. Numerous other defendants also challenged Corbin's latest filing.

*On September 4, 2008, "because of time and other restraints," Corbin filed a motion for permission to *pursue discovery via depositions, interrogatories, and requests for admission and production in the case. *The motion also requested permission for further amendment of his pleadings "because of anticipated *information obtained during the requested discovery."

Case:	Florida J.A.I.L.4Judges, Florida Division of Elections Committee #35025 and Montgomery Blair Sibley v. The Florida Bar, The Florida Supreme Court, Chief Justice Fred Lewis...*et al.*
Case No.:	4:08cv219
Court:	United States District Court for the Northern District of Florida
Date Filed:	February 29, 2008
Bar Counsel:	Barry S. Richard, Greenberg Traurig, Tallahassee
Bar Staff Liaison:	Paul F. Hill, General Counsel
Opposing Counsel:	Montgomery Blair Sibley, Washington, D.C.
Presiding Judge:	Hinkle

Summary:

Plaintiff – "a broad coalition of citizens from all backgrounds, professions, and political persuasions who are dedicated to the mission of re-instating the accountability of the Florida judiciary" – seeks federal court review of defendants' rules and practices, both on their face and as applied, which allegedly: deny an impartial tribunal, usurp political power reserved to the people, disparage the right to petition for redress, violate constraints relating to engaging in political activity, and violate Fla. Stat. Ch. 106 re campaign financing. The complaint asserts that the Bar, through its member publications and Judicial Independence Committee, is directly and indirectly engaged in opposing plaintiff's political activities to amend Article V of the Florida Constitution. Plaintiff further takes issue with the Florida Supreme Court's disposition of plaintiff's similar petition last year, which the court dismissed on the basis that it lacked jurisdiction to hear such claim – and which the U.S. Supreme Court dismissed on petition for writ of certiorari.

Plaintiff seeks appropriate injunctive relief and declarations: that the Florida Supreme Court and justices will conform their responses to motions to disqualify to pertinent state and federal constitutional

restraints, to protect plaintiff's rights in cases when the court's "official arm" is a party and plaintiff's proposed constitutional amendment may be at issue before that tribunal; that the Court and Bar have usurped political power from plaintiff by their "radical and unauthorized expansion" of the authorized roles beyond attorney admission and discipline; that the Bar must "level the playing field" by providing plaintiff with space in Bar publications, for plaintiff "to fairly compete in the field and marketplace of ideas" in connection with plaintiff's right to petition; that the defendant justices have violated Canon 7A(3)(d)(ii) of the Code of Judicial Conduct by permitting the Bar's improper activities; and that the Bar is violating state law by engaging in opposition to plaintiff's constitutional initiative without complying with Fla. Stat. Ch. 106. A jury trial is sought, along with costs, attorneys' fees and other relief deemed proper. A separate plaintiff's motion further seeks temporary injunctive relief to halt any such Bar activities and to allow for expedited limited discovery.

On March 26, 2008 the Supreme Court defendants moved to dismiss this action for lack of venue, arguing that none of the defendants reside in the Southern District and that the events at issue have a tenuous relationship to that locality as well. Further, the motion questions whether the plaintiff has significant contacts with the Southern District. The plaintiff responded on March 31, noting that the defendant Florida Bar has branch disciplinary offices in the district and that the alleged facts establish that a substantial part of the events or omissions giving rise to plaintiff's claims occurred in the Southern District. Also, on March 31 plaintiff filed an alternative motion that the matter be transferred to the Northern District if the court were inclined to grant the Supreme Court defendants' motion to dismiss – the judge denied that motion without prejudice due to plaintiff's failure to certify that it had conferred with opposing counsel re its motion to transfer, as local rule requires.

On April 9, 2008 the Bar filed both a motion to dismiss the complaint and a response in opposition to plaintiff's motion for temporary injunction and expedited limited discovery, with an additional motion to stay such discovery.

The Bar's response noted that, despite plaintiff's references to the federal constitution, JAIL4Judges has failed to identify any right provided for under federal law that has been violated – and is essentially asking a federal court to enjoin a state entity based upon an alleged violation of state law, barred by the Eleventh Amendment. Based on such lack of jurisdiction, the Bar argued that any request for temporary injunction must be denied. Even if the court had jurisdiction to grant the injunction, the Bar noted that plaintiff's request must be denied for failure to establish necessary prerequisites: it cannot succeed on the merits; plaintiff has not established a substantial threat of irreparable injury because the Bar cannot prevent citizens from voting for any constitutional initiative and, if the initiative failed, nothing prevents JAIL4Judges from pursuing this same cause in another year; a greater injustice would result from prohibiting The Florida Bar from providing information on the initiative than from temporarily requiring JAIL4Judges to compete for public support; and preventing the Bar from providing information necessary to make an informed decision would disserve the public interest in having greater information about a proposed initiative than less. Re any stay of discovery, the response argued that, in light of the Bar's contemporaneous motion to dismiss, discovery should be stayed until disposition of that pending motion – and that discovery would not otherwise assist the court in determining whether plaintiff's complaint states a claim.

The Bar's motion to dismiss stressed that JAIL4Judges has failed to identify a concrete controversy and that multiple contingent factors must occur before the proposed constitutional amendment would ever reach the Florida Supreme Court – absent such a justiciable controversy, any request for injunctive or declaratory relief must fail. Moreover, the motion argued, plaintiff has not stated a claim for injunctive relief where an adequate remedy at law exists – to the extent that the initiative might ever come before the Supreme Court, plaintiff could seek recusal of any justice who may have violated the Code of Judicial Conduct. As to plaintiff's claim that the Bar or Supreme Court have expanded the Bar's political role, the

motion notes that the Eleventh Circuit has recognized the Bar's functions extend beyond mere admission and discipline of attorneys, to include lobbying, plus the Florida Supreme Court has acknowledged areas that clearly justify such activities – seeking to protect the court system from the potential harms of JAIL4Judges' proposed initiative falls within the permitted lobbying category of "matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency." Since this Bar advocacy is specifically permitted, plaintiff has not identified any harm sufficient to state a claim for declaratory or injunctive relief. Regarding plaintiff's claimed violation of its right to petition, the motion noted that JAIL4Judges has not shown that the Bar has prevented it from publishing advertisements in Bar publications or from otherwise distributing communications to Bar members – indeed, all substantive Bar News articles attached to the complaint reference the JAIL4Judges website, allowing readers to access that site and formulate their own opinions and conceivably increasing support for its causes. Regarding plaintiff's claims that the Bar has not registered as a political committee under F.S. Chapter 106, the motion cites a formal opinion of Florida's Division of Elections, that the Bar is not a political committee.

JAIL4Judges responded on April 10, 2008 maintaining that its challenge of the Supreme Court's authority to take its limited constitutional grant to regulate admission and discipline of attorneys and create a massive mandatorily-funded, political action committee with which to advance its own political agenda is a valid yet novel legal claim heretofore not addressed or adjudicated. The response notes that in all prior cases regarding Bar lobbying the sole analysis undertaken was whether the challenged activity violated the right of free speech or association, not to "petition." As to the Bar's Eleventh Amendment assertions, JAIL4Judges notes that it is not seeking damages. Regarding its desire for immediate discovery, JAIL4Judges argues that such would assist the court in determining the issues raised herein about the range and scope of the Bar's political activities which are presently unknown.

On April 14, 2008 the Bar replied to JAIL4Judges' response, reiterating that this federal court does not have jurisdiction to determine whether an arm of the Florida Supreme Court is violating the Florida Constitution. The reply further stressed that The Florida Bar has the authority to conduct certain lobbying activities – implicit in those court determinations is the underlying presumption that The Florida Bar is not usurping political power in conducting such activities, otherwise the Florida Supreme Court could not have determined that certain lobbying activities are permissible without simultaneously determining that such activities do not exceed the Bar's delegated authority.

On April 21, 2008 the Supreme Court defendants filed a memorandum opposing JAIL4Judges' motion for temporary relief, adopting the Bar's response and additionally noting plaintiff's failure to provide sworn factual support for its claims. The following day, the Supreme Court defendants replied to JAIL4Judges' memorandum opposing their motion to dismiss, reiterating the burden of litigating this matter in the Southern District and noting that the minimal events at issue that took place in that locality only relate to the Bar.

On May 7, 2008 Judge Altonaga granted the Bar's motion to dismiss and denied JAIL4Judges' motion for temporary injunction as to the Bar, further dismissing all claims against the Bar without prejudice while noting that "Plaintiff does not seek leave to amend in the event the Motion to Dismiss is granted." Consequently, the order additionally granted the Supreme Court defendants' motion to dismiss for lack of venue and transferred the matter to the Northern District of Florida. All other motions were denied as moot.

As to JAIL4Judges'claim that the Bar is usurping political power, the order noted that such allegation is not a recognized constitutional violation, and plaintiff has not show any injury to establish standing to assert such a claim. Regarding the second claim of the Bar's unauthorized expansion of it role, causing the threat that JAIL4Judges "has and will continue to lose political power," the order noted that no actual injury was specified and "the threat of losing political power is not a cognizable injury" – and the Bar's

alleged lobbying activities "do not appear to be improper" under applicable case law. With respect to JAIL4Judges' third claim, the judge observed that the complaint is devoid of any assertion that the Bar inhibited JAIL4Judges from petitioning the government – or that JAIL4Judges sought access to Bar publications and was denied. The order further noted that JAIL4Judges otherwise has no standing to object to the Bar's allocation of monies obtained through membership fees, and cites no authority that a private right of action exists to enforce the registration requirements of F.S. Ch. 106.

On May 16, 2008 the case was transferred to the Northern District and assigned a new case number. On May 22 various pleadings – a motion for CM/ECF password, emergency motion for temporary restraining order and temporary injunction, motion for admission *pro hac vice*, and a first amended complaint for declaratory and injunctive relief – were filed that showed Sibley as an additional plaintiff, plus attorney for JAIL4Judges. These filings sought to enjoin the Supreme Court from suspending Sibley based on his claim that most of the justices had failed to properly execute their oaths of office.

And, in a May 28, 2008 report and recommendation to deny Sibley's emergency motion for temporary restraining order, Magistrate Sherrill observed that "these claims and allegations are too intertwined with the Florida Bar disciplinary proceedings and the prior petitions before the Florida Supreme Court to continue in this Court." A subsequent order on May 29 noted Sibley's suspension and decreed that he cannot act as counsel for JAIL4Judges – adding that Sibley may represent himself *pro se* and that a corporation may only appear in court if represented by an attorney. Consequently, the order found that the amended complaint could not proceed – and that Sibley must file a second amended complaint limited to allegations about himself as plaintiff (or alternatively find another attorney to represent JAIL4Judges) by June 30. Finally, the order denied Sibley's motions for CM/ECF password and appearance *pro hac vice* were denied.

On June 9, 2008 Sibley filed objections to the magistrate's May 28 report and recommendations. He also filed a second amended complaint for declaratory relief and damages.

In a June 12, 2008 order, Judge Hinkle accepted the magistrate's May 28 report and recommendation that Sibley's motion for a temporary restraining order should be denied for failure to establish a substantial likelihood on the merits.

On June 13, 2008 the Supreme Court defendants moved to dismiss the matter for failure to state a claim upon which relief could be granted. The motion argued that Sibley confuses unrelated federal and state oath requirements, and that pertinent oath requirements are met under governing jurisprudential principles – also the "de facto officer" doctrine and substantial compliance standards preclude such a claim that is otherwise an indirect and improper attempt to set aside state court action. The Bar also moved to dismiss the second amended complaint, further urging that Sibley cannot use this federal action to collaterally attack his state bar suspension, that The Florida Bar and its employees are not subject to state or federal loyalty oath requirements, and that the voiding of the state supreme court decision suspending Sibley from the practice of law is not the proper remedy for an alleged failure of a Bar prosecutor to file a loyalty oath.

On June 25, 2008 Sibley moved to amend his complaint, separately proffering a third amended complaint that would add Governor Crist and Attorney General McCollum as defendants due to putative errors in their loyalty and candidate oaths. The Supreme Court defendants responded in opposition on June 27, as did The Florida Bar. On July 7, 2008 Magistrate Sherrill issued another report with a recommendation that Sibley's motion to amend be denied because of jurisdictional arguments, the pendency of defense motions to dismiss, and the lack of prejudice in Sibley bringing his claim against others who are not involved in his bar proceedings in a separate action.

Also on July 7 Sibley responded to all motions to dismiss. In that filing he voluntarily dismissed both counts against The Florida Bar (leaving none pending). He otherwise maintained that he has legitimate *causes of action against the supreme court and these justices. On July 21 Sibley also objected to *Magistrate Sherrill's July 7 report and recommendations, claiming that he had prejudged Sibley's *additional claims to add the Governor and Attorney General as defendants herein.

*On August 7, 2008 the magistrate issued another report and recommendation regarding Sibley's second *amended complaint and the Bar's motion to dismiss. That document noted that although Sibley alleges *that he was harmed by defendants because he was disciplined as a lawyer, he has not alleged how any *alleged lack of an executed oath of office was causally connected to such harm – as such, Sibley's *complaint is nothing more than a generalized grievance about the operation of government" and he lacks *standing to bring it to federal court. Further, the report said: "To the extent that Plaintiff seeks to *collaterally attack the disciplinary action taken by The Florida Bar and approved by the Florida Supreme *Court...this court lacks jurisdiction. ...This, indeed, is the only reason that Plaintiff sues The Florida Bar *and Circuit Judge Orlando Prescott. The Florida Bar and Judge Prescott had nothing to do with the other *litigation cited by Plaintiff. Consequently, the court lacks jurisdiction to consider Plaintiff's federal *claims." As to the loyalty oath statutes cited by Sibley, the magistrate noted that 4 USC §101 does not *require any oath to be executed in written form, and 4 USC §102 is directed at persons who administer *oaths – nor do either create a substantive private cause of action – and even if Sibley had a right under *state law to compliance with any oath procedures, a violation of state law is not a violation of *substantive due process. The report added:

> *Plaintiff's due process claim, therefore, is a claim of a denial of procedural due process. "[O]nly *when the state refuses to provide a process sufficient to remedy the procedural deprivation does a *constitutional violation actionable under section 1983 arise." Plaintiff has not shown that he did *not have a remedy under state law for any alleged violation of state law. The Florida Supreme *Court has jurisdiction under Article V, § 3(b)(8), of the Florida Constitution to issue writs of quo *warranto to state officers to determine whether the officer has improperly exercised a power or *right derived from the State. I see no reason that the Florida Supreme Court could not consider *such a petition directed to sitting justices. When that Court lacks a quorum due to recusals, other *Article V judges may be substituted to consider the petition. ... Indeed, the qualifications of *sitting justices of the Florida Supreme Court would be especially a matter for Florida judges to *resolve.

*The magistrate therefore concluded that, if the court had jurisdiction, it should rule that Sibley has failed *to state a federal claim upon which relief may be granted, and that the court should, in its discretion, *additionally decline to exercise supplemental jurisdiction over any other state law claims herein. On *August 11, 2008 Judge Hinkle entered an order denying Sibley leave to file his third amended *complaint.

*On August 19, 2008 Sibley objected to the magistrate's August 7 report and recommendation, reiterating *that federal abstention principles should not apply in this case, that he clearly has standing, and has *pleaded claims upon which relief may be granted. Finally, he argues that his case should not be *relegated to any state court when his complaint additionally indicates diversity of citizenship and money *damages sufficient to invoke the jurisdiction of the federal courts.

Case: William H. Harrell, Jr., Harrell & Harrell, P.A., and Public Citizen, Inc. v. The Florida Bar, John F. Harkness, Jr., Kenneth L. Marvin, Mary Ellen Bateman, Elizabeth Tarbert *et al.*

Case No.:	3:08-CV-15-J-33TEM
Court:	United States District Court for the Middle District of Florida
Date Filed:	January 7, 2008
Bar Counsel:	Barry S. Richard, Greenberg Traurig, Tallahassee
Bar Staff Liaison:	Paul F. Hill, General Counsel
Opposing Counsel:	David M. Frank, David M. Frank, P.A., Tallahassee and Gregory A. Beck, Public Citizen Litigation Group, Washington, D.C.
Presiding Judge:	Covington

Summary:

Harrell (a Jacksonville attorney), his law firm (which advertises legal services via various forms of public media), and Public Citizen, Inc. (a non-profit public interest organization whose offers of pro bono representation are subject to Florida Bar advertising rules) sued The Florida Bar and various regulatory staff, to have various advertising rules declared unconstitutional in whole or in part and to enjoin their further enforcement. Harrell claims the Bar told him in 2007 that an ad containing the phrase, "Don't settle for less than you deserve" was violative of its rules, yet suggested and approved the same phrase in 2002 – which Harrell has used repeatedly since. Public Citizen, Inc. argues the Bar's rules injure its Florida members and consumers by preventing them from receiving truthful, non-misleading information about legal services and legal rights. Plaintiffs claim the rules at issue prohibit harmless advertising techniques that are prevalent in the media and that consumers are accustomed to viewing, yet the Bar maintains that any statement that is not both objectively relevant to the selection of a lawyer and factually verifiable is categorically prohibited. Additionally, plaintiffs challenge the Bar's prior restraints on television and radio ads, arguing that none of the rules they question is adequately supported by studies, factual findings, or other evidence demonstrating that they directly advance a legitimate state interest. Finally, they claim the Bar's rules are too vague to provide guidance and invite arbitrary and discriminatory enforcement in violation of the First and Fourteenth Amendments.

On January 17, 2008, on First Amendment grounds, the Plaintiffs moved for a preliminary injunction to prohibit enforcement of the challenged Bar rules against them.

On January 28, 2008 the Bar answered the complaint, including defenses that the court should abstain from hearing some claims and arguing that other allegations did not constitute a present case or controversy. The answer also questioned Public Citizen's standing to bring this action. A separate Bar motion to dismiss directed at Public Citizen further noted that the complaint contains no allegations when, if ever, a particular concrete and actual injury occurred to even one single member of Public Citizen's organization. Finally, the Bar filed a motion to abstain or, in the alternative, to strike – urging that the Court abstain from hearing any claim related to Rule 4-7.5(b)(1)(C) re background sounds while proposed amendments to it are pending; the motion also urged abstention re (or the striking of) Harrell's other conjectural claims of Bar sanctions even if he removed the phrase at issue from future ads.

On February 14, 2007 plaintiffs responded to the Bar defendants' motions to dismiss, strike and abstain, arguing that abstention is unwarranted and unnecessary in this First Amendment challenge – and would have the perverse effect of forcing Harrell to submit his ads for review in the very system of prior

restraint that he is challenging. The response adds that abstention would hardly clarify the challenged rules – indeed, past interpretations of those rules already give Harrell a reasonable fear that he would be disciplined based on his current ad campaign. Further, the response notes, abstention seems inappropriate for the Bar to assert when it is responsible for determining whether Harrell's ad comply with the questioned rules. The plaintiffs otherwise maintain that their claims are ripe and Public Citizen has established its standing in this case.

In a 33-page order issued February 29 which cited the court's "virtually unflagging obligation" to exercise its jurisdiction rather than abdicate when First Amendment freedoms are at stake, the trial judge found that the ends of justice would not be served by utilizing the *Pullman* doctrine, especially in the "piecemeal" manner requested by the Bar. Therefore, the court declined to utilize the abstention doctrine or to strike Harrell's allegedly conjectural claims. Judge Covington further found that Harrell and his firm have standing to assert such claims, and determined that plaintiff Public Citizen had met the legal requirements to assert associational standing in this action. The Bar's February 14 motions were therefore denied, and the court ordered a Bar response to plaintiffs' motion for preliminary injunction within 10 days.

On March 5, 2008 all parties jointly moved the court to reserve ruling on plaintiffs' motion for preliminary injunction stating that they expect to be able to resolve the case via motions for summary judgment without the need for any evidentiary hearing. The motion was further premised on intervening confirmation from the Bar that it had approved Harrell's use of the phrase "Don't settle for less than you deserve," although plaintiffs reserved the right to request a ruling on their motion "if the Bar, during the course of this litigation, institutes disciplinary action against Harrell or his firm under the rules challenged."

On March 10, 2008 the Bar defendants filed a response to plaintiffs' motion for preliminary injunction, noting reversal by the Board of Governors of The Florida Bar of the standing committee's decision that Harrell complained of, and the Board's finding that the statement "Don't settle for less than you deserve" does not characterize the quality of legal services and is therefore permissible – meaning plaintiffs no longer face irreparable harm pending resolution of this case on its merits. The response asks the court to abate proceedings on plaintiffs' motion.

On May 1, 2008 the Bar filed a motion to dismiss the complaint for lack of a case or controversy, noting that this matter involves the alleged fear that The Florida Bar will take disciplinary action against plaintiff Harrell for two specific reasons: (1) the lawyer advertisements in question contain a phrase that Bar staff and committee previously claimed was in violation of Bar rules; and (2) the ads in question will be later found by the Bar to violate other rules. The motion also noted that Harrell asks this federal court to resolve a dispute before he exhausted his administrative remedies within the Bar. As otherwise reported in its March 10 response, the Bar reiterated that this matter was now finally disposed of at the administrative level, and that plaintiffs' alleged fears and the basis for any alleged controversy are now moot: the Board of Governors has determined that the phrase in question is not in violation of Bar rules; and, even if the ads violated other rules, the Bar is prohibited by Rule 4-7.7(a)(l)(F) from imposing discipline regarding them absent some hidden misrepresentation. The memorandum additionally noted that, to the extent the complaint challenges other rules outside the scope of these ads, plaintiffs impermissibly seek an advisory opinion as to their constitutionality without establishing any real or substantial controversy.

On May 15, 2008 plaintiffs responded to the Bar's motion to dismiss, asserting that the Bar's mootness argument is precluded by the court's denial of the Bar's prior motion to dismiss on grounds of standing. They argue that Harrell retains an interest in remaining free of prior restraint, and Public Citizen retains ts interest in protecting its members' right to receive information about available legal services provided by

all members of The Florida Bar. Moreover, plaintiffs claim that a defendant attempting to establish mootness must show that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur – yet the Bar has never assured Harrell that he will not be prosecuted for running his ads under any Bar rules, or explained why the rules would not apply to his ads. Harrell can thus have no confidence that, in the absence of an injunction, the Bar will not prosecute him after this litigation is complete.

Plaintiffs' response adds that voluntary cessation of offensive conduct should only moot litigation if it is clear that a wrongdoer has not changed course simply to deprive a court of jurisdiction – yet the Bar's decision could change any time, is not prohibited by any judicial decision, and is not even formalized in the Board of Governors' minutes. Finally, plaintiffs argue that the Board's vote was much more limited than the Bar suggests: it did not purport to decide whether Harrell's ads violate other rules, or to offer a general "approval" of Harrell's ads. Plaintiffs maintain the Board's conclusion that one aspect of Harrell's ads is permissible is not an "approval" or "finding of compliance" as required by Rule 4.7-7(a)(I)(F), and therefore does not protect Harrell from prosecution for other aspects of his ads never considered by the Board.

Case:	Rose J. Spano v. Lorraine Hoffman
Case No.:	04-07131; 4D07-657; 4D08-1466
Court:	Seventeenth Judicial Circuit, Broward County; Fourth District Court of Appeal
Date Filed:	April 30, 2004
Bar Counsel:	Barry S. Richard - Greenberg Traurig, Tallahassee
Bar Staff Liaison:	Paul F. Hill, General Counsel
Opposing Counsel:	Rose J. Spano *Pro se*, Lighthouse Point and Diane H. Tutt, Davie
Presiding Judge:	Horowitz

Summary:

Lorraine Hoffman – a Ft. Lauderdale branch staff counsel – is individually sued for damages by Rose Spano – a disciplinary respondent – who claims defamation, violation of F.S. §831.01 (forgery), negligent misrepresentation, and intentional infliction of emotional distress. The Bar has contempt proceedings and several grievance cases pending against Ms. Spano but none of the activity alleged by Spano to have been done by Ms. Hoffman is known to have occurred outside of any Bar context.

The defamation count asserts that false comments were made by Hoffman to a third party to gain leverage in Spano's dispute with the Bar. The forgery claim stems from allegations that Hoffman filed an invalid form document intended to effectuate a cost judgment against Spano that was invalid as a matter of law. Spano's claim of negligent misrepresentation asserts that Hoffman's representations were made outside the course and scope of her Bar employment. Spano also claims a reservation of right to seek punitive damages in this matter.

On May 19, 2004 the Bar moved to dismiss Spano's complaint, arguing that any claims of defamation, negligent misrepresentation or intentional infliction of emotional distress against Hoffman while acting within the scope of her Florida Bar office would be barred by absolute privilege. The motion also noted that no private right of action for forgery exists in Florida and that Spano otherwise failed to plead many allegations with requisite specificity. On August 6, 2004 the judge entered an agreed order granting the Bar's motion to dismiss, but giving Spano 20 days to amend her claim and to "state with particularity the allegations of each count as to Ms. Hoffman individually as acting outside the course and scope of The Florida Bar." Spano did not amend her complaint consistent with the court's order of August 6, 2004.

Nevertheless – without contacting counsel of record and while still under rehabilitative suspension – Spano issued two notices of taking deposition on December 27, 2004 to Defendant Hoffman and another individual. When challenged by the Bar, Spano argued that "jurisdictional discovery" was still allowable, subject to court supervision. On January 21, 2005 the Bar countered with a motion for involuntary dismissal as the appropriate action herein due to Spano's failure to comply with the court's August 6, 2004 order. On January 31, 2005 Spano alleged that hurricane problems affected her ability to prepare an amended complaint between August and November 2004, and that an extension of time should be granted for the purpose of deposing Defendant Hoffman and preparing appropriate jurisdictional pleadings. Spano also moved for rule to show cause why Hoffman should not be held in contempt for her nonappearance at deposition, and assessed costs and attorney fees. The Bar responded on February 28, 2005 citing various deficiencies in Spano's deposition notice and other justification for Hoffman's failure to attend, reiterating that the matter was dismissed as of that date.

On May 5, 2005 Spano filed an amended three-count complaint against Hoffman and two additional individuals, containing counts sounding in defamation, negligent misrepresentation and intentional infliction of emotional distress. The allegedly defamatory comments were claimed to be false and uttered to gain leverage "in a dispute between Ms. Spano and the Florida Bar." Spano otherwise asserts that the defendants intended to say that she was "a child abuser, dug addict, drug dealer, in addition to other inflammatory and derogatory statements."

On May 18, 2005 the Bar moved to dismiss Spano's amended complaint, noting that no viable cause of action has yet been asserted. The motion argued absolute privilege protects Bar defendants not only against claims of defamation, but also tort claims that are simply restatements or a recasting of a basic defamation claim. Additionally, the Bar noted that Spano's amended complaint still failed to plead any claim with the requisite specificity sought by the court in its August 6, 2004 order and expected in the rules of civil procedure. Finally, the motion observed that Spano was disbarred on April 8, 2005 but filed the amended complaint using her Bar number – which should not be tolerated.

On May 10, 2006 the Bar further moved for a stay of any discovery pending disposition of various dispositive defense motions. Spano again attempted to depose Hoffman in the interim. On May 15 Spano responded, arguing that the Bar's motion to dismiss should be denied and that the court should strike all of the Bar's pleadings for failure to comply with Fla.R.Civ.P. 1.380(d) based on Hoffman's failure to attend a scheduled May 15 deposition.

On May 17, 2006, following hearing, Judge Horowitz granted the Bar's motion to dismiss but gave Spano 10 days to further amend her complaint setting forth more particular allegations against Hoffman. He denied Spano's motion for any involuntary dismissal of the Bar and otherwise stayed discovery pending the Bar's answer to any amended complaint.

Spano served another amended complaint on May 17. The three-count complaint against Bar employees Lorraine Hoffman, Melissa Mara, and Kenneth Marvin alleges defamation, negligent misrepresentation and intentional infliction of emotional distress resulting from their comments that Spano was a child

abuser, drug addict, alcoholic, and unfit person – on or about April 2003 and on three to four other occasions thereafter. Only the negligent representation count claims such representations were made outside the defendants' course and scope of employment with The Florida Bar. She seeks a jury trial, attorneys' fees and compensatory damages, and reserves her right to punitive damages.

On May 30 the Bar moved to dismiss Spano's second amended complaint with prejudice. Comparing her current filing with predecessor pleadings, the Bar noted that Spano has again failed to plead with requisite specificity – failing to state a claim for defamation or for negligent misrepresentation. Spano responded on June 12, still maintaining that her new complaint stated a cause of action and that the Bar's concerns should be dealt with separately, in a motion for summary judgment. On June 27 the trial judge granted the Bar's motion to dismiss in part, and denied it in part: Counts II & III (Negligent Misrepresentation & Intentional Infliction of Emotional Distress) of Spano's second amended complaint were dismissed with prejudice, but the Bar was given 10 days to serve its answer to Count I (Defamation). On June 30 Spano moved for a rehearing on the Bar's successful motion to dismiss Counts II & III.

On July 6, 2006 the Bar answered Spano's second amended complaint, asserting various immunities and privileges as affirmative defenses. Spano replied on July 24 regarding the Bar's asserted defenses, further moving to strike all affirmative defenses as not recognizable or legal sufficient. Also on July 24 the Bar moved to terminate Spano's deposition of Kenneth Marvin, begun on July 21; further on July 24, the Bar moved for protective order re the upcoming deposition of Lorraine Hoffmann.

On July 27, 2006 the trial judge denied Spano's motion for rehearing re the Bar's successful motion to dismiss Counts II & III of the second amended complaint.

On August 7, 2006 Spano moved to compel answers to deposition questions propounded to Marvin and Hoffmann, further seeking costs and sanctions for their alleged failure to properly respond, and requesting that all Bar pleadings be stricken. The Bar responded on September 12, arguing that the court should deny Spano's motion to compel responses to questions pertaining to personal information, find that the Bar defendants' opposition to such questions posed is justified, deny Spano's request for sanctions, and deny her motion to strike all Bar pleadings. Spano otherwise responded to various Bar discovery requests and, on September 11, moved to seal her pending September 14 video deposition.

Following a hearing on Spano's motion to compel answers and the Bar's motion for protective order re Hoffmann, on September 19, 2006 the trial judge granted the Bar's motion as to certain personal information re the Bar defendants. The judge further ordered a separate pleading from the parties to further clarify the deposition questions at issue, and he reserved any ruling on awarding costs or ordering a re-taking of any depositions. Those and other discovery matters remain at issue.

On October 26, 2006 Spano moved for leave to file a third amended complaint, to add a count for damages from tortuous interference with a business relationship and employment. On November 3 the Bar defendants moved to dismiss that filing with prejudice. Spano responded on November 9. Following hearing, on December 7 the trial judge dismissed both counts of Spano's third amended complaint and gave her 10 days to refile, noting she must "plead with particularity all allegations."

Spano filed a fourth amended complaint on December 9, 2006, again alleging defamation and tortuous interference with a business relationship and employment. This filing claims that the defendants made untrue and derogatory comments that she was a child abuser, drug addict, alcoholic and unfit person "on or about April 2003 and on several occasions thereafter" to various named members of Spano's former law firm, former clients, friends and family members, and other court and public employees. On December 18 the Bar defendants moved to dismiss Spano's fourth amended complaint with prejudice, arguing that – outside of a laundry list of alleged third parties – her filing still lacks particularity as to

whether their alleged actions were outside the course and scope of their official Bar duties, or to further clarify the context of such actions. The motion reasserts the absolute immunity from suit that Bar employees enjoy in the performance of their duties, and notes that Spano still fails to state a cause of action. Spano responded on December 21. And, on December 29 Spano proposed a settlement of this matter, seeking payment of $1,200,001 from Hoffmann and the Bar [*sic*], and $800,000 from Hoffmann [*sic*] and Marvin.

On January 9, 2007 the trial judge dismissed Spano's fourth amended complaint with prejudice due to the absolute immunity of the defendants as agents of The Florida Bar. And, on January 11 the Bar defendants moved for attorneys' fees claiming Spano either used this litigation to seek revenge against Bar employees who oversaw her disbarment or failed to make a reasonable investigation into the allegations of her various complaints – but, in any event, knew or should have known this action was frivolous and wholly without merit. On January 12, Spano filed a verified motion for rehearing of the court's January 9 order; the Bar responded in opposition on January 25; and Spano replied thereto on January 26. Thereafter, on January 31, 2007 the trial judge issued an order of referral to a general magistrate on the issue of the Bar's January 11 motion for attorneys' fees.

On February 1, 2007 the trial judge denied Spano's motion for rehearing of his order dismissing her fourth amended complaint. On February 12, Spano filed a notice of appeal from such action, to the Fourth District Court of Appeal.

Spano filed her initial brief on July 16, 2007, arguing that dismissal of her fourth amended complaint due to immunity was in error because no allegations in the complaint suggested that the allegedly defamatory remarks were made in the course of defendants' official duties – noting that absolute immunity is an affirmative defense and, in order for a defendant to be entitled to a dismissal of a claim on that ground, the complaint itself must demonstrate that the defendant is entitled to the privilege. Spano's brief further asserts that her fourth amended complaint stated a cause of action for defamation and tortuous inference; to the extent that it did not, amendment should have been permitted.

The Bar's answer brief of July 26, 2007 stressed that the trial judge correctly found that the Bar defendants enjoy absolute immunity since Spano's fourth amended complaint did not reflect the context in which the alleged statements were made and could not allege facts tending to show they were made outside of the defendants' employment. Further, the Bar argued, in spite of clear direction by the trial judge, Spano made no attempt to identify any particular business relationship under which she had any legal rights and she failed to identify a single relationship that had been damaged.

In an August 10, 2007 order, the Fourth DCA opted to dispense with oral argument of this case.

In a reply brief dated August 20, 2007 Spano reiterated that her complaint set forth the substance of the spoken words with sufficient particularity, and it was not her burden to allege that any actionable statements were made outside the scope of the defendants' employment. She also noted that her tortuous interference claim was well framed because particularity in pleading that cause of action is not required.

On November 14, 2007 the Fourth DCA affirmed the trial court's dismissal as to defendants Hoffman and Marvin because the complaint claimed they were employees of The Florida Bar and therefore enjoyed absolute privilege whether their allegedly defamatory statements were intentional, reckless or malicious as long as both individuals were acting within the scope of their duties. However, the appellate court reversed the trial judge's dismissal with prejudice as to defendant Mara because Spano's fourth amended complaint did not allege that Mara was employed by The Florida Bar or had any relationship with the Bar or any other governmental entity. Separately, the appellate court denied Spano's August 22 motion for attorneys' fees.

On November 21, 2007 Spano moved for rehearing, stressing that nowhere in her fourth amended complaint did she claim the defendants' improper comments were made while they were acting within the course and scope of their employment with The Florida Bar. Yet, in the first paragraph of the DCA opinion it states that dismissal was based "on the trial court's determination that the alleged statements were absolutely privileged because they were made by Florida Bar employees in connection with their official duties during the course of Bar disciplinary proceedings." Spano asserts that the trial court made no such determination, stating only in its dismissal order was that the defendants "are authorized agents of the Florida Bar" – which, without more, does not clearly establish absolute immunity. The Bar opposed Spano's rehearing motion via a response filed December 3. Spano's motion was denied on December 11 and the court's opinion was issued as mandate on December 28.

On December 11, 2007 Spano served a proposal for settlement, seeking $500,000 from remaining defendant Mara to dissolve all outstanding claims against her. On December 20, Spano noticed this case as ready for trial.

On January 16, 2008 Defendant Mara moved for summary judgment, stressing her absolute immunity from Spano's defamation claims – no different from that afforded to the other Bar defendants. On January 25 Bar attorneys moved for a protective order, to prohibit a second deposition of Mara because she had been previously deposed, no new matters have arisen, and the only fact at issue in the pending motion for summary judgment is Mara's employment with The Florida Bar, which has been established in prior depositions. Objections by Mara to two separate notices of deposition were made on January 28, along with a motion to stay all discovery pending disposition of Mara's motion for summary judgment.

On January 26, 2008 Spano moved to strike Mara's motions for summary judgment and protective order, claiming the 4th DCA heard and rejected the arguments within her motion for summary judgment and that Mara's reiteration of it is violative of civil procedural rules – and that Mara should be sanctioned and assessed costs. The trial judge granted the motion to stay discovery on February 13, unless any discovery is contemplated to determine Mara's employment status at the time of the allegations; Mara's motion for protective order was also granted on February 13, without prejudice, because she has already been deposed on employment issues.

On February 20, 2008 Spano filed a notice of filing in opposition to Mara's motion for summary judgment, with various exhibits. On February 27 Mara objected to Spano's second notice of taking Mara's deposition pending resolution of her motion for summary judgment. And, on March 3 Mara moved to strike some of Spano's exhibits that accompanied her February 20 filing. Spano objected thereto on March 5.

On March 7, 2008 the trial judge granted Bar Defendant Mara's January 16 motion for summary judgment and entered final judgment in her favor, finding that Mara was an employee of the Bar at all times relevant to Spano's fourth amended complaint and entitled to absolute immunity, which bars Spano's claims. Spano, on March 12, moved for sanctions and to set aside the order of March 7 – or alternatively to strike Mara's pleading with prejudice – claiming that Mara's counsel misrepresented facts and proffered a proposal of the order issued on March 7 ex parte. That motion was denied on April 1. On April 7, Spano filed notice of appeal to the 4th DCA, contesting Judge Phillips' March 7 final judgment.

*Spano filed her initial brief on July 15, 2008 arguing that the trial court erred in granting Mara's motion
*for summary judgment when there were genuine issues of material fact and a dispute whether Mara's
*actions and comments were outside the course and scope of her employment. On August 13 Mara filed
*her answer brief, arguing that the undisputed record evidence reflects that any alleged defamatory
*statements she might have made would have occurred during the course and scope of her employment

*with the Bar and in connection with Spano's disciplinary proceedings – therefore, pursuant to established *law, in the performance of disciplinary functions, Mara was entitled to absolute immunity from actions *based upon statements made within the scope of her employment regardless of whether they were made *with good intent or with malice. The brief also noted that future discovery would not have yielded any *new information necessary for the trial court to rule on the question of Mara's absolute immunity. *Spano's reply brief of August 29 stressed that her claims against Mara were based on actions taken and *statements made that were outside her authority and scope of official duties, which were disputed factual *issues.

Case:	John B. Thompson v. The Florida Bar
Case No.:	08-20565-CV-Lenard/Torres
Court:	United States District Court, Southern District of Florida
Date Filed:	March 4, 2008
Bar Counsel:	Barry S. Richard, Greenberg Traurig, Tallahassee
Bar Staff Liaison:	Paul F. Hill, General Counsel
Opposing Counsel:	John B. Thompson, *Pro se*
Presiding Judge:	Joan A. Lenard / Magistrate Judge Barry L. Garber

Summary:

Thompson – a member of The Florida Bar who is the respondent in several disciplinary complaints – claims that The Florida Bar, its governing board, and officers are engaged in a number of politicized ideological agendas that are violative of *Keller v. State Bar of California.* As examples, he cites "'judicial independence,' radical gay rights, promotion of euthanasia, promotion of the distribution of obscenity and sexual materials harmful to minors, the denigration of traditional religion and people who adhere to it, promotion of abortion for minors without parental assent, thwarting of popular amendments to the Florida Constitution that have absolutely nothing to do with the practice of law, and regulation of the 'manners' of lawyers' through 'courtesy codes' that have been consistently declared unconstitutional by federal courts of law."

He further claims that the Bar illegally and unconstitutionally expends compulsory membership dues to promote "judicial independence" through its website, lobbying efforts, "quick response teams" to knock down any public expression against judicial arrogance, through public pronouncements by its presidents and governors on behalf of the Bar, and through its two "captured" member publications.

According to Thompson, the Florida Supreme Court does not oversee the Bar. He says the Bar is in active pursuit of the professional destruction of any lawyer who dares speak out against incompetent, corrupt, or misbehaving judges. He alleges other questionable Bar activity: seeking mental health examinations of lawyers who tell the truth about corrupt public officials; failing to remove a Board member indicted on a felony charge; maintaining a "watch list" of certain nettlesome lawyers; using the unconstitutionally ambiguous Rule 4-8.4(d) to punish any activity by any lawyer that the Bar simply finds inconvenient; claiming to be a state agency in certain respects but acting like a private

organization in others; maintaining inappropriate ties with a Bar-created malpractice insurance carrier; and operating a disciplinary system in stark and disturbing contrast to ABA models

Thompson's three-count complaint seeks a declaratory judgment that the Bar is improperly exceeding its narrow regulatory and administrative functions, further requesting a permanent injunction mandating that the Bar cease all such activities and expenditures that have nothing to do with discipline. Secondarily, he asks for an independent accounting review of how the Bar is spending monies collected by compulsory fees, misusing "discipline" and promoting agendas beyond the legitimate functions of any state bar and the interests of its rank and file members. Finally, arguing that the U.S. Supreme Court left open the question of whether an integrated state bar that acts like a "labor organization" and so thoroughly abuses its authority can ultimately forfeit the power to enforce mandatory membership in the organization, Thompson seeks a permanent injunction prohibiting – on a "right to work" argument – compulsory membership in The Florida Bar and a denial of its power to compel membership as a condition for earning a living of its members. He also requests a jury trial.

On March 7, 2008 Thompson moved per 28 U.S.C. 2283 to stay all state court proceedings in which the Bar is seeking discipline of lawyers for speech that the Bar considers an endangerment to "judicial independence." He claims that, since filing this case, the Bar is "scurrying" to get the punishment of Broward attorney Sean Conway underway "in an attempt to thwart this court's jurisdiction over the illegal, unconstitutional acts of The Florida Bar on the issue of whether 'discipline' can be used to punish lawyers for truthful speech about the misconduct of state judges." That motion to stay was denied on March 13.

On March 25, 2008 Thompson moved to disqualify Barry Richard and his entire law firm as counsel for The Florida Bar because they would be called as witnesses to testify herein as to why the Bar is violating *Keller* and just how it is doing so. That motion was denied as moot on March 27 "as Defendant does not appear to have been served and no notice of appearance has been filed by counsel on behalf of Defendant." On April 28 the Bar filed a notice of waiver of service of summons herein. On May 13 Judge Lenard issued an order referring discovery disputes, pretrial motions and other matters to Magistrate Garber.

On May 15, 2008 Thompson moved to stay these proceedings until conclusion of his Bar discipline, noting that the referee in those proceedings had now received an extension of time until September 2 to issue her report but that the instant lawsuit was filed in anticipation that "this disciplinary 'house arrest'" would be over. Until such, Thompson maintains that opposing counsel will continue to claim that abstention principles preclude further federal relief. Thompson followed that filing with a separate motion for court-ordered mediation herein. On May 16 Thompson supplemented his motion to stay, claiming that his computer was hacked, obscene e-mails were sent from it, and that "there is evidence suggesting this hacking was done by someone connected with The Florida Bar's prosecutorial effort" against him.

On May 19, 2008, upon Thompson's motion to stay, Judge Lenard issued an order staying and administratively closing this case and denying all pending motions as moot, to include Thompson's motion for court-ordered mediation.

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*Case: John B. Thompson v. The Florida Bar

*Case No.: 1:08-CV-21922-AJ

*Court: United States District Court, Southern District of Florida

*Date Filed: July 7, 2008

*Bar Counsel: Barry S. Richard, Greenberg Traurig, Tallahassee

*Bar Staff Liaison: Paul F. Hill, General Counsel

*Opposing Counsel: John B. Thompson, Pro se

*Presiding Judge: Adalberto Jordan

*Summary:

*Thompson – a member of The Florida Bar who is the respondent in several disciplinary complaints – *seeks a declaration that Rules Regulating The Florida Bar 4-8.2(a), 4-8.4(d), 4-3.4(c), 4-3.6(a) and 4-*4.4(a) are all overbroad, vague, and violate the First and Fourteenth Amendments to the U.S. *Constitution, facially and in their application. He seeks a jury trial. Thompson claims he is being *prosecuted for truthful comments about two sitting judges against who he had pending matters, and *opposing litigants and their counsel. He also asserts that the charges against him under Rule 4-3.6(a) for *two-year old "extrajudicial" statements of "imminent" effect relate to a matter still not yet set for trial *and that such action was known in advance and authorized by the trial judge in the case – consequently, *no basis for any Rule 4-3.4(c) prosecution exists either since "no valid obligation" existed to act *otherwise. Finally, he states that Rule 4-4.4(a) and 4-8.4(d)-related charges against him involve petition-*based speech regarding a matter in which he had no client and did not involve his practice of law.

*Coincidental with filing this complaint Thompson filed a motion to disqualify Judge Jordan and any *other Florida Bar member judge from this case, asserting the past history of his other recent Bar-related *cases and other difficulties he had with U.S. Marshals at the courthouse when he made this filing that *made "it clear that some communications of some kind have emanated from the Chief Judge to the US *Marshal and apparently to others, which ha[ve] 'poisoned the well' of this entire federal district court." *The pleading asserts that marshals claim Thompson has been disbarred. His motion adds that "clearly *no federal judge who is a Florida Bar member can possibly preside over this case or apparently any other *case in which Jack Thompson is the plaintiff and The Florida Bar is a defendant." That motion was *followed by a July 9, 2008 supplemental filing, with a copy of correspondence from Thompson to Chief *Judge Moreno and U.S. Marshal Pharo claiming surveillance and other harassment by them and other *federal officials, seeking all communications from them about him over the past four years, and *asserting a monetary claim of $10 million in damages for breach of his civil rights. On July 16, Judge *Jordan denied Thompson's motion to disqualify. Thompson followed on July 18 with a "motion for *access to federal courthouse," including his previous correspondence and stating "the undersigned is not *going to put up with these Gestapo tactics outlined in the attached letter, and...This thuggish activity is *just one of the reasons this court should have granted Thompson his motion for recusal."

*On August 4, 2008 the Bar moved to dismiss Thompson's complaint, maintaining that there is no *subject matter jurisdiction for federal court review of the matters alleged in his pleading, and that his *complaint fails to state a claim upon which any relief can be granted. Arguing abstention, the Bar's *motion noted there is a disciplinary case against Thompson ongoing, involving important state interests *and in which there are no procedural bars to review of Thompson's federal claims. The motion also *reminds that the constitutionality of the rules at issue has been consistently upheld against similar *arguments made by Thompson.

*On August 6, 2008 Thompson moved to stay these proceedings citing the Florida Supreme Court's June *23 actions in the pending disciplinary case of The Florida Bar v. Conway premised on Rule 4-8.2(a), *where the court issued a show cause order whether Conway's order granting him normal access to *federal courthouses, or he will secure that normal access by other means."

*On September 5, 2008 Judge Jordan entered an order on pending motions, granting Thompson's motion *to stay this case, including a stay of any response to the Bar's motion to dismiss, pending a decision by *the Florida Supreme Court in the Conway case. Thompson's motion for normal court access was *denied, with the observation that Thompson apparently has not been barred from the courthouse and has *been able to file documents and deliver correspondence. "To the extent that Mr. Thompson wants a *judicial decree telling the U.S. Marshal how to carry out her responsibilities, that request is denied" but *the order did further inform that Thompson is a member of the Bar and has not been disbarred. Three *days later, Thompson filed notice with the court asserting, "If this court actually believes that it has *absolutely no duty to inquire as to either the US Marshal's Office is acting as if it were some sort of *latter-day Nazi SS, then plaintiff has absolutely no doubt whatsoever as to how this court will rule in a *declaratory judgment action seeking relief from a state bar's notion that it too can, with impunity, act as *if it could insist upon the 'goose-stepping brigades' Justice Douglas warned us integrated state bars *would become."

□