OA 6-5-89

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Re: Thomas R. Schwarz Case No.. 70,702

/

SUPPLEMENTAL RESPONSE OF RESPONDENT THE FLORIDA BAR

Respondent, THE FLORIDA BAR ("the Bar") provides this Supplemental Response in reaction to observations filed with this Court as a result of invited comment regarding the report of the Judicial Council on political activity of The Florida Bar, ordered in earlier proceedings in this case: The Florida Bar re Schwarz, 526 So.2d **56, 58** (Fla. **1988).** This response further addresses additional commentary shared with the Court relating to the Bar's legislative activities, and provides updates on pertinent case law developments and the Bar's administration of a member objection procedure for legislative positions since submission of its initial pleadings and oral argument in this action. The Bar respectfully states:

1. The Florida Bar was integrated by this Court in Petition of Florida State Bar Association, **40** So.2d **902** (Fla. **1949).** Justice

Terrell, writing for the majority, defined the integrated bar "as the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which each member is obliged to bear his portion of the responsibility." He further stated that integration "provides a fair and equitable method by which every lawyer may participate in and help bear the burden of carrying on the activities of the bar instead of resting that duty on a voluntary association composed of a minority membership." [40 So.2d at 904]

Justice Terrell considered the individual state bar groups which had been integrated to that time, and recognized the varied activities pursued by those organizations. He specifically reviewed and remarked with favor on the California Bar's involvement in preparing and supporting bills in the legislature. In responding to objections raised against integration, he said the concept "was never designed to sacrifice the freedom and initiative of the bar, its boldness and courage in challenging the cause of the downtrodden nor its inherent independence in taking up battle for the minority." [40 So.2d at 908]

As noted by Justice Terrell:

> Bar integration grew from a felt necessity for an organization that could speak for the profession in esse. It is not a compulsory union but a necessary one to secure the

> composite judgment ~~of the bar~~ on questions involving its duty to the profession and the public. . . .
>
> . . . The assault on our institutions which the Bar is expected to take the leading role in challenging, also requires the full manpower of the bar. We do not think bar integration would be worth the candle as a specific for unethical conduct, but as a means of giving the bar a new and enlarged concept of its place in our social and economic pattern . . . [40 So.2d at 908, Emphasis added]

This Court was obviously aware of the impact of its decision when it recognized that the integrated bar may impose curbs on professional freedoms, but ". . . every other business must give place to restrictions that arise in the fact of growing populations." [40 So.2d at 908]

2. As a result of the above quoted opinion, the Supreme Court of Florida established The Florida Bar and has continuously acknowledged:

> The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence. [Rules Regulating The Florida Bar 1-2]

3. This Court has also approved (and amended on various occasions since 1949) the charter documents that authorize and govern the activities of The Florida Bar. The Rules Regulating The

Florida Bar clearly authorize this organization to engage in legislative activity.

> Subject to the continued direction and supervision by the Supreme Court of Florida, the board of governors may, by amendment to this chapter, take all necessary action to:
>
> . . .
>
> (c) Establish, maintain and supervise:
>
> . . .
>
> (4) A program for providing information and advice to the courts and other branches of government concerning current law and proposed or contemplated changes in the law. . . [Rules Regulating ~~The~~ Florida Bar 2-3.2]

At the same time, these rules place reasonable restrictions upon The Florida Bar by limiting the manner in which the Bar or its Board of Governors may adopt any formal legislative position:

> . . . The Florida Bar shall not take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Rules Regulating The Florida Bar [Standing Policies ~~of~~ ~~the~~ Board Of Governors Of ~~The~~ Florida Bar 9.10(a); also restated in The Florida Bar Journal annual directory issue, "Legislative Policy and Procedure," 62 Fla. B.J. 115 (1988)]

4. As noted in the Bar's initial Response in this action, these purposes and policies have been the subject of scrutiny by this Court: see ~~In Re~~ Amendment to Integration Rule of The Florida Bar, 439 So.2d 213 (Fla. 1983). The Bar reiterates that the recent

challenge of its legislative activ ties at the federa level--Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986)--still seemingly reflects the current federal law applicable to legislative activities of any integrated bar:

> The similarities between union dues and integrated bar dues are so substantial that we may safely transpose the Abood [v. Detroit Board of Education, 431 U.S. 209 (1977)] holding to the facts presented in this appeal as follows: the Florida Bar may use compulsory Bar dues to finance its Legislative Program only to the extent that it assumes a political or ideological position on matters that are germane to the Bar's stated purposes.
>
> . . .
>
> . . . Abood specifically noted that the union was free to politicize on any issue of interest to that group. See 431 U.S. at 235, 97 S.Ct. at 1799. Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. Id. Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members. [798 F.2d at 1569-1570]

Furthermore, the Bar again stresses the significance of the Gibson opinion's closing footnote, which observed:

> 5. Although the question of proper remedy is not before this court, this aspect of the Abood opinion suggests that the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program, but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying. [According to testimony at trial, each lawyer's share of the lobbying budget amounts to approximately

> $1.501. Lawyers would only have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right not to disclose his benefits. See Abood, supra, at 241, n. 42, 97 S.Ct. at 1802, n. 42. [798 F.2d at 1570, footnote 5 (Emphasis supplied)]

In accordance with those observations in Gibson--and at the request of the federal district court on remand of that case--The Florida Bar took steps to develop the "proper remedy" for implementation within its legislative programming. Such action was not taken to avoid "the difficult task of discerning proper Bar position issues," but to overlay an additional measure of control over legislative activity that remains limited by this Court to topics related to the purposes of The Florida Bar as set forth in the Rules Regulating The Florida Bar. That remedy became fully developed when this Court **"heartily"** approved—on the same day the initial opinion in the instant case was rendered--the legislative objection procedure now codified within Bar Rules: The Florida Bar Re Amend. to Rule 2-9.3, 526 So.2d 688 (Fla. 1988).

5. Since implementation of that policy, some 40 legislative positions have been officially adopted on behalf of The Florida Bar spanning the 1987-88 and 1989-90 bienniums: see Exhibits A & B. All these positions have been subjected to formal member notice and are the product of this organization's "comprehensive legislative policy and procedure. . . as limited by the standing board policy on

legislation": see In Re Amendment to Integration Rule of The Florida Bar, 439 So.2d 213, 214-5 (Fla. 1983).

6. Upon this predicate The Florida Bar supports the report of the Judicial Council, ordered by this Court in these proceedings. At its January 26-27, 1989 session, the Board of Governors of The Florida Bar formally endorsed that document and now urges its adoption to guide future legislative activities of this organization.

The Council's report acknowledges the continued viability of the Bar's legislative programming, noting only two reported cases in opposition to legislative involvement of some form by the organized bar. The Council quite properly distinguishes Schneider v. Colegio de Abogados de Puerto Rico 682 F.Supp. 674 (D.P.R. 1988) from any situation in Florida due to the political positions taken by the integrated bar of Puerto Rico that were wholly unrelated to that organization's fundamental purposes, and that bar's failure to adequately safeguard the rights of dissenting members. Levine v. Supreme Court of Wisconsin, 679 F.Supp 1478 (W.D. Wis. 1988) was reversed in proceedings subsequent to preparation of the Judicial Council's report: Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1988). Therefore, the original district court holding in Levine--i.e., that the integrated bar of Wisconsin violated members'

first amendment speech and associational rights — has no residual vitality.

The Judicial Council correctly recognizes that legislative involvement by integrated bars in this country is sanctioned by the overwhelming weight of authority from both state and federal courts. Many of those cases are acknowledged within this Court's original opinion in this matter: see The Florida Bar re Schwarz, 52 So.2d 56, 57 (Fla. 1988). Other opinions are noted in materials developed by the Judicial Council during its independent research of this topic. The most current compilation of prevailing law appears within the Supreme Court of California's opinion in Keller v. The State ~~Bar of~~ California, 767 P.2d 1020, 1028 & 1038-9 (Cal. 1989).

The Florida Bar notes the Judicial Council's admonition that "when adopting a position on proposed legislation, the Bar must confine itself to those subjects directly affecting the administration of justice or the advancement of jurisprudence." Such restrictions are presently embodied in the Bar's charter documents and all pertinent pronouncements from this Court, although the Bar would respectfully note the observations by the 11th Circuit Court of Appeals in Gibson that a remedy akin to the refund procedure presently in effect could completely avoid the difficulty in discerning the propriety of a legislative positon taken by the Bar.

Consequently, the Bar supports adoption of the five recommended subject areas recognized by the Judicial Council "as clearly justifying legislative activities by the Bar" under an analysis utilized by the Schneider court. [682 F.Supp 674 at 685]

> Questions concerning the regulation and discipline of attorneys;
>
> Matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> Increasing the availability of legal services to society;
>
> Regulation of attorneys' client trust accounts; and
>
> The education, ethics, competence, integrity and regulation as a body, of the legal profession.

Similarly, the Bar urges acceptance of the three additional criteria suggested by the Council to aid in determining the propriety of legislative involvement by the Bar when certain topics appear to fall outside of the five specifically identified areas of acceptable legislative activity.

> That the issue be recognized as being of great public interests;
>
> That lawyers are especially suited by their training and experience to evaluate and explain the issue; and
>
> The subject matter affects the rights of those likely to come into contact with the judicial system.

The Judicial Council's report further observes that the current legislative objection procedures of The Florida Bar within Rule 2-9.3 appear consistent with the Council's recommended objectives. The Bar would concur, with continued reliance on this Court's action in The Florida Bar Re Amend. To Rule 2-9.3, 526 So.2d 688 (Fla. 1988). And, of special significance is the recent federal court analysis of this rule, contained in the Final Order of Dismissal by the United Stated District Court for the Northern District of Florida upon remand of Gibson v. The Florida Bar:

> This court has reviewed the rules and procedure recently implemented by the Florida Bar, which were adopted by the Florida Supreme Court in The Florida Bar Re Amendment to Rule 2-9.3 (Legislative Policies), 526 So.2d 688 (Fla. 1988), and now codified as rule 2-9.3, Legislative policies, Rules Regulating the Florida Bar. The rule as adopted meets the safeguards and requirements necessary for protection of members' first amendment rights, as set out in both the case of Chicago Teacher's Union v. Hudson, 475 U.S. 292, 106 S.Ct. 1066 (1986), and the Eleventh Circuit opinion in the case at bar, Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986). [Final Order at 1, Gibson v. The Florida Bar, No. TCA 84-7109-MMP, N.D.Fla. May 2, 1989; appeal docketed, No. 89-3388, 11th Cir., May 3, 1989.]

7. Notwithstanding its general support of current legislative activity by the Bar, the Judicial Council suggests that the Bar's member objection procedure in Rule 2-9.3 be amended to clearly assign the burden of proof to the Bar in any arbitration proceeding.

The Bar is completely amenable to codifying this evidentiary provision within its rules. Such a requirement is consistent with the Bar's expectations of proof in any arbitration proceeding under Bar Rule 2-9.3, both as to the accuracy of the amount of any escrowed dues monies [Chicago Teachers Union, Local No. 1 v. Hudson, 106 S.Ct. 1066, 1075 (1986)] and as to whether a particular legislative position is germane to this organization's stated purposes [Gibson v. The Florida Bar, 798 F.2d 1564, 1569 (11th Cir. 1986)].

The Council additionally recommends that Bar Rules provide that the identity of any legislative objector, and of those who challenge particular allocations, be made public only upon the request of the dissenting member.

The Florida Bar has never formally addressed the issue of publicly releasing the names of dissenting Bar members, although it should be conceded that objection letters have been included within the public portion of materials provided to our Board of Governors in furtherance of its duties to review such protests under Bar Rule 2-9.3. Additionally, such objection letters have been considered in open sessions of the Board. No other publication of the names of such dissenters has been made by the Bar, and we would acknowledge that such release would collide with the only known

court pronouncement on this issue: see Schneider v. Colegio de Abogados de Puerto Rico, 682 F.Supp. 674, 689 (D.P.R. 1988).

Consequently, the Bar accepts the Judicial Council's recommendations in this regard, adding that Bar Rule 2-3.10 (Meetings) should be similarly amended to allow for more discrete action on such legislative objections during executive sessions of the Board of Governors.

8. In addition to Mr. Schwarz' observations filed in this matter, as Petitioner, only three other Bar members provided comments in response to this Court's request published in the March 15, 1989 issue of The Florida Bar News. The Bar stands by the comments in its original Response--and supplemented by this pleading--with regard to Petitioner's argument. In varying degrees, those other commentators question the policy determination inherent within our current legislative programming that, consistent with the spirit of this integrated Bar, all members shall pay their fair share of an activity approved by this Court as consistent with the stated purposes of this organization. In addition, these member comments question the legality of the Bar's legislative activity under present constitutional principles.

Professor Little's assertion that increasing the availability of legal services to society is a general welfare issue to be

addressed by the plenary welfare and taxing powers of the legislature ignores this tribunal's "long-standing commitment to the broad delivery of legal services" [~~In re~~ Interest ~~On~~ Trust Accounts, 402 So.2d 389, 396 (Fla. 1981)], the broad delivery of which has been termed "a cherished commitment of this Court" [Matter of Interest on Trust Accounts, 402 So.2d 389 (Fla. 1981) further citing The Florida Bar v. Furman, 376 So.2d 378, 381-82 (Fla. 1979)].

Mr. Bryan, a former member of the governing board of this organization, seemingly takes issue with the substance and spirit of the Bar's legislative activities, additionally questioning our representative form of government and legislative procedures—all of which were formulated to inject legally adequate measures of due process into the legislative programming of The Florida Bar. He otherwise quite correctly describes the present variance in authorized legislative activities of the Bar (in its full official capacity, using mandatory dues funds) vis-a-vis the substantive law sections of The Florida Bar (using voluntary dues assessments): see also Rules Regulating The Florida Bar, 2-7.5. It is submitted, however, that the current Bar procedures--and division of legislative labors—have afforded ample opportunity for helpful advice to the legislature from Bar sections in those areas Mr. Bryan terms "arcane," "complicated" and where there may be no public interest. The compilation of legislative positions also taken by

Bar sections appears at the close of the two most recent biennial legislative reports in Exhibits A & B.

Professor Little further criticizes the current objection procedure and arbitration process, citing Justice Terrell's concerns over allegedly similar threats to personal liberty posed by labor unions or other human agencies in a **1943** case. Reliance on such remarks seems entirely misplaced in view of Justice Terrell's pronouncement six years later that the integrated bar **"is** no more akin to unionism and the closed shop than it is to the Rotary Club or the Presbyterian **Church."** [Petition of Florida State **Bar** Ass'n, 40 So.2d 902, **908** (Fla. **1949)]**

9. Otherwise, the comments of Messers Bryan, Little and Trawick question aspects of both the five core subjects and three supplemental criteria recommended for discerning proper Bar positions on legislative issues. In the face of such overwhelming authority cited by the Judicial Council and produced in intervening court action, it is difficult to fathom how any of the recommendations of the Judicial Council can be questioned as to their legality or propriety.

Simply stated, the comments presented in opposition to the Council's support of the Bar's legislative programming are antithetical to the notion of the integrated bar as espoused by this

Court and others. The constitutionality of the integrated bar was established firmly in Florida by Petition of Florida State Bar Ass'n, and in the United States by Lathrop v. Donohue, **367** U.S. 820 **(1961).** Both cases remain solid authority for The Florida Bar's present legislative activities. Constitutional arguments regarding freedom of association and freedom of speech generally attacking the concept of integration are without validity.

Abood and its progeny stress that, in a First Amendment context, where compelled financial support of a group is permissible, an individual cannot withdraw his support from acts promoting "the cause which justified bringing the group together." **[431** U.S. 209, **224 (1977)]**

Of particular note is the most recent review of political activities of the State Bar of California wherein the Supreme Court of California observed that, as to matters pertaining to the advancement of the science of jurisprudence or the improvement of the administration of justice: "In the context of lobbying and amicus curiae activities, this language should be read broadly." The court went on to stress:

> Laws are the business of lawyers. The dr fting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are

matters which often require expert lega knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to significant improvements in the legislative proposal. The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems." Falk I supra, 305 N.W. 201, 231-232 (opn. of Williams, J. fns. omitted.)[20]

---

[20] The same reasoning applies to lobbying before administrative agencies, and to the filing of amicus curiae briefs. Agencies and courts, in their interpretation of laws, also benefit from the collective advice of the bar. [Keller V. The State Bar of California, 767 P.2d 1023, 1030-1 (Cal. 1989)]

10. As noted by the Bar in its initial Response, this organization bound itself to a legislative objection procedure suggested by the Gibson case as early as March 1987 through passage of the measure as a standing policy of the Board of Governors. Since formal adoption of Rule 2-9.3 by this Court in June of 1988 the Bar has adopted 40 separate legislative positions that have been subject to this procedure now further sanctioned by the Gibson trial court on remand, Allowing for successive objections from the same Bar member to separate legislative topics, these 40 formal positions

have generated dissent from only 40 individual Bar members within our full membership of over 44,000. Statistics on these objections follow:

1987-88 Biennium

Positions **1 - 7**	**12** objections
Positions **8 - 11**	**6** objections
Positions **12 - 13**	0 objections
Positions **14** - 16	5 objections
Positions **17 - 18**	1 objection
Positions **19 - 22**	**7** objections

[After allowing for successive objections from the same Bar member to separate groups of legislative positions, the Bar's **22** official legislative positions for this period drew various objections from **25** separate Bar members.]

1989-90 Biennium

Positions **1 - 3**	**7** objections
Positions **4 - 13**	**12** objections
Position **14**	0 objections
Positions **15-18**	**5** objections
Positions **19-32**	(In process)

[After allowances for successive objections by the same member, these 18 active positions have drawn objections from 21 separate Bar members; six of these 21 were among the 25 objectors from the previous biennium.

The amount of mandatory dues at issue in these matters is something less than the $7.70 of each member's $140 dues that underwrite the Bar's entire legislative budget. Nevertheless, pending implementation of a method to specifically allocate costs attributable to particular legislative positions of the Bar, the full *$7.70* amount is placed in escrow and susceptible to rebate based on only one or more timely objections throughout the currency of any legislative position.

Advance notice of estimated pro rata legislative expenses is provided to all members at the beginning of each fiscal year, within The Florida Bar Journal's annual directory issue [see, "Bar Services Report," 62 Fla. B.J. 13, 29 (1988)] and such calculations are regularly revised for escrow purposes in the event of interim budget amendments. At the conclusion of the Bar's fiscal year and a closing audit by independent accountants, final verification of legislative expenses is accomplished and necessary escrow adjustments are made prior to payment of pro rata refunds and accumulated interest.

In all cases, the Board of Governors has bypassed arbitration proceedings and authorized partial dues refunds, with appropriate interest, where a member objection has been properly made under Rule 2-9.3.

In comments filed with this Court, Professor Little asserts that he never received a refund from his own legislative "objection." This is is rebutted by the series of letters found at Exhibit C. while Professor Little argues that the Bar has been "most grudging and niggardly" in its administration of Rule 2-9.3, this correspondence should suggest the opposite: the Bar merely awaits some specificity as to his disagreement with "a particular position on a legislative issue" consistent with governing procedure.

CONCLUSION

This action seeks to confirm whether the Supreme Court of Florida has failed to define or limit the scope of The Florida Bar's legislative program. The Bar would urge that such activities are well clarified and regulated by a dynamic process that fully meets constitutional requirements and meaningfully addresses potential member dissent. The Judicial Council's recommended amendments to the process appear to be constructive improvements, are totally

endorsed by The Florida Bar, and this organization urges their immediate adoption by this Court.

Respectfully submitted,

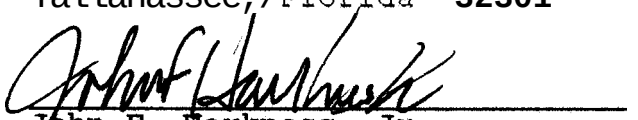
Rutledge R. Liles
President
The Florida Bar
901 Blackstone Building
Jacksonville, Florida 32202
(904) 632-200

Stephen N. Zack
President-elect
The Florida Bar
Court House Center, 26th Floor
175 N.W. First Avenue
Miami, Florida 33128
(305) 373-4000

John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32399-2300
(904) 222-5286

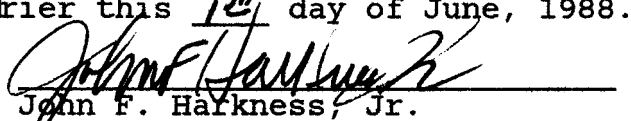
Paul F. Hill
General Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Barry S. Richard
Of Counsel to The Florida Bar
Roberts, Baggett, LaFace & Richard
Post Office Drawer 1838
Tallahassee, Florida 32301

By: 
John F. Harkness, Jr.
Florida Bar #0123390

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Thomas E. Schwarz, 4561 Northwest 79th Avenue, Lauderhill, Florida 33321, by courier this 10th day of June, 1988.


John F. Harkness, Jr.