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The Honorable Raymond Ehrlich,
Chief Justice
The Florida Supreme Court
Tallahassee, Florida 32399-1925

Re. Legislative Activities of The Florida Bar

Dear Mr. Justice Ehrlich:

I am writing to comment on the December 1988 Special Report of the Judicial Court of Florida to the Florida Supreme Court entitled "Legislative Activities of the Florida Bar." (I will hereafter refer to this as the "Report.") I asked Clerk White how the Court intended to receive commentary. He had no definite answer and in the absence of clear direction I am writing this letter to express my views. If another approach is more appropriate, I would appreciate being informed.

Let me first point out that I was out of the country during the entire time the Council was considering the matter, and, consequently, had no actual notice of the proceedings or convenient opportunity to participate. Otherwise, I would have made my initial comments to the Council.

My overall impression of the Report in that it has not made a comprehensive and thorough study of the issues involved. Consequently, the Report is thin in content, the analysis shockingly twisted in one important aspect, and its conclusions are of doubtful validity.

The reference of the Supreme Court raises at least two central issues and one or more subsidiary issues. The main issues are:

1. Does The Florida Bar possess the governmental authority under the law of Florida to compel members of the Bar to pay money to fund the Bar's legislative lobbying activities that have nothing to do with admission to the Bar or discipline of lawyers?

2. Does it violate the Florida and United States Constitutional rights of members of The Florida Bar who, as a condition for obtaining and holding a license to practice law in Florida, are compelled to contribute money to support particular legislative lobbying activities of The Florida Bar with which they disagree?

Two subsidiary questions are:

3. Do individual lawyers and organizations of lawyers have ample opportunity to participate and be heard in the political processes in Florida?

4. May members of The Florida Bar form additional lobbying organizations to be subscribed to and paid for by lawyers who voluntarily choose to support their endeavors?

I will discuss each of these issues briefly.

1. **Does** The Florida Bar possess the governmental authority under the law of Florida to compel members of the Bar **to** pay money to fund the Bar's legislative lobbying activities that have nothing to do with admission to the Bar or discipline **of** lawyers?

The Florida Bar is a governmental entity, specifically an agency of The Florida Supreme Court created by the Court **under** the constitutional powers prescribed in Article V § 15 Florida Constitution.[1] Indeed, the very rule that establishes the Florida Bar properly refers to it as "an official arm **of** the Court." Rules Regulating the Florida Bar, 494 So.2d 977, 979 (Fla. **1986).** The Florida Bar is, therefore, an agency **of** the judicial branch of government and, as such, can have no more governmental powers and authority than those possessed by the Court itself. As an agency of the judicial branch of government, The Florida Bar is thus restrained by the separation of powers doctrine of Article II § 3 Florida Constitution, and limited by the same Constitutional strictures in United States Constitution and the Florida Constitution that pertain to all governments. In short, The Florida Bar, as an arm of government, can possess no more power to take positions on issues through lobbying the legislature than could the Court itself.

To examine this question thoroughly one must first **look** for a source of power to authorize the regulatory action being taken by any governmental agency that is not the legislature. While I will not undertake to examine what the scope of the Court's jurisdictions, powers and functions as a judicial body may be, **I** will briefly refer to the regulatory powers that have been delegated to it by the people through the Constitution. These are to: (1) adopt rules for "practice and procedure in all Courts" (Article V §2(9); (2) "establish by rule uniform criteria for the determination of the need for additional judges" (Article V §9); (3) make findings and certifications with respect to (2)

[1] The initial integrated bar was created under the pre-1968 inherent powers to regulate the practice of law. Petition of Florida State Bar Assn., 40 So.2d 902 (Fla. 1949). That power has now been Constitutionalized in the 1968 Constitution.

(id.); (4), "regulate the admissions of persons to the practice of law and the discipline of persons admitted." (Article V $15); and, (5) under prescribed circumstances, perform judicial reapportionment. (Article IV $16 (f).)

It is from these Constitutional provisions that the Court, and its agent, The Florida Bar, must seek the governmental power to require anyone to contribute to the Bar's lobbying activities. Any governmental entity claiming a power to compel must find it in our Florida Constitution. The Supreme Court has time and again applied this restraint to itself saying the "jurisdiction of the Supreme Court is conferred by the Constitution itself" and "it [the Court] is not endowed by any common law perogative outside of the boundaries established by organic law." Sun Insurance Office, Limited V. Clay, 133 So.2d 735, 741 (Fla. 1961). The Court has freely acknowledged that even the judicial, as opposed to regulatory, jurisdiction of the Court is defined and restrained by the Constitution. Carmazi v. Board of County Commissioners, 104 So.2d 727 (Fla. 1958). It is true, of course, that the Supreme Court possesses inherent powers necessary to augment its particular powers, but the inherent powers are closely restrained. As the Supreme Court recently repeated in Booker v. State, 514 So.2d 1079, 1081 (Fla. 1987) (Quoting from Petition of Florida Bar, 61 So.2d 646 (Fla. 1946):

> Inherent power has to do with the incidents of litigation, control of the court's process and procedure, control of the conduct of its officers and the preservation of order and decorum with reference to its proceedings. Such is the scope of inherent power unless the authority creating the court clothes it with more. (e.s.)

It is also true that within the realm of its rule making powers, i.e. those I have stated above, "the Court is free to adopt any procedural rule." (e.s.) State v. Miller, 313 So.2d 656, 658 (Fla. 1975).

From all the above, I conclude that the Court plainly has plenary power to adopt rules of procedure, and, by parity of reasoning, plenary power to adopt rules pertaining to admission and discipline of lawyers. Outside that sphere of prescribed regulatory power, all legislative power resides in the legislature, or as otherwise or assigned by the Constitution.

On the surface of this analysis, one may conclude that the Supreme Court itself could undertake some kind of lobbying activities in the legislature that pertains to its realms of authority: rules of procedure, rules of admission and discipline of lawyers, need for judges, and judicial reapportionment. One could also conclude that the only lobbying permitted to the Court by the separation of powers doctrine of Article 11, § 3 is to present its views to the legislature by letter or other dignified form of transmission, and that the Court has no power to compel

the members of the Bar to enhance the lobbying effort. These points are not at issue here, and may be fairly debatable. What should not be debatable however, is the proposition that under no reasonable view of the regulatory power assigned by the people through the Constitution does the Supreme Court possess the power to compel the members of The Florida Bar to conduct lobbying activities broader than those described above. More particularly, the power of the Court to adopt rules of procedure and to regulate admissions and discipline of lawyers does not include a power to compel contributions for broader lobbying purposes.

Proper analysis thus reveals that The Florida Bar may possess only narrow and limited governmental powers. Being an arm of the Court, The Florida Bar cannot possess greater powers to lobby and to compel contributions from the members of The Florida Bar than the Court itself possesses. Moreover, being a subordinate agency of government, The Florida Bar may possess only those powers properly and expressly delegated by the Supreme Court and those necessarily inherent within express grants. It is in this context that the Report should have considered the issues submitted to it by the Court.

On page 9, the Report recommends five areas "as clearly justifying legislative activities by the Bar." These are:

(1) Questions concerning the regulation and discipline of attorneys:

(2) Matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;

(3) Increasing the availability of legal services to society;

(4) regulation of attorneys' client trust accounts; and

(5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

In addition, the Report recommends that the Court authorize the Bar to become "actively involved" in legislative lobbying "when the legislation appears to fall outside of the above specifically identified areas," if three additional criteria are satisfied:

(1) That the issue be recognized as being of great public interest;

(2) That lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) The subject matter affects the rights of those likely to come into contact with the judicial system.

I believe the Report's recommendations numbered (1), (4), and (5) are within the Court's Constitutional powers, with the exception that the term "regulation" must not be read more broadly than encompassed within the Court's power to "regulate the admission of persons to the practice of law." (Article V §15.) Item (2) is somewhat problematic because it, as is the remainder of the Report, fails to attribute sources of power. (Instead, the Report assumes the question to be "Restrictive Criteria.") Nevertheless, as long the substance of the issues remains within the constitutional scope of "rules for practice and procedure" (Article V §2(9)) and need for judges (Article V 9), the function is within the Court's power and might be delegated by the Court to The Florida Bar.

As to item (3), "increasing the availability of legal services to society," the Constitution delegates no legislative function to the Court apart from those mentioned: to wit, practice and procedure, numbers of judges, judicial reapportionment and admission to and discipline of members of the Bar. Matters beyond that are plainly general welfare issues that fall to be addressed within the plenary welfare and taxing powers of the legislature. The Court, thus, has no power to compel members of the Bar to defray legislative lobbying on that subject, nor may it authorize the Bar to compel its members to contribute for that purpose.

What has been said about item (3) applies more cogently to the "additional criteria" recommended by the Bar. Indeed, these criteria are so expansive that they could be extended to virtually any piece of legislation introduced into the legislature. For the Court to adopt such a rule would plainly undermine the separation of powers doctrine of Article II 63, and permit the Bar to compel its members to support the wide-ranging political views of the majority of the Board of Governors on countless numbers of issues. The Constitution devolves no such power on the Court, nor may the Court delegate such a power to The Florida Bar.

In sum, the Report simply ignores the question of sources of Constitutional authority from which the The Florida Bar might be empowered to compel the members to contribute funds to pay for legislative lobbying. Upon examining this question in the same way that the Court regularly examines power issues when any other department of government is the actor, I conclude the the scope of delegable authority assigned to the Court by the Florida Constitution is much more restrictive than the Report acknowledges.

2. Does it violate the Florida and United States Constitutional rights of members of The Florida Bar who, as a condition for obtainins and holding a license to practice law in Florida, are compelled to contribute money to support particular legislative lobbying activities of The Florida Bar with which they disagree?

From what I have said above, I plainly believe that any attempt to compel members of the Bar to pay for legislative lobbying activities beyond narrow limits is ultra vires and void. I have reached this conclusion by sole reference to sources of authority in the Florida Constitution and without considering limits on power imposed by either the Declaration of Rights of the Florida Constitution or the First Amendment to the United States Constitution. By contrast, the Report silently assumes the existence of authorizing powers and concerns itself only with perceived limitations. The Report made this error by concerning itself only with federal issues, which are issues of limitation, and not with issues of empowerment, which the Supreme Court must first consider under the Florida Constitution. I will now briefly examine the limitations.

First Amendment issues have been the focus of most of the national litigation on this subject and will, I am sure, be a continued focus of litigation in Florida if the Supreme Court adopts all the Report's recommendations. Although I will not examine these issues--which are summed up by Thomas Jefferson's admonition: " ... to compel a man to furnish money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[2] --- I will assert two opinions about the Report. First, the "additional criteria" for legislative lobbying are so broad and vague as to place no limit on the Bar's legislative lobbying activities. As a consequence, such a rule would repeatedly impose the obligation to "furnish money for the propagation of opinions which he disbelieves," upon each member of the Bar who does not support the Board of Governor's policy choices (including Board members who were in the minority and disagreeing members of the Supreme Court). Recent examples of Board decisions to lobby include, a shoot to kill statute, taxes on services, caps on tort recoveries and others. Forcing lawyers to support the pro or con on any such measure, whatever its true merit, is the the very thing that recent court decisions say the First Amendment precludes. The Report simply seeks to resurrect the forbidden activities in the guise of "additional criteria."

Finally, The Florida Bar and the Report steadfastly adhere to a most grudging and niggardly acknowledgment of the Constitutional rights of members of the Bar. I am speaking specifically of the arbitration process that a dissenting member must submit to to be relieved of the compulsion "to furnish money for the progation of opinions which he disbelieves." As Justice Terrell put it, "... what is liberty if a mans job, his very economic existence, is eternally threatened by a labor union or some other human agency?"[3] The Court should insist upon the fullest expression of these freedoms by requiring the Bar to permit members to choose at the time dues are paid to pay for lobbying activities voluntarily or to decline to pay. The rebate procedure discussed on page 10 of the Report is, in my opinion, an affront to the members.

[2] Quoted in Abood v. Detroit Bd. of Education *431* U.S. 135, 97 S.Ct. *1782, 1799,* N. *31 (1977).*

[3] Terrell, J., dissenting, International Assn. of Machinists v. State, *15* So.2d *485, 495* (Fla. *1943.)*

May I also note that the statement on page 10 that "In practice ... the Bar has waived the arbitration option in every case and simply refunded the pro rata monies to objecting members" is not literally true. (I do not doubt or deny that the Council was so advised.) I am enclosing correspondence that clearly establishes that I was an "objecting member," but I have never received a refund. May I emphasize, however, that the small amount of money is of no personal importance to me. By contrast, these things are of fundamental interest to me and, I believe, all members of the Bar: that the Court acknowledge, first, the limits of power that The Florida Bar may possess; second, the Constitutional rights of the members of the Bar; and, finally, the obligation of the Bar to protect and honor those rights. However small the amount, the Bar should pay, and with enthusiasm, what the Constitution requires.

3. Do Individual lawyers and Organizations of Lawyers Have Ample Opportunity To Participate and Be Heard In Political Processes In Florida?

In the mind of the populace, this question must seem cynical or absurd. It knows full well that lawyers have more acquaintance with and access to the political process than any other profession in Florida and always have had. Why, then, should such a question be asked?

The answer is that the approach taken by the Report calls these matters into question. The Report makes the following argument:

> The Council submits that the advice of the Bar is important to the legislature's deliberations within areas pertaining to the administration of justice. ... It appears that the Bar has an obligation, grounded upon the integration rule setting forth that Bar's very purpose for existence, to speak out on appropriate issues concerning the courts and the administration of justice and advise the legislative and executive branches of government of its collective wisdom with respect to these matters. To prohibit such communication would work a grave disservice to the people of this state and would infringe upon the free speech of the great majority of the state's attorneys.

Report, p. 6 (e.s.). This argument, particularly the sentence I have underlined, simply turns the issue inside out in a most cynical manner. In sum, the Report initially begs the question of what source of power to compel members to contribute to lobbying is available to The Florida Bar under the Florida Constitution and, then attempts to use the First Amendment to the United States Constitution as a basis of compulsion. The Report, thus attempts to shift the ground by referring to a supposed "prohibition [of] such communication," which is not the issue, and to avoid the true issue which is "what power does the Bar have to compel members to contribute to lobbying activities."

The truth is that when The Florida Bar, an arm of government, compels contributions from its members, it is exercising the power of government. It is, therefore, the sheerest nonsense to speak of not permitting an arm of government to compel members of the Bar to propagate its political views as "infringing upon the free speech of the great majority of the state's attorneys." The only purpose of the First Amendment is to restrain governments--including The Florida Bar--not to empower them.

Each and every lawyer and non-lawyer in Florida has individual rights guaranteed by the First Amendment. These include the rights to speak out individually and to form organizations of kindred spirits to speak out collectively. Lawyers have formed many such organizations, including the Florida Trial Lawyers Association, the Florida Academy of Trial Lawyers, the Florida Association of Women Attorneys, numerous voluntary bar associations and others, many of which actively engage in legislative lobbying. The First Amendment assures that no clovernment may Place impediments in the way of these individual and collective activities. By the same token, however, the First Amendment grants to no government the power to force any person or class of people into an association for the purpose of taxing them to propagate the political goals of the government. That, in a nutshell, is the issue that faced the Council, and not some threat to the ability of lawyers to speak out.

In sum, The Florida Bar is an arm of government. It is created by the Supreme Court to assist the Court in performing its Constitutional functions, including especially the admission and discipline of lawyers. By contrast to the governmental entity called The Florida Bar, the private legal profession is the individual and collective legal capacity of all the men and women who are qualified to and do function as lawyers. The profession may be regulated by The Florida Bar acting as an arm of government, but The Florida Bar and the legal profession are not synonymous. Moreover, the legal profession and each of its practitioners are protected against the tyranny of all gpvernments, including The Florida Bar, by the First Amendment, the Florida Declaration of Rights and other constitutional restraints on government. To view the matter as does the Report is to invite government to overreach itself and erode Constitutional governance.

4. May Members of The Florida Bar Form Additional Lobbying Organizations To Be Subscribed To And Paid For By Lawyers Who Voluntarily Choose to Support Their Endeavors?

To anyone with the slightest knowledge of either current affairs or of the meaning of the First Amendment, this, too, will seem a silly question. I have posed it for the same reason as I posed question 3; that is, to reveal the thinness of thought and analysis presented in the Report.

The plain answer to this question is, "Yes." Lawyers, and anyone else, may form privately funded voluntary organizations to raise money to engage in legislative lobbying. Moreover — and this is what the First Amendment is all about--no government, not even The Florida Bar, may stop them from doing it. Indeed, no government, not even The Florida Bar, may stop individual lawyers and voluntary associations of lawyers from lobbying hard against whatever legislative polices The Florida Bar or even the Supreme Court may be endorsing. Indeed, it is just such a conflict that poses the crux of the issue: may The Florida Bar compel a member to provide money to permit the Bar to lobby against a position that he is supporting in his private capacity? As Jefferson put it, to permit such a thing would be "tyrannical," and as Justice Terrell wrote for the Court when it approved the initial integration rule "nor was [The Florida Bar] intended as a means to aid groups and elites in the exercise of arbitrary power or to enforce their will on others."[4]

In short, members of the legal profession have plenteous opportunity to lobby the legislature and nothing prevents them from doing more. If the leaders of The Florida Bar choose to do so, they may, of course, create a private Bar Political Action Committee for the purpose of raising and spending money on whatever political issues its contributors will support. Individual members of the Bar may volunteer to contribute to such an endeavor, but they may not be compelled by government to do so.

In conclusion, I urge you and the members of the Supreme Court to examine the central question of what power The Florida Bar, as an arm of government, possesses to tax members of the Bar to pay the costs of legislative lobbying. I think it plain that The Florida Bar may possess no more power than does the Court itself and that any such power is limited to the constitutionally prescribed and limited subjects of the Court's jurisdiction and rule making authority. Only after finding a source of power for a particular subject need the Supreme Court consider how the power may have been limited by other provisions of the Florida and United States Constitutions.

In making that examination, you and the justices must not wrongly look to constitutional limitations as a means of

[4] Petition of Florida State Bar Assn., *40 So.2d 902, 908* (Fla. 1949).

empowering government, as the Report has done but the Florida Supreme Court never has, but you must, as you always have, followed the admonition of Justice Bradley: "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be obsta principiis."[5] Or as Thomas Jefferson also said, "In questions of power ... let no more be heard of confidence of man, but bind him down from mischief by the chains of the Constitution."

Yours truly,

Joseph W. Little

JWL:mks

cc: The Honorable Rosemary Barkett
The Honorable Stephen Grimes
The Honorable Gerald Kogan
The Honorable Parker Lee MacDonald
The Honorable Ben F. Overton
The Honorable Leander J. Shaw
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Enclosure

[5] Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct. 524, 535, *29* L.Ed. 746. These last two quotations were used by dissenting Chief Justice Adair in State v. District Court, 305 P.2d 1101, 1114 (Mont. 1957). Chief Justice Adair also gave obsta principiis this meaning: "... resist the first beginnings. Do not let the tyranny of government get a start."