IN THE
SUPREME COURT OF FLORIDA

Case No. 91,236

DONALD A. TOBKIN, M.D., ESQ.,

Petitioner,

vs.

KIMBERLY L. JARBOE and LINDA JARBOE,

Respondents.

On Petition for Review of a Decision of the District Court of Appeal of Florida, Fourth District, or for a Writ Necessary to the Complete Exercise of this Court's Jurisdiction

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Answer Brief of Respondents

Thomas R. Julin
Edward M. Mullins
Eduardo W. Gonzalez
Florida Bar No. 325376 & 863920

Steel Hector & Davis LLP
200 S. Biscayne Blvd. Suite 4000
Miami, Florida 33131-2398
305.577.2810 or 2844 Fax 7001

Attorneys for Kimberly L. Childress and Linda Jarboe

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INTRODUCTION

This case arises from a decision in August 1989 by Donald A. Tobkin, a Florida Bar member, to undertake representation of the Jarboe family -- Linda and her three children, Kimberly,[1] Deborah and Ryan Jarboe -- in a probate matter arising in Pennsylvania even though he was not a member of the Pennsylvania Bar. After the Jarboes, who lived in Ohio and Indiana, terminated Tobkin for making false statements about them in pleadings, one of the daughters, Kimberly, complained in letters to the Florida Bar dated February 25, 1992, and April 17, 1992, about Tobkin's professional conduct. Her mother allegedly verified the allegations.

Tobkin sued his former clients on August 4, 1992, claiming breach of contract and various torts. Persevering through multiple dismissals, he ultimately amended his complaint to include claims for libel based on the Bar complaints.[2] The trial court finally dismissed the *fourth* version of the complaint on March 26, 1996, three-and-a-half years after the lawsuit began. The Fourth District upheld that result more than a year later on May 21, 1997.

Now, almost six full years from the date of Kimberly's first complaint to the Bar, Tobkin, having lost all his other claims against the Jarboes, continues to prosecute Kimberly and her mother

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1. Kimberly is now married and goes by the name Kimberly L. Childress.

2. Tobkin named all four family members in his original and amended complaints, even including Ryan's estate after his tragic accidental death. The trial court dismissed all claims against Deborah and Ryan's estate. Tobkin did not appeal the dismissal of those claims. The Fourth District therefore struck Deborah and Ryan's estate as appellees, (Fourth District Order of Dismissal, April 3, 1997). Tobkin's naming of Deborah and Ryan's estate as respondents here is therefore inappropriate.

for libel. The judicial odyssey forced upon Linda and Kimberly by his libel claims demonstrates the need for an absolute privilege to protect those who complain to the Florida Bar. As this Court and others have recognized in placing general restraints on actions for defamation,[3] a lawsuit for libel is a potent weapon in the hands of any civil litigant who wishes to deter critics.. In the hands of a lawyer unsettled by a former client's complaints, a lawsuit for libel is not only a potent weapon, but a potentially debilitating weapon that can be deployed at minimal cost to the lawyer but with such maximum effect on the complainant that even its existence threatens the integrity of the Bar and its members by silencing legitimate critics.

For this reason, Florida courts, as well as courts throughout the country, historically have embraced the principle that absolute protection- is essential to protect citizens, who themselves are benefitted only rarely by the Bar's quasi-judicial disciplinary proceedings, from libel suits based on the complaints that commence those proceedings.

Tobkin argues the Fourth District should have read this Court's rule-making decision in The Florida Bar Re Amendments To The Rules Regulating The Florida Bar, 558 So. 2d 1008 (Fla. 1990), as altering this fundamental common-law principle. But, the action taken by that decision was only to lift the gag order previously

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3. See, e.g., New York Times Co. v. S , 376 U.S. 254 (1964) (recognizing necessity of federal constitutional privilege to protect speech); Nodar v. Galbreath, 462 So. 2d 803 (Fla. 1984) (recognizing necessity of common law privilege to protect speech).

imposed against complainants and to allow public access to grievance records after a committee decides whether to find probable cause -- matters deemed essential for public respect and confidence in' the system -- not to adjudicate whether such a rule change would eliminate the common-law absolute privilege that also was necessary to public respect and confidence in the system.

The Bar Disciplinary Review Commission that advocated the rule "recommend[ed] that the complainant not be given immunity or privilege from civil liability *but be subject to applicable Florida law."* Id. at 1009 (emphasis added). That recommendation perhaps assumed that granting greater public access' to grievance proceedings might alter the common-law absolute privilege. But, any such assumption was shown in the Fourth District to be incorrect because the absolute privilege for Bar complaints, like the absolute privilege for statements in other quasi-judicial proceedings, never has been dependent on confidentiality for its existence. The Fourth District therefore properly held that 'applicable Florida law" is that statements made in Bar complaints proceedings are absolutely privileged, greater openness notwithstanding. The Fourth District recognized that the Bar proceedings are judicial in nature and that the absolute privilege is as essential to the effectiveness and integrity of such proceedings as it is to other judicial proceedings. The Fourth District properly rejected the idea that opening the process to the public would ream lawyers with the weapon taken from them long ago for reasons entirely unrelated to confidentiality. This Court should uphold that ruling now. Alternatively, this Court should

dismiss this case for lack of jurisdiction because no other Florida court has rendered a decision that conflicts with the Fourth District's decision and that decision cannot possibly be regarded as interfering with this Court's jurisdiction to discipline lawyers. Indeed, the decision entirely removes any impediment that lesser protection for complainants might impose on such jurisdiction.

The trial court in this 'case dismissed the plaintiff's defamation actions for another reason entirely: Tobkin failed to give the Jarboes the pre-suit notice required by section 770.01, Florida Statutes. This provides an alternative basis for affirming dismissal of the case. As this Court held in Wagner, Nugent, Roth, Romero, Erikson & Kupfer, P.A. v. Flanagan, 629 So. 2d 113 (Fla. 1993), chapter 770 applies to all litigants, including so-called 'non-media" defendants such as the defendants to this action. The Fourth District erred in concluding otherwise.

STATEMENT OF THE CASE AND OF THE FACTS

Tobkin's perfunctory Statement of the Case and Facts omits most of the procedural history of the case and almost all of the relevant facts. By doing so, he fashions his argument as an abstract and academic issue, treating the Jarboes as though they were nothing more than names in a hypothetical, and avoiding consideration of the real harm that individuals suffer at the hands of lawyers like him who use the procedural and substantive complexities of libel actions to attack those who file grievances against them. The following statement corrects this omission as well as a significant factual error in Tobkin's brief.

Tobkin Sues the Jarboes

On August 4, 1992, Tobkin, a Florida Bar member living and working in Pembroke Pines, Florida, filed a complaint in Broward County alleging that Linda Jarboe and her children, Kimberly, Deborah, and Ryan, had breached a contingency contract for legal services and had defrauded him in connection with a dispute involving a Pennsylvania trust. v.1 r.1-10. Defendants, residents of Ohio and Indiana, retained Florida counsel, Glenn Mednick, and moved to dismiss for lack of jurisdiction and to quash service of process. v.1 r.31-35, *45-46.*

Before these motions could be heard, Tobkin filed an amended complaint, repeating all the prior counts and adding a count that alleged that Kimberly Jarboe had defamed him in a letter she had submitted to the Florida Bar. The defendants then renewed their motions to dismiss for lack of jurisdiction, v.1 r.170-77, and to quash amended service of process. *v.3* r.425-26. The trial court granted the motion without prejudice and gave Tobkin fifteen days to amend. v.3 r.461.

Tobkin next filed a second amended complaint, again repeating his prior allegations and this time adding a defamation claim against Linda Jarboe based on her substantiation of Kimberly's complaint against him to the Florida Bar. *v.3* r.464-539. The defendants renewed their motions to dismiss for lack of jurisdiction, *v.5* r.728-744, and to quash service of process. v.5 r. *862-63.* The trial court again granted the motions with leave to amend. v.6 r.864-65.

Tobkin then filed a *third* amended complaint. *v.6* r.866-934.

The defendants filed a motion to dismiss with prejudice or for final judgment for lack of jurisdiction. v.6 r. 1013-16. The trial court denied that motion. v.6 r.1022. When Defendants renewed their motion to dismiss, however, v.7 r.1102-07, the trial court granted the motion with prejudice. v.7 r.1178-79. Tobkin then moved for rehearing of that order, v.8 r.1237-39, and the trial court sustained dismissal of the fraud and breach of contract claims, but concluded dismissal of the defamation claims against Kimberly and Linda would be without prejudice, v.8 r.1291-94.

The Fourth Amended Complaint

Two-and-a-half years from the date of the first complaint, plaintiff filed his *fourth* amended complaint on February 14, 1995. v.8 r.1300-19. This 20-page version of the complaint now advanced only two counts, both for libel.

Count I attacked Kimberly for sending a letter on February 25, 1992, from her home in Indianapolis, Indiana, to a Florida Bar Grievance Committee in Miami, Florida. The letter, attached to the complaint as an exhibit, explained that Kimberly's mother, Linda, was a co-trustee with a Pennsylvania attorney, Christopher Walters, of three Pennsylvania trusts that Kimberly's grandmother had established for the three Jarboe children. According to the letter, the mother was very close to Ron Tobkin, and he had suggested that plaintiff Donald Tobkin, his brother in Florida, could answer Linda's questions pertaining to her duties as trustee. Linda Jarboe accepted the offer of help, but the letter alleged that "Donald Tobkin took advantage of my mother's relationship to his brother and our whole family's inexperience in trust matters."

v.8 r. 1300-19 Ex.E.

"Tobkin mislead us about his qualifications in Pennsylvania trust law. He has none," the letter alleged. Id. He "implied that there may have been unusual circumstances to my grandmother's death and that somehow Chris Walters was conspiring to steal millions of dollars through false audits of the estate." Id.

The letter complained that Tobkin induced the Jarboes to enter a contingency fee agreement entitling Tobkin to 30 percent of whatever he recovered; advised the mother not to communicate with Walters, her co-trustee; ordered Walters to send copies of all matters relating to the trusts to Florida; and requested the transfer of large sums from the trusts without receipts or knowledge of the beneficiaries. Id.

The letter further alleged that Tobkin "filed suit not in Pennsylvania, but in Broward County, Florida; and he claimed my brother, sister and I were residences (sic) of Florida and that Chris Walters did business in Florida. A total fabrication." Id. When Kimberley retained a Pennsylvania trust lawyer to review the matter, the letter alleged, the lawyer found no glaring irregularities in the administration of the trusts, and the lawsuit was dropped. Id.

Tobkin, however, according to the letter, insisted on a contingency award, refused to accept payment based on a reasonable fee, sued the Jarboes for the contingency fee in Ohio, joined the estate of Ryan after his death in 1992, and "intimidat[ed]" Linda Jarboe even though she "ha[d] no money and [was] still devastated by the death of her son.". Id. The letter closed telling the

committee that "whatever you can do will be **greatly appreciated.** This type of behavior is a disgrace to the whole legal community." Id.

Count I'alleged that the claims made by Kimberly and **Linda** were false and that they harmed Tobkin in his employment by Sheldon J. Schlesinger in Broward County, Florida, when Tobkin disclosed the grievance to him on April 6, 1992. v.8 r.1305-07 ¶¶ 19-25.

Count I also alleged that Kimberly further defamed **Tobkin by** responding on April 17, 1992, to Tobkin's April 6, 1992, letter **to** the Florida Bar in which he attempted to dismiss Kimberly's allegations as arising from a "fee dispute." This second letter, v.8 r.1300-19 Ex. G, acknowledged the fee dispute, but explained that it had arisen from Tobkin's decision to file a lawsuit in Florida that "would have forced us to perjure ourselves when we said we were residents of Florida . . ., which we were not nor ever have been." The letter also pointed out that Kimberly stood by her allegation that Tobkin was "deceitful," in that he had filed a complaint in Florida "stating that not only **my** sister Debi and I did business in Florida, but that Chris Walters, the man Tobkin was suing on our behalf did business in Florida . . . **and** I know for a fact that Chris Walters did no business in Florida." Id.

The second letter advised the Bar that Tobkin's claims **that he had been denied access to the Pennsylvania trust** records were a 'total concoction," and that his allegations that "the Jarboe family was in dire straits for funds'" was "most remarkable" in light of the fact that the trusts had provided for the children's college and living expenses since their grandmother's death in

January 1986. Id.

Count II claimed that Kimberly's mother, Linda, also had defamed Tobkin by affirming 'to the members of the Broward County Grievance Committee of the Florida Bar" that Kimberly's statements against him were true. v.8 r.1313 ¶37.

On January 29, 1993, according to the complaint, a Bar lawyer advised Kimberly that the jurisdictional allegations Tobkin had made regarding her family's residency in Florida and Walter's conduct of business in Florida "appeared to be false and misleading," v.8 r.1347, but that a Grievance Committee had found "no probable cause to believe Mr. Tobkin was guilty of misconduct justifying disciplinary action" because "Tobkin had several pieces of jurisdictional evidence at the time he drafted the complaint." Id. The letter did not identify this evidence.

The Fourth Amended Complaint contains no allegations that the Florida Bar took any actions or issued any type of reprimand against Kimberly or Linda for making the complaint against Tobkin.

The Trial Court's Basis for Dismissal

The Jarboes moved to dismiss the Fourth Amended Complaint contending that its allegations did not show they had engaged in any conduct in Florida that would provide a basis for the exercise of jurisdiction over them. v.8 r.1354-77. The motion was supported by jurisdictional affidavits, v.9 r.1378-1495, showing that the defendants resided in Ohio and Indiana, that Tobkin had been a plaintiff's malpractice attorney in Florida during the three years from his graduation from law school to the time he accepted the Jarboes' representation and that he had no probate experience,

v.9 r.1464, that Tobkin had filed the lawsuit in Florida against Walters without the Jarboes' knowledge of or consent to its jurisdictional allegations, v.9 r.1381-82, that Tobkin never served the Florida lawsuit on Walters, v.9 r.1456-57, that Tobkin was not admitted to the Pennsylvania Bar, v.9 r.1464, and that Tobkin sought pro hac vice admission to the Pennsylvania probate court without the required sponsorship of a Pennsylvania Bar member, v.9 r.1462-63, that Tobkin's pro hac vice motion was "dismissed with prejudice," v.9 r.1482, but that Tobkin nevertheless doggedly pursued a fee claim against the Jarboes.

The motion showed that Tobkin had no jurisdictional basis for his fee claims and that he had added the libel claims to try to create an alternative jurisdictional peg, but that they failed to do so because Tobkin could not allege compliance with the pre-suit notice requirements of section 770.01, Florida Statutes, and because bar complaints are absolutely privileged. v. 8 r.1354-77. The Jarboes' counsel reiterated these grounds at the hearing on the motion. t.3/25/96 at 20-26.

Tobkin argued that section 770.01, Florida Statutes should be regarded as inapplicable because the Jarboes were not members of the "media," t.3/25/96 at 33, and that the absolute privilege for Bar complaints had been abrogated by this Court's rule-making decision **Amendments to the Rules**, 558 So. 2d at 1008, which lifted the gag order on complainants and allowed public access to Bar grievance records after a committee determined probable cause.

At the hearing, Circuit Judge Patricia Cocalis granted the motion to dismiss with prejudice, finding (1) the complaint failed

to make any allegations against Deborah or the Estate of Ryan, and (2) the Complaint failed to allege facts to establish long-arm jurisdiction. Tobkin v. Jarboe, 3 Fla. L. W. Supp. 729 (Fla. 17th Cir. Ct. 1996); v.10 r.1573-76. With respect to the latter finding, the trial judge specifically observed that plaintiff's only remaining basis for alleging jurisdiction over Linda and Kimberly was his claim that they had committed a tort in Florida by sending complaints to the Florida Bar. The trial judge reasoned in reliance on Silver v. Levinson, 648 So. 2d 240, 241 (Fla. 4th DCA 1994), that unless this claim stated a cause of action she could not find that the complaint adequately alleged, jurisdictional facts. The court then found that the claim did not state a cause of action because it made no allegation of compliance with section 770.01, Florida Statutes, relying on Wagner, Nugent, Johnson, Roth, Romero, Erikson & Kupfer, P.A. v. Flanagan, 629 So. 2d 113 (Fla. 1993), for the finding that the pre-suit notice required by this statute in defamation actions is "'applicable to all civil litigants" 'in defamation actions.'" Id. (quoting Wagner, Nugent). The trial judge did not address the absolute privilege issue.

The Fourth District's Basis for Affirming Dismissal

Tobkin appealed the dismissal of his claims against Kimberly and Linda, but not the dismissal of his claims against Deborah and the Estate of Ryan Jarboe. The Fourth District affirmed the trial court's dismissal on the ground that statements in complaints to the Bar are absolutely privileged, but concluded section 770.01, Florida Statutes, is not applicable to this action because the

defendants are not members of the media. Tobkin v. Jarboe, 695 So. 2d 1257 (Fla. 4th DCA 1997).

In his brief to this Court, plaintiff states that the "absolute privilege" issue "was not argued on appeal." (Petitioner's Brief on Merits 2). This statement is flatly wrong. The Jarboes devoted an entire section of their brief to that point. (Appellees' 4th DCA Answer Brief 39-44). Tobkin responded to that argument (Appellant's 4th DCA Reply Brief 6), and then argued the point again on rehearing. (Motion for Rehearing). In fact, the Fourth District explicitly considered and rejected the only argument that Tobkin makes here. 'We find," the Fourth District held, "that The Florida Bar Re Amendments To The Rules Regulating The Florida Bar, 558 So. 2d 1008, 1014 (Fla. 1990); Rules Regulating the Florida Bar, 3-7.1(f), (h), (k) did not affect the conclusion in Stone[v. Rosen, 348 So. 2d 387 (Fla. 3d DCA 1977)] because the reasoning remains sound in enhancing the professionalism of lawyers." Tobkin, 695 So. 2d at 1259.

SUMMARY OF ARGUMENT

Point I. Florida law uniformly recognizes an absolute privilege for statements made in Florida Bar complaints. The Fourth District's opinion correctly followed the Third District's opinion in Stone v. Rosen, 348 So. 2d 387 (Fla. 3d DCA 1977), and the long line of precedent holding that statements made in judicial proceedings are absolutely privileged. Because Bar proceedings are judicial in nature, statements made in Bar complaints are absolutely privileged.

The fact that a portion of Bar proceedings are now open to the

public does not alter Stone's holding or the applicability of the judicial statement privilege to Bar complaints. An absolute privilege applies to statements in judicial proceedings even though many judicial proceedings are of public record-. Additionally, making statements in bar complaints absolutely privileged helps maintain high standards of lawyer professionalism and discipline.

This Court's promulgation of Bar rules did not alter the Stone holding. Instead, it merely lifted the gag order previously imposed against complainants and made Bar grievance records available to the public after a Committee determined whether probable cause existed. This Court may have anticipated that judges might view the rule change as altering the common-law absolute privilege, but as the Fourth District properly held, the rule change did not eliminate the privilege because the privilege was never based on the protection that confidentiality gave lawyers, it was based on the Bar's need for information about the conduct of Bar members and the judicial nature of the Bar's grievance proceedings. It would be truly ironic if this Court's adoption of a rule change intended to increase public respect and confidence in the Bar were interpreted as eliminating the absolute 'privilege which far so long has itself been regarded as essential to public respect and confidence in the Bar.

This Court's rule-making decisions do not, in any event, provide a basis for conflict jurisdiction and the Fourth District's decision does not interfere with this Court's jurisdiction to regulate lawyers. The Court therefore should reconsider its order accepting jurisdiction over this case.

Point II. Alternatively, the Court should uphold dismissal of the plaintiff's libel claims because he failed to notify the Jarboes before he filed his suit that he claimed they had published false and defamatory statements about him. Section 770.0'1, Florida Statutes, makes the giving of such a notice a condition precedent to filing any civil action for libel. Tobkin's arguments that section 770.01 is inapplicable because the Jarboes are not "media" defendants," cannot be sustained in the face of this Court's ruling in Wagner, Nugent that Chapter 770 applies to all civil actions for libel or the constitutional problems that would be created by -holding that the statute discriminates between "media" and "non-media" defendants.

ARGUMENT

I.

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY HELD THAT AN ABSOLUTE PRIVILEGE APPLIES TO STATEMENTS IN COMPLAINTS TO THE FLORIDA BAR

The Fourth District's decision not only conforms with every Florida appellate decision that has examined whether an absolute privilege protects Bar complaints, it also is consistent with the vast majority of the decisions on this 'point from other jurisdictions and from a special report by the American Bar Association.

The only argument that Tobkin advances for overturning Stone, 348 So. 2d at 387, is that the case has been undermined by this Court's alteration of the rules governing the confidentiality of Bar complaints. That analysis is fundamentally flawed because

neither Stone nor the New Jersey case upon which it relied justified their recognition of an absolute privilege on the confidentially of bar complaints.

A. The Absolute Privilege in *Stone* was Premised Upon the Need to Have Ethical and Fit Lawyers

In Stone, 348 So. 2d at 387, the Third District held that Florida common law recognizes *"an absolute privilege on the part of a citizen to make'a complaint against a meznber of the integrated* bar *of this State."* Id. at 388 (emphasis added). In so doing, the Stone court adopted the reasoning of a 1956 New Jersey Supreme Court opinion joined in by former Supreme Court Justice William Brennan, in which the court concluded that an absolute privilege exists to complain to a state bar grievance committee. See id. citing Toft V. Ketchum, 113 A.2d 671 (N.J. 1955).[4] Adopting Toft, the Stone court noted that the issue of whether to afford an absolute privilege to complaints to an integrated bar requires the resolution of two competing interests: (1) the interest of an attorney not to be faced with groundless charges of impropriety and (2) the "'public interest to encourage those who have knowledge of any unethical conduct of attorneys to present such information"' to the appropriate authority. Id. at 389.

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4. Toft, which held that a complaint in an ethics matter was immune from a malicious prosecution suit by the attorney, initially was overruled by the New Jersey legislature. N.J.S.A. 2A; 47A-1 (L. 1956, c. 122). In 1984, the New Jersey Supreme Court adopted a new ethics rule adopting an absolute immunity for ethics complaints and bringing New Jersey back to the majority. In re.' Hearing on Immunity for Ethics Complainants, 477 A.2d 339 (N.J. 1984).

In weighing these two opposing interests, the Stone court agreed with Toft and afforded "'great weight'" to the need to "'rid the bar of those who are unfit to practice in [the legal] profession.'"' Id. The Stone court reasoned that "'[i]f each person who files a complaint with the ethics and grievance committee may be subject to a malicious prosecution action by the accused attorney there is no question but that the effect in many instances would be the suppression of legitimate charges against attorneys who have been guilty of unethical misconduct, a result clearly not in the public interest.'" Id. The practice of law is a privilege, the Stone court reasoned, and the "acceptance of these privileges carries with it certain responsibilities and obligations to the general public." Id. The Stone court concluded that statements in complaints to the Florida Bar are absolutely privileged.

Stone thus was not premised upon the confidentiality of bar complaints. Indeed, the Stone court observed,

> 'On the one hand, there is the injury that may be suffered by any attorney as a result of the institution of disciplinary proceedings against him on what turns out to be improper or groundless charges. Even if the charges against him are found to be baseless and the complaint is dismissed, he still may suffer from the public knowledge of these proceedings which may damage his reputation and injure his ability in the future to earn a living."

Id. (quoting Toft, 113 A.2d at 674). Yet, *still, the Stone court found bar complaints to be absolutely privileged. Despite* the potential damage to an attorney's reputation, Stone held that absolute immunity should attach to bar complaints to protect the overriding interest to have fit attorneys practice law in Florida.

No basis exists for Tobkin's argument that the rationale of Stone was altered by the limited change of the confidentiality of Bar complaints. (Petitioner's Merits Brief 7-8).

As shown below, three overriding reasons exist why this Court should continue to uphold Stone despite Tobkin's misguided arguments that its reasoning has been overtaken by events. First, every Florida case that has analyzed the issue has concluded that statements in Bar complaints are absolutely privileged. Second, Stone conforms with the vast majority of jurisdictions that have addressed the issue of whether bar complaints are absolutely privileged. Third, the only authority Tobkin cites for his claim that Stone no longer applies did not and cannot overrule Stone.

B. Florida Law is Uniform In Holding Florida Bar Complaints Are Absolutely Privileged

Since Stone, every Florida case which has addressed the issue of whether statements made in complaints to the Florida Bar are absolutely privileged has followed Stone. Petitioner cites none of these cases in his brief on the merits.

In fact, just 10 years ago, this Court cited Stone with approval in Feldman v. Glucroft, 522 So. 2d 798, 801 (Fla. 1988) (absolute immunity exists for statements made in all judicial and professional, licensing, and administrative proceedings).

Florida's District Courts of Appeal also have followed Stone. Before reaching its decision in this case, the Fourth District already had held that "an individual is afforded an absolute privilege . , . in making . . . a complaint [to the Florida Bar]." Mueller v. The Florida Bar, 390 So. 2d 449, 453 (Fla. 4th DCA 1980)

(The Florida Bar and its agents acting within the scope of their office are not subject to liability for defamation or malicious prosecution). The Second and First District Courts of Appeal also concurred with Stone.[5] Additionally, the Fifth Circuit Court of Appeals approved Stone in 1992, ***two years*** **after** the 1990 Amendments to the Rules opinion.[6]

The basis for the absolute privilege for bar complaints are two-fold: (1) it is part and parcel of the absolute privilege protection applied to judicial proceedings; and (2) public policy interests in maintaining high standards of lawyer professionalism and discipline require the recognition of the absolute privilege.

1. **Bar Proceedings are Quasi-Judicial and thus the Absolute Privilege for Judicial Proceedings Applies**

At the turn of the century, this Court held that relevant statements made during the course of judicial proceedings are protected by an absolute privilege. See Myers v. Hodges, 53 Fla. 197, 44 so. 357 (1907) (protecting statements made in libel pleading). This rule long has been followed by this Court.'

The recognition of this absolute privilege comes from the

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5. See McKenzie v. Raymond, 519 So, 2d 711, 711 (Fla. 2d DCA 1988) (recognizing absolute privilege of a citizen to make a complaint against a Florida Bar member); Northwest Fla. Home Health Agency v. Merrill, 469 So. 2d 893, 899 n.3 (Fla 1st DCA 1985).

6. Dugas v. City of Harahan, LA., 978 F.2d 193 (5th Cir. 1992) (adopting and holding that absolute privilege protection also applies to communications with the Florida Board of Bar Examiners).

7. E.g., McNayr v. Kelly, 184 So. 2d 428 (1966); Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927); see also Ponzoli & Wassenberg, P.A. v. Zuckerman, 545 So. 2d 309 (Fla. 3d DCA 1989); Sailboat Key, Inc. v. Gardner, 378 So. 2d 47, 48 (Fla. 3d DCA 1980).

English common law.[8] As this Court stated in Myers, "[i]n England, the law seems to be settled now that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings." 44 so. at 360. And, as far back as 1605, an English common law court concluded that an absolute privilege protected counsel from slander suits for words spoken that were relevant to the judicial proceeding.'

Furthermore, English courts have held that the absolute privilege that applies to statements in judicial proceedings also -applies to statements to legal disciplinary bodies, such as the bar complaint that forms the basis of Tobkin's defamation claim here. In'1892, an English court held that an absolute privilege applies to statements in a complaint letter against a solicitor to a law society. See Lilley v. Ronev, 61 L.J.Q.B. 727 (1892) (attached). Thus, under English common law, because proceedings before a disciplinary committee are judicial in character, they are protected by an absolute privilege. See Addis v. Crocker [1961] 1 Q.B. 11 (1960) (holding that absolute privilege must apply to

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8. Florida Statutes declare that the common law of England, as it existed down to July 4, 1776, is in force. See § 2.01, Fla. Stat. (1995). Cases dating as far back as 1605 recognize an absolute privilege for statements made during the course of judicial proceedings. See Brook v. Mantague, Cro. Jac. 90 (1605).

9. Marrinan v. Vibart, [1963] 1 Q.B. 528 (1962)(attached); Brook v. Mantague, Cro. Jac. 90 (1605), cited in Myers, 44 So- at 360 (1907); see also Munster v. Lamb $1 Q.B.D. 588 (attached) (1883); R v. Skinner, (1772) Lofft 54 cited in 28 Lord Hailsham, Halsbury's Laws of England *Libel &* Slander ¶ 98 at 48 (4th ed. 1979) (attached).

Solicitor disciplinary proceedings because proceedings are judicial in character) (attached).

Proceedings before a Florida Bar 'Grievance Committee are judicial, or 'at least quasi-judicial, in nature. The Florida Bar's own rules state so. R. Regulating Fla. Bar 3-7.6(e)(1) ("[a] disciplinary proceeding . . . is a quasi-judicial administrative proceeding"). Disciplinary proceedings before a grievance committee begin with the filing of a complaint. See R. Regulating Fla. Bar 3-7.4(b). After the filing of the complaint, a grievance committee is required to investigate all charges of lawyer misconduct. See R. Regulating Fla. Bar 3-7.4(c). After their initial investigation is complete, the committee is empowered to determine whether or not there exists probable cause to issue a more formal complaint to the Florida Bar. See R. Regulating Fla. Bar 3-7.4(l). The committee also has the power to recommend that an admonishment of minor misconduct be issued by the Bar. See R. Regulating Fla. Bar 3-7.4(m).

To carry out these responsibilities, Florida Bar Rules provide the grievance committees with the power *to compel the attendance of witnesses, to take or cause to be taken the depositions of witnesses, and to order the production of books, records, or other documentary evidence." R. Regulating Fla. Bar 3-3.1. Additionally, each grievance committee member has the power "to administer oaths and 'affirmations to witnesses in any matter within the jurisdiction of the agency." Id.

The English Court similarly noted that a Solicitor Disciplinary Committee was a judicial body because it had the power

to fine solicitors, administer oaths, and obtain subpoenas. See Addis, [1961] 1 Q.B. at 11 (attached). In addition, courts across the United States have concluded that statements in disciplinary Bar proceedings are protected by the absolute privilege that applies to judicial proceedings because bar proceedings are quasi-judicial in nature.[10] Because bar proceedings are quasi-judicial in nature, the Fourth District in Mueller held that statements made by the staff counsel for the Florida Bar are absolutely privileged. 390 So. 2d at 451 (Florida Bar and staff counsel act as agents of this Court in administering its jurisdiction and thus statements made by the Bar and its staff counsel in furtherance of its official duties are absolutely privileged).

Finding that complaints to the Florida Bar in a quasi-judicial proceeding are absolutely privileged is consistent with the law of this State promulgated by this Court that "[t]here is an absolute, ***rather than qualified,*** *immunity* from defamation actions in all judicial and legislative hearings; moreover, this type of immunity applies in many other professional, licensing, and administrative proceedings."[11] Indeed, applying the absolute privilege to quasi-

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10. See, e.g., &&p-Flair v. Merrill, 928 P.2d 1244, 1246 (Ariz. Ct. App. 1996); Field v. Kearns, 682 A.2d 148, 151-52 (Conn. 1996); Kerpelman v. Bricker, 329 A.2d 423, 425 (Md. Ct. Spec. App. 1974); Weiner v. Weintraub, 239 N.E.2d 540, 540-41 (N.Y. 1968); Hecht v. Levin, 613 N.E.2d 585, 588 (Ohio 1993); Ramstead v. Morgan, 347 P.2d 594, 598-601 (Or. 1959); Odeneal v. Wofford, 668 S.W.2d 819, 820 (Tex. Ct. App. 1984).

11. Feldman V. Glucroft, 522 So. 2d 798, 801 (Fla. 1988) (emphasis added) (citing Robertson v. Industrial Insurance Co., 75 So. 2d 198 (Fla. 1954) (license revocation proceedings before the Insurance Commissioner); Bell v. Gelert, 469 So. 2d 141 (Fla. 3d DCA 1985) (labor grievance complaint); Farish v. Wakeman, 385 So.

judicial proceedings has been codified in the Restatement (Second) of Torts. See &statement (Second) of Torts § 585, cmt. c, at 245-46; § 588, cmt. d, at 245 (1977).

The absolute immunity applied to judicial -or quasi-judicial proceedings is not dependent upon the confidentiality of the proceedings. Just the opposite, most court pleadings, trials, and depositions are matters of public record. Yet, the statements in judicial proceedings remain absolutely privileged. This Court has noted that this absolute privilege for judicial proceedings recognizes that an individual's reputational rights are outweighed by public policy:

> This absolute immunity resulted from the balance of two competing interests: the right of an individual to enjoy a reputation unimpaired by defamatory attacks versus the right of the public interest to a free and full disclosure of facts in the conduct of judicial proceedings. In determining that the public interest of disclosure outweighs an individual's right to an unimpaired reputation, courts have noted that participants in judicial proceedings must be free from the fear of civil liability as to anything said or written during litigation so as not to chill the actions of the participants in the immediate claim.

2d 2 (Fla. 4th DCA 1980) (compelled testimony before a legislative committee); Seidel v. Hill, 264 So. 2d 81 (Fla. 1st DCA 1972) (worker's compensation proceeding); see also Fridovich v. Fridovich, 598 So. 2d 65, 69 n.7 (Fla. 1992) (statements made under a state attorney's investigatory subpoena); Hope v. National Alliance of Postal and Federal Employees, 649 So. 2d 897 (Fla. 1st DCA 1995) (statements made in letters by uncertified labor organization to postmaster as part of collective bargaining procedure); Weitzer v. U.S. Precast Corp., 645 So. 2d 180 (Fla. 3d DCA 1994) (letter sent by authorized representative of party in pending quasi-judicial administrative NLRB proceeding); Jones Life Ins. Co. of Fla., 215 So. 2d 889 (Fla. 3d DCA 1968) (same as Robertson); Bencomo v. Morgan, 210 So. 2d 236 (Fla. 3d DCA 1968) (statements made by doctor in letter in support of petition to have plaintiff declared incompetent).

Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994) (citation omitted). Thus, Tobkin's contention that opening disciplinary proceedings to the public somehow overrules the common-law absolute privilege recognized by Florida courts for judicial or quasi-judicial proceedings is incorrect.[12]

2. Public Policy of Promoting Higher Standards of Legal Professionalism Requires Absolute Privilege Protection for Florida Bar Complaints

Absolute privilege protection for statements in Florida Bar complaints is sound public policy. The Stone court concluded that the public interest in maintaining high standards of legal

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12. In Fridovich, 598 So. 2d 65 (Fla. 1992), this Court held that statements made to a police officer or state attorney prior to the institution, of criminal charges are only qualifiedly privileged. This Court distinguished statements made pursuant to a state attorney investigative subpoena, which this Court held to be absolutely privileged. Id. at 69 n.7. A bar complaint is more akin to a verified statement made pursuant to a state attorney investigative subpoena than it is a complaint made to a police office. A bar complaint in the form of an inquiry initiates a bar proceeding. Bar counsel must screen each inquiry and determine whether, if the alleged conduct were proven, whether a disciplinary rule has been violated. R. Regulating Fla. Bar 3-7.3(a). If so, the inquiry is treated as a formal complaint. Id. 3-7.3(b). In contrast, a mere statement given to a law enforcement officer may not go any farther than the officer in question. Bar complaints are not made prior to the judicial proceeding; they initiate the proceeding.

The Fridovich court limited the holding of Robertson, 75 So. 2d at 198 (letter written initiating license revocation proceedings before the Insurance Commissioner), only to the extent that it was inconsistent with the holding in Fridovich. Subsequent to Fridovich, Florida's appellate courts have not interpreted Fridovich to have overturned Robertson. See Weitzner, 645 So. 2d at 181 (finding no conflict between Fridovich and Robertson and Seidel, 264 so. 2d at 81 and holding that letter sent by authorized representative of party in pending quasi-judicial administrative NLRB proceeding to be absolutely privileged).

Professionalism and discipline overrides the interest of protecting attorneys from groundless charges of impropriety:

> [f]or the sake of maintaining the high standards of the profession and disciplining those who violate the canons of Legal Ethics, one who elects to enjoy the status and benefits as a member of the legal profession must give up certain rights or causes of action, which, in this instance, is the right to file an action against a complainant who lodges an unsuccessful complaint with the Grievance Committee of the Florida Bar.

Stone, 348 So. 2d at 389; see also Field v. Kearns, 682 A.2d 148, 149 (Conn. 1996) (absolute privilege protection for Bar complainants is supported by "the strong public policy of protecting the courts and public from unethical and unprofessional attorneys").

The New Jersey Supreme Court also grappled with the public policy of making bar complaints absolutely privileged in In re Matter of Hearing on Immunity for Ethics Complainants, 477 A.2d 339, 344 (N.J. 1984), where the court held such complaints to be absolutely privileged.

The Hearing on Immunity court first noted' that in recent years, the public had become "much more aware of and concerned with titters affecting the bar and the bench." Id. at 341. Indeed, the court noted that the growth in complaints against the bar members had outstripped the growth of the bar itself. Id. "Obviously," the court mused,

> [T]hese facts could be used 'to support the . . . conclusion [that bar complaints should not be absolutely privileged], on the ground that the rule allowing suit by the attorney against the malicious complainant has apparently.had no chilling effect whatsoever, or very little; otherwise, one might say, we would not have so many complaints filed at an accelerating pace.

Id. But, the court refused to allow the apparent willingness of the public to file Bar complaints to influence its conclusion that anything less than absolute immunity for Bar complaints would suffice to preserve the public's voice.

"The ability of attorneys to effectively muzzle potential complainants should not be underestimated," the court observed. Id. at 342. "The formal filing of ethics complaints rarely represents the first occasion on which an attorney involved has heard about them. There is almost invariably a succession of letters, phone calls, threats, and demands by the potential claimant before any ethics complaint is filed." Id. 'There are many opportunities," the court observed, "for the attorney to make it clear that if such a complaint is filed, the attorney will sue in response, using all the power of the office of attorney to bring about the justice that the attorney feels is his or her due." Id.

The inequitable balance of power between attorney and client was not lost on the New Jersey Supreme Court. 'The potential for intimidation is obvious, for complainants know that lawyers are fully capable, through their own personal means, without substantial expenditure, to prosecute such litigation." Id. On the other hand, "[t]he complainant's certainty of expense in defending same, plus the risk, however remote, of being held liable is enough to make some potential complainants change their minds." Id. The New Jersey Supreme Court would not tolerate such intimidation to occur even once:

> Whether this has happened, is happening, or is likely to happen is less important to us than our belief that it should never happen. We should not tolerate the

> possibility within our disciplinary system that a potential ethics complainant may be intimidated by an attorney into not filing a complaint. The need for public confidence in the integrity of that system is much too important.

Id.

This warning could not fit more aptly here. The Jarboes complained to the Florida Bar about Tobkin's conduct in February 1992. Approximately six months later, Tobkin filed his action against them. Now, Tobkin, prosecuting his former clients on his own behalf, has kept the Jarboes in litigation for six years. All his other claims against them have been dismissed and, tellingly, he did not appeal those dismissals. What is left are only his dubious defamation claims. What message would be sent to clients of Florida Bar members if Tobkin's actions were legitimized by reinstatement of his stale claims against two out-of-state residents who merely complained about his ethics?

Abolishing the absolute privilege for Bar complaints would produce the incongruous result that attorneys would have an absolute privilege for defamatory statements they make in their own complaints or depositions, Sussman v. Damian, 355 So. 2d 899 (Fla. 3d DCA 1977), while the public would lack the same privilege to make Bar complaints against lawyers. Another incongruity would be that Bar disciplinarians and staff counsel would enjoy absolute protection, Mueller, 390 So. 2d at 453, while those they prosecuted would not. The absolute privilege for judicial proceedings extends to "the judge, parties, counsel, and witnesses." Defamation and Privacy, 19 Fla. Jur.2d § 65, at 385 (1980). The absolute privilege in Bar proceedings should be no less

compensable.

As the New Jersey Supreme Court opined,

> [W]e have asked for a great deal of trust on the part of the public [regarding the integrity of the bar] . . . We ask [them] to trust and believe that justice is being done . . . to trust a system in which the . . . proceedings . . are dominated by lawyers in its dispensation of discipline to other lawyers , . . [we] jeopardize that trust . . . by allowing even one citizen to be sued on account of a complaint made against a lawyer . . . or to be threatened with such suit, . . . or by asserting . . . [through our rules] that such a threat can be made good.

Matter of Hearing, 477 A.2d at 344.

C. ***Stonr*, its Progeny, and the Fourth District's Decision Below Conforms with the Majority Rule**

A survey of jurisdictions in the last twenty years reveals that Florida and New Jersey are not alone in adopting an absolute privilege for Bar complaints. A developing trend among the jurisdictions is that Bar grievants are absolutely privileged to make complaints to the state Bar. Compare Fridovich, 598 So. 2d at 67 (following majority of the states that held that statements made to law enforcement officials were only qualifiedly privileged).

The majority of the jurisdictions consistently have held that the following compelling policy considerations outweigh the attorney's right to protect his or her reputation:

(1) the chilling effect that retaliatory **law suits would have** on the grievant's willingness to report improper behavior,

(2) the reduced effectiveness of the bar as a **self-**regulating **profession** that **would** result from fear of retaliatory suits,

(3) protecting the potential bar **grievant** from being intimidated into not filing a **complaint** by

attorney,

(4) the collateral litigation that would be spawned by the absence of absolute privilege,

(5) public protection from unethical and unprofessional attorneys, and

(6) protection of the integrity of the courts.

At least *thirty-six* jurisdictions other than Florida recognize an absolute privilege for bar grievants.[13] This number

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13. Those states are: **Alabama:** Ala. Disciplinary P. Rule 15(a); **Arizona:** Ashton-Blair, 928 P.2d at 1246; Drummond v. Stahl, 618 P. 2d 616, 620 (Ariz. Ct. App. 1980); **California:** Rosenthal v. Vogt, 280 Cal. Rptr. 1, 4 (Cal. Ct. App. 1991) (citing Cal. Civ. Code § 47); **Colorado:** Colo. R. Civ. P. 241.25(e); **Connecticut:** Field, ,682 A.2d at 151-52; **Dmlawarm:** De. R. Prof. Resp. Bd. Rule 10; **District** of **Columbia:** Weaver v. Grafio, 595 A. 2d 983, 988 (D.C. 1991) (citing Bar Rule XI, § 19(a)); **Georgia: Ga.** R. State Bar Rule 4-221(g); **Hawaii:** Wong v. Schorr, 466 P. 2d 441, 443 (Haw. 1970); **Idaho:** Id. R. Bar Comm. R. 217; **Illinois:** Weisberg v. Rafael, 67 B.R. 392 (N.D. Ill. 1986) (applying Illinois law); Iowa: **Iowa** Ct. R. 118.19; **Kentucky: Ky.** St. S. Ct. Rule 2.041; **Kansas:** Jarvis v. Drake, 830 P.2d 23 (Kan. 1992); **Louisiana:** Goldstein v. Serio, 496 So. 2d 412 (La. Ct. App. 1986); **Maryland:** Kerpelman, **329** A. 2d at 425; **Massachusetts:** ALM Sup. Jud. Ct. Rule 4:01, § 9; **Michigan:** Mich. Ct. R. 9.125; **Minnesota:** Minn. R. Prof. Resp. 21; **Mississippi:** R.L. Netterville v. Lear Siegler, Inc., 397 So. 2d 1109, 1112 (Miss. 1981); **Montana:** Mt. R. Disc. R. 10; **Nebraska:** Sinnett v. Albert, 195 **N.W.2d** 506, 508 (Neb. 1972); **Nevada:** Nv. St. S. Ct. R. 106; **New Jersey:** Matter of Hearing, 477 A. 2d at 344; New **York:** Weiner, 239 **N.E.2d** at 540-41; Jonas v. Faith Properties, Inc., 634 **N.Y.S.2d** 323, 325 (1995); **North Dakota:** N.D. Cent. Code § 27-14-03 (1997); Ohio: Hecht, 613 **N.E.2d** at 588; **Oklahoma:** Ok. R. 5.4, Rules Governing Disciplinary Proceedings; **Oregon:** Ramstead, 347 P. 2d at 594; **South Carolina: S.C.** App. Ct. Rule 413, Rules for Lawyer Disciplinary Enforcement, Rule 13 (1997); **South Dakota:** Flugge v. Wagner, 532 **N.W.2d** 419-421 (S.D. 1995) (relying on authority from other jurisdictions that absolute privilege attaches to statements in complaints to state bars to hold that the same privilege attaches to complaint made to the board of accountancy); **Tennessee:** Tn R. S. Ct. R. 9, § 27.1; **Texas:** Parker v. Holbrook, 647 **S.W.2d** 692, 695 (Tex. 1982); **Utah:** Ut R. Lwyr. Disc. & Diab. 13; **West Virginia:** W.Va. Lawyer Disciplinary **Proc.** Rule 2.7; Farber

constitutes by far the majority of jurisdictions which have addressed the issue.

In June 1970, the American Bar Association ("ABA") Special Committee on Evaluation of Disciplinary Enforcement reviewed the issue and recommended that the ABA adopt a policy "that any individual who submits a complaint against an attorney to an authorized disciplinary agency shall h&e absolute immunity from any suit predicated thereon." ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations an Disciplinary Enforcement, at 74 (June 1970, Tom C. Clark, Chairman) ("ABA Clark Report") (attached). The ABA Clark Report authors began by noting that absolute immunity was the rule in the majority of jurisdictions that had reviewed the issue. Id. They then noted that an absolute privilege was necessary to encourage the filing of complaints: "Complainants, untrained in the law, uncertain as to the facts and often uneducated, will be reluctant to add to their troubles by taking any action that may result in their becoming defendants in a lawsuit." Id. at 75.

. The authors recognized that some jurisdictions had conferred a qualified immunity, overcome by malice, such as that advocated by

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v. Dale, 392 S.E.2d 224 (W. Va. 1990); Wyoming: Wyo. Bar Disciplinary Code Rule XII.

Unlike some of these other states, Florida does not have a court rule rendering bar complaints either privileged or nonprivileged. Therefore, this Court must follow the common law of Florida on that issue. Indeed, as noted below, this Court cannot, under Florida 'Constitutional law, effect a change in Florida substantive law in a rule-making proceeding.' See infra Point I.D.2.

Tobkin here. The authors found this inadequate. "Unfortunately, some attorneys, angered by what they believe to be an unjustified complaint, have instituted suits alleging malice, although they have no evidence to support the claim." Id. Many of these attorneys do so "to teach the complainant a lesson,'" the authors observed, resulting in suits filed by attorneys who incur no costs to themselves who force their frivolous claim to trial only to settle for a nominal amount or to drop the suit altogether against the likely judgment-proof complainant. Id. The ABA recommendation is now codified as a Model Rule. ABA Standing Committee on Professional Discipline, ABA Model R. for Lawyer Disciplinary Enforcement 12(A) (1996 ed.) (attached).

The few jurisdictions? that have held that only a qualified privilege attaches to complaints made to bar associations have done so on the bases that (1) the privilege cannot apply where the bar association has no power to impose sanctions, or (2) that the bar should not be the only professional association to which absolute privilege apply. For example, in Preiser v. Rosenzweig, 646 A.2d 1166, 1169 (Pa. 1994), the court distinguished between public and private professional peer-review proceedings. An absolute privilege does not apply to the latter because there is no

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14. Those states are **Indiana:** Ind. St. Ct. Rules, Part IV, Admission & Discipline Rule 23 § 20 (1983) (qualified immunity); **Missouri:** Mo R. Bar R. 16.07 (complaints made in good faith); **Maine:** Me. Bar Rule 7.3(a) (same); **New Hampshire:** N.H. Sup. Ct. R. 37 (same); **Pennsylvania:** Preiser v. Rosenzweig, 646 A.2d 1166, 1169 (Pa. 1994) (same); **Rhode Island:** RI S. Ct. R., Art. III, R. 7 (privileged if made in good faith); **Washington:** Moore v. Smith, 578 P.2d 26, 29 (Wash.1978).

authority to impose sanctions. This position is consistent with the public policy supporting absolute privilege because traditionally, absolute privilege is afforded only if there exists some compelling public policy justification for the privilege. W. Prosser, Handbook of the Law of Torts § 114 (4th ed. 1971). Where no sanction can be imposed, little public benefit exists for the proceedings.

Preiser has no application to this case. The Jarboes' complaints were made to Florida's integrated bar which has full authority to discipline attorneys practicing within the state.

The Washington Supreme Court in Moore v. Smith, 578 P.2d 26, 29 (Wash. 1978), declined to extend absolute privilege finding "no compelling justification . . . sufficient to warrant placing attorneys under a disability [absolute privilege] suffered by no other profession." Id. Moore is inapposite as well. Attorneys in Florida are not the only professions whose conduct can be criticized by citizens without fear of civil liability. As noted above, Florida follows the majority rule, codified in the Restatement, that statements made in quasi-judicial proceedings, such as license revocation proceedings before the Insurance Commissioner, labor grievance and NLRB proceedings, and workers' compensation proceedings, are absolutely privileged.

But, even if lawyers were being singled out -- which they are not -- that would be sound public policy. As described by the New Jersey Supreme Court, lawyers are able to intimidate complainants unlike the members of any other profession. By representing themselves, they can threhten a complainant with the very real

threat that a protracted battle in the courts based upon the complainant's Bar complaint will not require the lawyer to incur any legal fees. Indeed, during this time of heavy criticism of lawyers, the profession should strive to set the highest level of professionalism among its members, including the acceptance of the fact that complaints against them will not subject a complainant to liability. If this is an unequal burden for lawyers, it is one they have earned. As the Stone court noted, the practice of law in Florida is a privilege, "the acceptance of these privileges carries with it certain responsibilities and obligations to the general public." 348 So. 2d at 389.

D. This Court's Promulgation of Florida Bar Rules Regarding thm Confidentiality of Bar Proceedings Did Not and Could Not Alter thm Common-Law Rule that Florida Rar Complaints Are Absolutely Privileged

Despite that the Stone rule has been the law in Florida for two decades; that it conforms with the Florida absolute privilege recognized for statements made in other quasi-judicial proceedings; that it is consistent with the majority rule approved by most states, the ABA, and the Restatement (Second); that it is founded upon English common law; and that it represents sound public policy, Tobkin, anxious to continue prosecuting his former clients, requests abandonment of Stone. The sole basis of this request is his argument that this Court's rule-promulgating case, Amendments to Rules, 558 So. 2d at 1008, overruled Stone. (Petitioner's Brief on Merits 9-12).[15]

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15. Tobkin also cites statements in Bar Complaint/Inquiry forms that state that complainants may be the 'subject of defamation

This Court's promulgation of Florida Bar Rules in The Florida Bar Re Amendments to Rules Regulating the Florida Bar, 558 So. 2d 1008 (Fla. 1990), did not and could not alter the absolute privilege recognized by Stone v. Rosen and accepted by this Court in Feldman v. Glucroft. As shown below, three reasons lead to this conclusion.

1. This Court's Promulgation of Bar Rules Did Not Overturn *Stone*

In the first instance, in amending the Bar rules, this Court did not purport to overturn the holding of Stone. Rather, this Court simply chose not to apply the new rule opening Bar complaints to the public retroactively because '[the publication of the confidential information in [the now nonconfidential] files could subject a complainant to a possible suit for libel and slander." Amendments to the Rules, 558 So. 2d at 1011 (emphasis added). The Court did not say that the elimination of confidentiality *would* subject a complainant to a libel suit or that it *should* subject a complainant to such a suit. Rather, the Court recognized that its alteration of the confidentiality rule might result in libel claims being filed that otherwise would not have been.

The order in Amendments to the Rules cannot be read on its face as doing anything more than declining to create an absolute immunity or privilege *through the rule-making* process. Instead, Amendments to the Rules leaves complainants, as the body proposing the rule change had advocated, 'subject to applicable Florida law,"

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suits. But, the Florida Bar's interpretation of the law does not constitute legal authority.

id. at 1009, whatever that might be determined to be later in litigation.

Moreover, the change made by this Court to the Bar rules would not necessitate re-evaluation of the absolute privilege even if the privilege were justified by confidentiality because the revised rule accomplished only a very narrow lifting of the confidentiality of Bar complaints. Today, while a grievance committee investigation of a bar complaint is pending, the Bar complaint remains confidential. R. Regulating Fla. Bar 3-7.1. It is only when false public statements are made during a confidential "disciplinary investigation, the Florida Bar has the power to disclose information and correct any false or defamatory statements. See id. 3-7.1(p). Otherwise, only when there is a probable cause determination does the initial Bar complaint become public information.[16] See id. 3-7.1(j)-(k).

Thus, if a groundless Bar complaint is filed against an attorney, the complaint becomes public information only after a grievance committee has concluded that there is no probable cause to believe that the attorney is guilty of unethical conduct. Any harm caused by a groundless grievance is neutralized by the finding that there is no probable cause finding. Of course, if the grievance committee does find probable cause that the ethical rules have been violated, the attorney has no standing to complain of the public disclosure of the Bar complaint.

Indeed, the authors of the ABA Clark Report recommending

16. This analysis was confirmed by the Miami branch office of the Florida Bar on December 18, 1997.

that the states adopt an absolute privilege for bar complaints, found that the degree of confidentiality currently provided by the Florida Bar Rules to be sufficient to protect the reputation of charged attorneys:

> The policy of disciplinary agencies not to divulge the existence of complaints while they are being investigated effectively protects the attorney from any public disclosure. Thus, the attorney is given more practical protection than a party to an ordinary lawsuit, who may be the subject of prejudicial statements made by his adversaries in the pleadings and in open court. These generally are regarded as absolutely privileged and may be, and often are, publicly disclosed.

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Tobkin nevertheless argues that the absolute privilege leaves an attorney 'no mechanism by which to protect his reputation against a baseless public grievance." (Petitioner's Brief on the Merits at 10). This is wrong. Florida perjury and contempt laws and Florida Bar rules negate the harm an attorney may face because of **a false and defamatory grievance.** At the end of a 'Florida Bar Inquiry/Complaint Form," a Bar complainant must sign the following notarized oath: "Under penalty of perjury, I declare the foregoing facts are true, correct and complete." R. Regulating Fla. Bar 3-7.3(c). And, making a false statement under oath in an official proceeding is a third-degree felony in Florida.[17] § 837.02(1), Fla.

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17. An "official proceeding" means "a proceeding heard . . . before any . . . official authorized to take evidence under oath." § 837.011(1), Fla. Stat. (1995). Grievance committees are authorized to take evidence under oath. See R. Regulating Fla. Bar 3-3.1. Thus, a proceeding before a grievance committee is an "official proceeding." Individuals who make false statements under oath in non-official proceedings are guilty of perjury. See § 837.012(1), Fla. Stat. (1995).

stat. (1995) . Any individual filing a grievance is also subject to a grievance committee's power to hold individuals in contempt.[18]

2. A Non-Adversarial Rule-Making Proceeding Cannot Overturn a Uniformly Held Rule of Substantive Law

Amendments to the Rules could not, in any event, alter the common-law. Promulgation of Bar rules cannot overturn a common-law privilege. This Court's rule-making power 'is limited to rules governing procedural matters and does not extend to substantive rights. "[19] Specifically, this Court has concluded that its power to adopt rules pertaining to the Florida Bar does not affect substantive law:

> [C]ourts have, inherent power to make rules governing contempt, admission to the bar, and for conduct of the business brought before them, but the courts have no power to effect substantive law or jurisdiction.[20]

This Court could not have overturned this State's substantive

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18. As agents of the Supreme Court of Florida, grievance committees can hold Bar complainants in contempt. See R. Regulating Fla. Bar 3-3.1. The Florida Bar Rules provide that grievance committees possess those powers that are "necessary to conduct the speedy and proper disposition of any investigation or cause." Id.

19. Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993); see also In re Standard Jury Instructions [illegible] 89-1), 575 So. 2d 194 (Fla. 1991) (proposed jury instructions are "'not an adjudication on the merits of the form, substance, or correctness of the instructions'") (citation omitted); Lundstrom v. Lyon, 86 So. 2d 771, 772 (Fla. 1956) ("[I]t cannot be doubted that courts may not by rule of practice either by statutory or inherent rule making authority, amend or abrogate a right resting in either substantive or adjective law.").

20. In re Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure, 199 So. 57 (Fla. 1944) (emphasis added); see also In re Jacksonville Bar Ass'n, 169 So. 674, 675 (Fla. 1936) (concluding that "rules of court must be subordinate to law and in cases of conflict the law will prevail").

law on the basis of a nonadversarial rule-making proceeding.

3. This Court's Promulgation of Bar Rules Does Not Create Any Type of Jurisdiction By which This Court can Overrule *Stone v. Rosen*

Although this Court has accepted review of this case, it should discharge jurisdiction if, on closer examination, it finds no basis for exercising jurisdiction.[21] No basis exists here.

a. A Promulgation of Florida Bar Rules Does Not Create Conflict Jurisdiction

In seeking this Court's review of the Fourth District's decision, Tobkin argued that the Fourth District's decision conflicted with Amendments to the Rules and therefore this Court had conflict jurisdiction. See (Petitioner's Brief on Jurisdiction at 2-6) citing Art. V, § 3(b)(3), Fla. Const. (this Court may review district court decision "that expressly and directly conflicts with a decision . . . of the supreme court on the same question of law"). In fact, the Fourth District's decision was not in conflict with any adversarial decision of any district court decision or decision from this Court. Constitutionally, this Court simply lacks jurisdiction to review the Fourth District's decision.

This Court previously has held that its promulgation of procedural rules does not create conflict jurisdiction. For example, rules of procedure are enacted by this Court through

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21. See Kennedy v. Kennedy, 641 So. 2d 408, 409 (Fla. 1994) (after initially granting jurisdiction to review district court decision based upon conflict, declining jurisdiction "upon closer examination of the decision under review"); Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983) (discharging jurisdiction after determining no conflict existed upon closer review of facts); City of Jacksonville v. Florida First Nat'l Bank, 339 so. 2d 632 (Fla. 1976) (same).

Article V, section 2 of the Florida Constitution. In Allstate Insurance Co. v. Langston, however, this Court held that it 'does not have jurisdiction based on alleged conflict with a rule of civil procedure." 655 So. 2d 91, 93 n.1 (Fla. 1995); see also State v. Lyons, 293 So. 2d 391, 3'93 (Fla. 2d DCA 1974) (no conflict jurisdiction based upon alleged conflict between criminal rule of procedure and case from this Court).

Additionally, this Court's passing comments about Stone in The Amendments to the Rules cannot invoke the Court's jurisdiction. The Florida Constitution requires an express and direct conflict of "decisions," before this Court can properly exercise jurisdiction. See Art. V, § 3(b)(3), Fla. Const. This Court narrowly has read the word "decision." A decision is not language or expressions found in a dissenting or concurring opinion or in the record, Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); nor is it a ruling from the district court when the mandate is withheld because the en banc district court was split on the issue, Boler v. State, 678 So. 2d 319, 320 n.2 (Fla. 1996), *nor* is it "conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Gibson v. Maloney, 231 So. 2d 823, 824 (Fla. 1970) (emphasis in original); Niemann v. Niemann, 312 So. 2d 733, 734-35 (Fla. 1975). Nor, is it *obiter dicta.* Ciongoli v. State, 337 So. 2d 780, 781 (Fla. 1976) (certiorari discharged). Indeed, if this Court finds that it did make a constitutional "decision" for purposes of conflict jurisdiction in Amendments to the Rules, its brief discussion of Stone represents no more than *obiter dicta.* Pell v. State, 122 So. 110, 112 (Fla. 1929) (parts of opinion not

essential to the decision merely represent *dicta* and have no force as precedent).

This issue should not be taken lightly. If this Court decides that dicta in a rule making proceeding can and did overrule an adversarial decision from a district court of appeal, it will dramatically increase the number of cases over which this Court may exercise jurisdiction.[22]

b. This Court Lacks Jurisdiction Over this Petition Under Its "All Writs" Power

Just as clearly, this Court does not have jurisdiction over this petition based upon Tobkin's argument that the Fourth District's decision somehow affected this Court's ability to reguiate attorneys, citing this Court's "all writs" authority pursuant to of article V, section 3(b)(7), Florida Constitution.

This Court's all writs power is "confined to a class of cases over which the Court normally would have some form of original or appellate jurisdiction, but where the full and complete exercise of that jurisdiction seems likely to be curtailed or'defeated before the Court could otherwise hear the case." Gerald Kogan & Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1152, 1266 (1994). The all writs power *"cannot be used as an independent basis of jurisdiction." St.*

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22. Just in this decade, the Court has promulgated or amended procedural rules in over 150 proceedings. Of these 150 proceedings, over 40 of them dealt with Florida Bar matters. See (attached appendix). Concluding that Amendments to the Rules is a decision that invoke conflict jurisdiction will open over 150 proceedings upon which future petitioners will base their appeals.

Title Ins. Corp. v. Davis, 392 So. 2d 1304, 1305 (Fla. 1980) (emphasis added).

This Court's jurisdiction over the admission and discipline of lawyers under article V, section 15, of the Florida Constitution cannot supply the all writs source of jurisdiction. In State ex rel. Chiles v. Public Employees Relations Commission, 630 So. 2d 1093 (Fla. 1994), the state petitioned for review of a PERC decision to proceed with certification of a bargaining unit for state-employed attorneys, arguing certification would interfere with the Court's jurisdiction over lawyers. This Court denied the petition, holding the mere fact that lawyers would be affected by the PERC decision could not justify use of the "all writs" power. Id. at 1095.

Similarly, the Fourth District's decision in this case that a common-law' privilege protects the public's right to complain about attorneys does not encroach upon this Court's jurisdiction over the admission or discipline of attorneys. Indeed, the decision entirely removes whatever tangential impact the common law of libel might have on the Court's ability to discipline lawyers by immunizing those who complain to the Florida Bar from liability for common-law libel claims. Indeed, nothing in the Fourth District's decision in this case prevents this Court from revisiting the issue of confidentiality of Bar complaints or otherwise constricts this Court's power to amend the Rules Regulating The Florida Bar.

The Court has no need to resort to its "all writs" power to protect its jurisdiction to admit and discipline lawyers. Cases which require invocation of the all writs provision are

extraordinary and exceptionally rare. This is not one of them.

II.

PLAINTIFF'S CIVIL ACTION FOR DEFAMATION WAS PROPERLY DISMISSED FOR FAILURE TO GIVE PRE-SUIT NOTICE PURSUANT TO SECTION 770.01

An alternative basis for affirming dismissal is the ground relied upon by the trial court: the plaintiff failed to provide the defendants notice before filing suit of the published statements he alleged to be false and defamatory.[23] Section 770.01, Fla. Stat. (1991), requires such notice to be given before the commencement of any civil action for libel or slander and often makes litigation unnecessary by encouraging voluntary corrective action. Failure to comply with this pre-suit requirement mandates dismissal.[24] Moreover, dismissal must be with prejudice if the statute of limitations has run.[25]

In this case, Tobkin has admitted that he did not give the notice required by section 770.01 and that it is now too late to

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23. Once this Court accepts jurisdiction, it can review and determine all issues before it. See Lawrence v. Florida East Coast Railway Co., 346 So. 2d 1012, 1014 n.2 (Fla.1977) (concluding that the Court may "consider any error in the record" once the case is properly before it for review); see also Fla. R. App. P. 9.040 ("In all proceedings a court shall have jurisdiction as may be necessary for a complete determination of the cause") (emphasis added).

24. See Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950) ("giving of notice in writing is a condition precedent to suit").

25. See Orlando Sports Stadium, Inc v. Sentinel Star Co., 316 So. 2d 607, 610 (Fla. 4th DCA 1975) (affirming dismissal with prejudice where plaintiff provided notice only after filing suit for defamation).

give such notice.[26] He has argued only that the statute is not applicable here because the defendants are not members of the "media."

That argument might have been successful under the version of section 770.01 that existed in 1950, but it cannot be successful today. In 1950, section 770.01 applied on its face only in actions against a "newspaper or periodical." Chapter 16070, Laws of Florida, Acts of 1933. This Court recognized in Ross v. Gore, 48 so. 2d 412(Fla. 1950), that that language rendered the statute unavailable to defendants other than newspaper and periodical publishers, but nonetheless rejected an argument that the law violated principles of equal protection. The Court held that treating newspaper publisher differently was "a valid classification based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed and is not, therefore, contrary to the 'equal protection' clause of the Fourteenth Amendment to the Federal Constitution." Id. at 416.

Almost four decades later, decisions like Ross have been questioned because they 'came at a time when first amendment and equal protection jurisprudence was substantially less developed than is the case today." Rodeny A. Smolla, Law of Defamation § 9.12[2][b] n. 155 (1986). The "time is . . . ripe for a new and

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26. Because the statute of limitations governing civil claims for libel is two years, Fla. Stat. § 95.11(4)(g) (1991), and Tobkin's action accrued, if at all, upon fist publication in 1989, Fla. Stat. § 770.07, dismissal of the lawsuit pursuant to section 770.01, Fla. Stat., for failure to comply with a condition-precedent to suit would be fatal to his claim.

serious challenge to many of the restrictions in the coverage of typical retraction statutes." Id.

The Florida Legislature had anticipated that challenge, however, when in 1976 it amended section 770.01 to make it applicable to lawsuits arising from publication not only in newspapers and periodicals, but also in lawsuits arising form publication in any "other medium." Chapter 76-123, Laws of Florida. Two persuasive federal district court decisions, Laney v. Knight-Ridder Newspapers, Inc., 532 F. Supp. 910 (S.D. Fla. 1982), King v. Burris, 588 F. Supp. 1152 (D. Colo. 1984) (applying Florida law), rendered soon after this amendment, agreed that the broadening of the statute in 1976 made it applicable in all civil actions for libel and thus protected the statute against constitutional attack.

In Laney, Judge James Lawrence King held, 'The better interpretation of the statute's applicability, as it is the most fair, is that the provision is applicable to all defendants in actions for libel or slander. . . . Notice affords defendants the opportunity to issue a retraction or even to settle the overall conflict, thereby mitigating damages or eliminating litigation altogether. 532 F. Supp. at 913. Judge King held that an interpretation limiting application of section 770.01 to media defendants "strains against considerations of fairness as well as against the declarations in other libel cases which expressly or impliedly state that notice must simply be provided to "defendants." Id. at 912.

Then, in King v. Burris, another district judge held that the Florida Legislature obviously, intended to extend the protection of

the pro-suit notice statute to non-media defendants when it amended the statute in 1976 to make it applicable in actions arising from publication in any "other medium." 588 F. Supp. at 1158. In King, the claim was based on an oral statement by the president and general manager of a professional baseball organization at a meeting of the American Association of Professional Baseball Clubs. Id. at 1154.

Later, however, intermediate Florida appellate court decisions disagreed with this interpretation of the 1976 amendment and held that the pre-suit notice requirement should be regarded as -applicable only to media defendants."

This Court then wrote in Wagner, Nugent, Johnson, Roth, Romano, Erikson & Kupfer, P.A. v. Flanagan, 629 So. 2d 113 (Fla. 1993), a case involving an interpretation of section 770.07, that "[a]lthough Chapter 770 primarily addresses media defendants, we note that the chapter is broadly titled Civil Actions for Libel. We hold the above statute applicable to all civil litigants, both public and private, in defamation actions." Id. at 115.

The trial judge interpreted this language to mean just what it says and dismissed the case. The Fourth District, on the other hand, treated Wagner's interpretation of chapter 770 as dictum and rejected the argument that all aspects of chapter 770, including section 770.01, must be treated as applicable in all civil actions

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27. Gifford v. Bruckner, 565 So. 2d 887 (Fla. 2d DCA 1990); Della-Donna v. Gore Newspapers Co., 463 So. 2d 414 (Fla. 4th DCA 1985); see also Corkery v. SuperX Drugs Corp., 602 F. Supp. 42 (M.D. Fla. 1985).

for libel.[28] Tobkin v. Jarboe, 695 So. 2d 1257, 1258 (Fla. 4th DCA 1997). That aspect of the Fourth District's **decision is incorrect.**

Section 770.01 itself states that pre-suit notice must be given before "any civil action is brought for publication or broadcast, in a newspaper, periodical, or other medium." § 770.01, Fla. Stat. (1991) (emphasis added). The term "other medium" does expand the applicability of the statute well **beyond special media** interests such as newspapers to encompass any form of publication, including private letters.[29]

Moreover, section 770.01 requires a plaintiff to serve notice on "the defendant" instead of the "newspaper publisher,"

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28. Such "*dictum* of the Florida Supreme Court is not without value as precedent." Weisenberg v. Carlton, 233 So. 2d 659, 660-61 (2d DCA), cert. denied 240 So. 2d 643 (Fla. 1970). If the Fourth District disagreed with this Court, 'the proper course would have been to rule in accordance **with" Wagner, Nugent** and then to certify the case to this Court. Continental Assurance Co. v. Carroll, 485 So, 2d 406, 409 (Fla. 1986).

29. Cf. Nelson v. Associated Press, Inc., 667 F. Supp. at 1474 (concluding that the phrase "other medium" in section 770.01 "should be read broadly," and applying 770.01 in suit against wire service); The American Heritage Dictionary 815 (New College ed. 1980) ("medium" is an "agency, such as a person, object, or quality, by means of which something is . . . conveyed"); Webster's Third New Int'l Dictionary, 1403 (1986) (medium is "something through or by which **something** is accomplished, conveyed or carried on"). Only one other state notice statute uses the term "medium", and that law has been interpreted as applying to both media and non-media defendants. Nebraska's retraction statute provides that a plaintiff may recover general **damages** only after requesting a correction from a defendant who has defamed the plaintiff "by any medium." Neb. Rev. Stat. § 25-840.01 (1995). Nebraska courts have applied this language to non-media defendants. See, e.g., Whitcomb v. Nebraska State Educ. Ass'n 165 **N.W.2d** 99 (Neb. 1969) (applying the state's **pre-suit** notice 'statute to a case involving alleged defamation by a report of the Nebraska State Education Association, a private non-media defendant).

"periodical publisher," or "media defendant." Had the legislature intended to limit the applicability of section 770.01 to media defendants, it easily could have done so by inserting language to that effect in the statute. To put it another way, "[i]f the legislature did intend to so limit the applicability of this provision, it seems logical that a specific retraction would have been inserted into the statute. One may reasonably infer from the generality of the language, therefore, that the statute requires notice to all potential defendants in an action for libel or slander." Laney, 532 F. Supp. at 912.

Both Laney and King echoed the commentators' concerns that interpreting the statute as providing special protection for media defendants only might well render it unconstitutional in light of modern equal protection principles. The Fourth District did not share that concern and criticized the Jarboes for not citing "authority for the proposition that the right to pre-suit notice under section 770.01 is a fundamental right." Tobkin, 695 So. 2d at 1259. But, the constitutional issue is not whether pre-suit notice is a fundamental right. No one is arguing that it is. The issue is whether the Legislature may single out a particular class of speakers for special protection and then deny that same protection to other speakers. Modern United States Supreme Court decisions rendered after Ross have recognized that such discrimination between different types of speakers creates such a danger that speech will be regulated on the basis of its content that the discrimination can be justified only by compelling

governmental interests.[30] There plainly are no compelling interests that would justify treating media and non-media defendants differently and therefore the statute should not be interpreted as imposing such different treatment.

Florida courts have "the duty if reasonably possible, and consistent with constitutional rights, to resolve doubts as to the validity of a statute in favor of its constitutional validity and to construe a statute, if reasonably possible, in such a manner as to support its constitutionality."[31]

Here, "[g]iven that an interpretation upholding the constitutionality of the act is available to this Court, it must adopt that construction," rather than strike down the statute and apply it to no one. Miami Dolphins, Ltd v. Metropolitan Dade County, 394 so. 2d 981, 988 (Fla. 1981). Indeed, such a construction would be consistent with the established 'rule that

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30. See, e.g., Arkansas, 481 U.S. 221 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue 460 U.S. 575 (1983); Police Dep' of Chicago v. Mosley, 408 U.S.' 92, 95 (1972) ; Carey v. Brown, 447 U.S. 455 (1980); Niemotko v. Maryland, 340 U.S. 268 (1951); see generally, Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20 (1975).

31. Leeman v. State, 357 so. 2d 703, 705 (Fla. 1978); Corn v. State, 332 So. 2d 4, 8 (Fla. 1976) (same); see also State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994) (the court is 'bound 'to resolve all doubts as to the validity of [the] statute in favor of its constitutionality'") (quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)); Firestone v. News-Press Publishing Co., 538 So. 2d 457, 459 (Fla. 1989) (Whenever possible, a statute should be construed so as not to conflict with the constitution."); Vildibill v. Johnson, 492 So. 2d 1047, 1050 (Fla. 1986) (even if a statute 'may reasonably be construed in more than one manner, this Court is obligated to adopt the construction that comports with the dictates of the Constitution"),

where a statute has been found to violate the equal protection clause, courts will traditionally read into it the improperly excluded class."[32]

CONCLUSION

This Court should affirm the Fourth District Court of Appeal's affirmance of the trial court's dismissal with prejudice of the plaintiff's fourth amended complaint or should dismiss the case for lack of jurisdiction.

Respectfully submitted,

Steel Hector & Davis LLP
Attorneys for Kimberly S. Jarboe Childress and Linda Jarboe

By _____
Thomas R. Julin
Edward M. Mullins
Edurado W. Gonzalez
Florida Bar Nos. 325376 & 863920
200 S. Biscayne Blvd. 40th Floor
Miami, Florida 33131-2398
305.577.2810 or 2844 Fax 7001

32. Childs v. Childs, 419 N.Y.S.2d 533, 541 (N.Y.A.D. 2d Dep't 1979), appeal dismissed, cert. denied, 446 U.S. 901 (1980); see also Califano v. Westcott, 443 U.S. 76, 89 Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677, 691 n.25 (1973); Levy v. Louisiana, 391 U.S. 68 (1968).

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 1997, a true and correct copy of the Answer Brief of Respondents was mailed to:

Richard A. Barnett
Richard A. Barnett, P.A.
121 South 61st Terrace
Suite A
Hollywood, FL 33023

Thomas R. Julin

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