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FEB 26 1998

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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

THE FLORIDA BAR,
Complainant,
v.
C. RANDALL SAYLER,
Respondent.

Supreme Court Case No. 89,493
By Chief Deputy Clerk 3/23
The Florida Bar File No. 96-50,917

RESPONDENT'S BRIEF

I. Rules 3-4.3, 4-4.4 and 4-8.4 of the Rules of Professional Conduct of the Florida Bar Are Unconstitutional "Content-Based" Restrictions on Free Speech

Law exists not to make lawyers wealthy by milking cases for excessive fees, but to benefit the public by dispensing justice without delay to preserve public safety and order.

Our legal system failed to protect the citizens of West Palm Beach, Florida on September 19, 1996. Ordinary citizens at work--a cab driver, small business owners--were endangered by a violent cab-jacking and subsequent hostage-taking at a workers' compensation defense law firm by an injured worker, Terry Lee Hogan. Complaint of the Florida Bar, Composite Exhibit "A".

Lawyers claimed some \$ 100,000 in fees for work on Mr. Hogan's injury claim, although there was no dispute that he was injured on the job, according to news reports. (Hogan's lawyers are quoted as claiming \$ 56,000 in fees, inferentially, defense fees must have been at least equal to that amount.) "Pain Frustration Pushed Ex-Veteran Over the Edge", The Palm Beach Post, September 29, 1996, Page 1A, (all editions).

The bloody tally at the end of that day: Needlessly aggressive and lengthy litigation on what should have been a straight-

forward workers' compensation injury claim killed two people and wounded one.

This case concerns the Florida Bar's plea to this Honorable Court for special treatment and rights for some favored Florida lawyers--to suppress newspaper and other criticism and punish their critics in violation of the First Amendment--that neither judges nor the public enjoy.

The Florida Bar claims a "status-based" exception to free-speech rights that apply to everyone else: Truthful speech may be suppressed and disciplined, per the Bar, by a form of "heckler's veto."

All an attorney has to do, according to the Bar, to immunize himself or herself from truthful criticism, is to make outrageous, false allegations against a critic attorney with the Bar--i.e., "stalking"--and the accused attorney's quantum of free speech is thereby diminished without regard to whether there is or has ever been any truth to the charge.

To limit an attorney's right of free speech based, not upon prior wrongful *conduct*, but merely upon past *accusations* by opposing counsel violates the due process and equal protection clauses of the Fourteenth Amendment. See, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 1 L.Ed. 2d 796, 77 S. Ct. 752 (1957).

No other group of citizens or professionals receives such a privilege to silence their critics as that demanded by the Bar:

The career Florida high-school teacher has not been given the right, under this Court's past decision, to be spared from

caustic criticism of her professional ability. Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984).

The public employee has no right to be free of critical opinions on the conduct of his official duties. Demby v. English, 667 So.2d 350 (Fla. App. 1 Dist. 1995).

The Florida Administrative Hearing Officer has no right to be free from criticism by lawyers appearing before him. Essen v. Mellon, 747 F. Supp. 692 (S.D. Fla. 1990).

Not even State and Federal Judges have the right to be free from public criticism, Pennekamp v. Florida, 328 U.S. 331, 90 L. Ed. 1295 (1946), Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42, 98 S. Ct. 1535, 1542-43, 56 L. Ed. 2d 1 (1978), or from criticism by lawyers appearing before them, In re Snyder, 472 U.S. 634, 86 L. Ed. 2d 504, 105 S. Ct. 2874 (1985).

Florida lawyers, according to this Court, do not have the professional right to be free from being called obscene names by opposing counsel ("---hole", "---k you", "Looney"), particularly if such conduct is provoked by the other attorney's unprofessional conduct. Florida Bar v. Martocci, 699 So.2d 1357 (Fla. 1997).

(Although Martocci was decided against the Florida Bar on October 2, 1997--in advance of the Respondent's hearing before the Referee on October 10, 1997, and well before the Referee's deadline for submitting written argument some three weeks after October 10, 1997--and it obviously is an important "lawyer speech" case precedent, counsel for the Florida Bar, the Branch

Staff Counsel for the Ft. Lauderdale office, inexplicably failed to advise the Referee of this new authority adverse to the Bar in his written "Argument" submitted to the Referee on October 27, 1997, or in the pleading that he filed with the Referee on November 20, 1997. The Referee's report was rendered on December 1, 1997 (two months after Martocci was decided against the Bar) without the Referee being advised of the new precedent.)

"The freedom of speech and of the press, which are secured by the First Amendment against abridgement by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state." Thornhill v. State, 310 U.S. 88, 94, 60 S. Ct. 736, 740 (1940).

Although freedom of speech is not absolute, legislation that aims at penalizing the publication of truthful information can seldom satisfy constitutional safeguards and is generally presumed unconstitutional. Doe v. Supreme Court of Florida, 734 F. Supp. 981 (S.D. Fla. 1990) (invalidating former Florida Bar Rule 3-7.1 as a constitutionally-impermissible content-based restriction on free speech).

The Complaint of the Florida Bar objects to communication of newspaper articles from The Palm Beach Post expressly because of what they contain: "reference[] to the recent murder of an attorney who represented employers and servicing agents in workers' compensation cases." Complaint of the Florida Bar, Allegation 6. "... headlines that embarrass, [or] frighten...". Complaint, Allegations 7 and 10.

But this reportage is the *truth*, uncontested by the Florida Bar.

Public dissatisfaction with how the legal system operates and how lawyers treat them is a fact, despite the innovative efforts of this Honorable Court to improve public access to court proceedings.

The public knows what they believe about the legal system, The Palm Beach Post (reporting the vox populi) knows this, and respectfully, if the Court will note Judicial Management Council and Bar surveys, Florida Judges and the Bar well know this fact:

"Most Floridians believe the state court system is too complicated and moves too slowly, and that fair treatment is related to one's race and financial status... The finding on attitudes toward lawyers continues to be disturbing." The Florida Bar News, December 1, 1996, pp. 1, 10.

"All of the [Florida] judges surveyed think the public does not have confidence in the existing legal system." The Florida Bar News, July 1, 1997, pp. 1,8 at 8.

"85 percent of judges agree...that attorneys have become money-oriented and put fees before clients." Id., at 8.

(In fairness, it should be noted that the Florida Supreme Court does not have direct control over the discipline of Florida lawyers. That responsibility has been delegated to the "Board of Governors" of the Florida Bar.

The "Board of Governors" of The Florida Bar, although given the important job of lawyer regulation by the Court, is uniquely insulated from the public and accountability to Florida taxpay-

ers (who pay some \$ 200 million annually to fund state courts):

Over ninety-six percent of the "governors" are lawyers (some of whom live outside the State of Florida), less than four-percent of the "governors" are non-lawyers.

It is perhaps ironic that out-of-state lawyers living in places as distant as Colorado, New York and New Jersey have greater representation on the Bar's "Board of Governors" than the Florida public. Florida Bar Journal, September 1997 (Directory Issue), pp. 468.

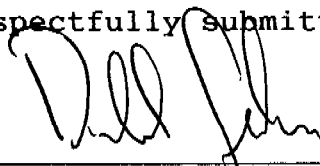
By not allowing direct public election of non-lawyer representatives to the Bar's Board of Governors, and increasing the number of public representatives on the Board, the Florida Bar itself arguably contributes to public distrust of a system that is not accountable to it.)

The Respondent's conduct, communicating truthful opinions and newspaper articles to a fellow attorney is constitutionally -protected free speech under the First and Fourteenth Amendments to the U.S. Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Respondent's Brief have been furnished to the Clerk of the Florida Supreme Court via United States Express Mail and via regular United States Mail on this 25th day of February 1998 to Kevin P. Tynan, Esquire, Branch Staff Counsel, The Florida Bar, 8900 North Andrews Avenue Suite 835, Fort Lauderdale, Florida 33309.

Respectfully submitted,



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