OA 2-4-98



THE SUPREME COURT OF FLORIDA

4TH DCA CASE NO: 96-02317
CIRCUIT CASE NO: 92-21070 (04)

91,236

DONALD TOBKIN, M.D., ESQ.,

Petitioner,

v.

KIMBERLY L. JARBOE, DEBORAH S. JARBOE, LINDA JARBOE, and ESTATE OF RYAN JARBOE,

Respondents.

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# PETITIONER'S REPLY BRIEF

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## CERTIFICATE OF INTERESTED PERSONS

Counsel for the Appellant, RICHARD A. BARNETT, ESQ. certified that the following persons and entities have or may have an interest in the outcome of this case.

1. Donald A. Tobkin, M.D., Esquire
   (petitioner)

2. Richard A. Barnett, Esquire
   (counsel for petitioner)

3. Thomas Julin, Esquire
   (counsel for respondents)

4. Linda Jarboe
   (respondent)

5. Kimberly L. Jarboe
   (respondent)

6. Deborah S. Jarboe
   (respondent)

7. Estate of Ryan Jarboe
   (respondent)

8. Honorable Patricia W. Cocalis
   In the Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida

## CITATIONS OF AUTHORITY


CASES PAGE(S)

Stone v. Rosen
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Feldman v. Glucroft
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## I. THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY HELD AN ABSOLUTE PRIVILEGE APPLIES TO STATEMENTS AND COMPLAINTS TO THE FLORIDA BAR

Respondents suggestion that the Fourth District decision conforms with every Florida Appellate decision on this issue demonstrates their determination to ignore this Court's adoption of the Commission's recommendation that complainants are subject to common law liability for their statements. Respondents constantly ignore this Courts' statements and the actions of the Bar in implementing the decision which superseded the decision in Stone.

Conceding that the lack of confidentiality was not the reason for the retreat from absolute immunity, Tobkin would submit that the "public interest to encourage those who have information of any unethical conduct of attorneys to present such information" has not in any way been stifled by the rejection of absolute immunity.

As can be seen from the following graph (see Appendix 1) from 1988 through 1996 the number of Bar Complaints per attorney has remained virtually identical before and after March 1990. In other words, just as many complaints per lawyer were filed after the rule change as before the rule change.

Therefore, if the rationale for the absolute immunity, was to assure quality legal services by encouraging Bar Complaints, the empirical fact is that there has been no change in the number of Bar Complaints per attorney which proves there has been no chilling effect by the removal of absolute immunity. Despite the repeated assertion in the support of absolute immunity that maintaining the

quality of the legal profession is mutually exclusive with an attorney's right to protect his reputation, the fact is that under the present system the quality of the Bar is maintained even though the individual attorney has the right to vindicate his reputation.

Even if lifting the veil of confidentiality was not the reason for discarding absolute immunity, since the facts demonstrate that the absence of the immunity does not chill the submission of grievances, from a logical stand point the lack of confidentiality supported abolishing the absolute immunity. To do so would not and did not compromise the enforcement mechanism but yet without confidentiality the reputation of the attorney could be damaged unless he was able to defend his good name.

In summary, the public interest in attorney quality by not discouraging grievances and the attorney's need to protect his reputation if wrongfully challenged are not mutually exclusive. Since the withdrawal of absolute immunity, the facts show that the number of bar Complaints per attorney remained constant. Under this Court's ruling, the changes resulted in a win win situation.

## II. FLORIDA LAW IS NOT UNIFORM IN HOLDING BAR COMPLAINTS ARE ABSOLUTELY PRIVILEGED

With the exception of the Stone decision there is not one single decision that addresses this factual situation and explains its decision.

This Court's opinion in Feldman v. Glucroft, 522 So.2d 798 (Fla. 1988) concerned hospital medical peer review. The issue was governed, in part, by Florida Statute. The Court recognized a

limited immunity but also held that whatever information was not kept confidential within the medical review process could be used in a defamation action based on malice or fraud.

The question before the Fourth District in Mueller v. The Florida Bar, 390 So.2d 449 (Fla. 1980) was whether the Staff Attorneys of the Florida Bar enjoyed absolute immunity from liability for defamation.

This is distinguishable from an action against a private citizen complainant who files a grievance against his attorney. The 'Bar employed Staff Attorney has the duty to review and prosecute claims.

The Court recognized that the Florida Bar was an arm of the judiciary and therefore its agents, acting within the scope of their office, enjoyed absolute immunity from liability for publication of defamatory matter.

In McKenzie v. Raymond, 519 So.2d 711 (Fla. 2d DCA 1988) the Court adopted the holding in Stone without any comment whatsoever. This was two years before this Courts decision changing the system.

## III. THE ABSOLUTE PRIVILEGE FOR JUDICIAL PROCEEDINGS DOES NOT APPLY TO A BAR GRIEVANCE BECAUSE IT IS NOT A JUDICIAL PROCEEDING

Bar grievances are characterized under Rule Regulating The Florida Bar 3-7.6 (e) Nature of Proceedings (1) Administrative in Character. A disciplinary procedure is a quasi-judicial administrative proceeding.

The term quasi-judicial modifies the term administrative. In other words a disciplinary proceeding is an administrative proceeding with quasi-judicial characteristics.

The most cursory look at the disciplinary process demonstrates just how far it is from the judicial forum. First, and omitted by Respondents, the complainant submits a complaint which is reviewed by Staff Counsel who may reject it if it doesn't allege a violation, Rule 3-7.3. A Circuit Court Judge does not have a lawyer who discards complaints that he alone determines do not state a cause of action, Second, if the complaint survives the Staff Attorney it goes to a full grievance committee not to a single Judge, three Judge or even seven Judge panel but an entire committee. Rule 3-7.4(b). If this committee determines there is probable cause, then Staff Counsel prepares a formal complaint 3-7.4(1).

Although Petitioner could continue, the point is made. This is not a judicial proceeding. Nor should this case be decided on whether grievance procedures look like judicial proceedings.

Finally, this issue should not be decided based upon what other states have done. This Court instituted a comprehensive program after an exhausive collaborative effort with the Florida Bar and a Special Commission addressing how our state should handle Bar grievances and the relative rights of complainants and attorneys.

The issue is whether this Court's decision in The Florida Bar Re: Rules 558 So.2d 1008 (Fla. 1990) seven years ago which removed

the absolute immunity has adversely effected the likelihood that aggrieved clients will bring Bar Complaints based on their fear of being subjected to suit. This was the concern in Stone. The answer is No. This Court should uphold the removal of the absolute immunity since its absence has not discouraged Bar Complaints, That fact has been proved. The further good news is that attorneys now subject to public scrutiny may protect there reputational rights.

## IV. THIS COURT'S PROMULGATION OF FLORIDA BAR RULES REGARDING CONFIDENTIALITY OF BAR COMPLAINTS SUPERSEDES PRIOR PRECEDENT

Respondents on page 32 of their Brief characterize Petitioner's request to this Court as seeking the "abandonment of Stone."

Respondents misapprehend the following facts. First, this Court's opinion in The Florida Bar : Re Rules 558 So.2d 1008 (Fla. 1990) issued in 1990 was the result of studies commissioned by the Court in conjunction with the Florida Bar and a special Commission to examine the issues raised by grievance proceedings and to examine the rights of the people of the State of Florida, individual complainants and attorneys. Second, and most important is that this Court's opinion in fact supplanted Stone. This Court's opinion neither affirmed or overruled particular points of law. Rather, this opinion prescribed a comprehensive program for grievance practices in this state. This Court is the ultimate arbiter of the law of the State of Florida. To the extent that prior case law conflicted with what this Court prescribed such prior law was superceded.

## V. THE FOURTH DISTRICT COURT OF APPEAL WAS CORRECT IN RULING THAT F.S. 770.01 DOES NOT REQUIRE NOTICE TO AN NON-MEDIA DEFENDANT

Respondents would have this Court reverse the Fourth District on the non-applicability of F.S. 770.01 to non media defendants.

That Court has recently issued another opinion consistent with and citing its opinion in this case which states the obvious fact that under the Statute only media defendants are entitled to Notice. Mancini v. Personalized Air Conditioning, 23 FLW D85 (Fla. 4th DCA 1997). The opinion states all that is necessary to demonstrate the correctness of the ruling in this case.

CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and **correct copy of the foregoing** was mailed to: Thomas R. Julin, Steel, Hector & Davis, **LLP, 200** South Biscayne Blvd., Suite 4000, Miami, Florida, 33131-2398, Attorneys for Respondents, this 28th day of January, 1998.

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**APPENDIX** 1

| Fiscal Year | 87-88 | 88-89 | 89-90 | 90-91 | 91-92 | 92-93 | 93-94 | 94-95 | 95-96 | 96-97 |
|---|---|---|---|---|---|---|---|---|---|---|
| Bar Population | 42,974 | 44,175 | 44,924 | 45,166 | 46,453 | 48,759 | 50,586 | 5 1,749 | 53,577 | 56,379 |
| Complaints | 6919 | 7175 | 8128 | 8068 | 8234 | 7497 | 7796 | 8470 | xx39 | 9436 |
| Complaints per Attorney | .161 | .162 | .180 | .178 | ,177 | .153 | .154 | ,163 | .164 | .167 |
| Complaints per Attorney before end of fiscal year 1990 | .167 | | | | | | | | | |
| Complaints per Attorney after end of fiscal year 1990 | | | | .165 | | | | | | |

Sources:

1. Survey on Lawyer Discipline Systems
   American Bar Association
   Center for Professional Responsibility
   Standing Committee on Professional Discipline (

2. Florida Bar Online
   Law Practice Regulation
   Regulation of Lawyers Conduct
   Selected Disciplinary Statistics (1997)