IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR

CASE NO. 92,841

COMMENTS OF FLORIDA BAR MEMBER DAVID P. FRANKEL

Florida Bar member David P. Frankel ("Frankel"), pursuant to rule 1-12.1 of the Rules Regulating The Florida Bar, hereby respectfully submits these comments on the Petition to Amend Rules Regulating The Florida Bar, filed by the Board of Governors of The Florida Bar on April 21, 1998. As set forth in more detail below, the proposed rule amendments concerning the reapportionment of the Board of Governors violate the United States Constitution and the Florida Constitution.[1] Frankel therefore respectfully requests that this aspect of the proposed rule amendments be modified to either adopt an "at-large" representation system or to provide *nonresident* members of The Florida Bar with representation on the Board of Governors that is proportionally equal to representation provided to *resident* members of The Florida Bar.

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[1] To be clear, both the *existing* apportionment scheme and the *proposed* reapportionment scheme are violative of the Privileges and Immunities Clause to the United States Constitution and the Equal Protection Clauses of the United States and Florida Constitutions. The legal analysis contained in these comments applies equally to both the existing and the proposed schemes.

I. BACKGROUND

Frankel is and has been an active member of The Florida Bar (sometimes referred to herein as the "Bar"), in good standing, since 1980. He attended and graduated from a law school located in the state of Florida and has practiced law both in and outside of Florida. Since June 1986, Frankel has resided outside of Florida. At all times since becoming a member of The Florida Bar, Frankel has paid the same amount of compulsory annual Bar dues (presently $190.00 per year) as is ordinarily paid by resident Bar members. He and other nonresident Bar members in good standing are also subject to the same disciplinary rules and trust account and *pro bono* reporting requirements applied to resident Bar members.

In *In re The Florida Bar*, 316 So. 2d 45, 49 (Fla. 1975), this Court stated that "the Florida Bar is an agency of the judicial branch." An even more unequivocal statement is contained in the introduction to the Rules Regulating The Florida Bar: "The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court."

By rule, the Supreme Court of Florida has described its delegation of authority to the Board of Governors (sometimes referred to herein as the "Board") as follows:

> **(a) Authority and Responsibility**. The board of governors shall have the authority and responsibility to govern and administer The Florida Bar and to take such action as it may consider necessary to accomplish the purposes of The Florida Bar, subject always to the direction and supervision of the Supreme Court of Florida.
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> . . . .
>
> **(c) Powers of Court**. The Supreme Court of Florida may at any time ratify or amend action taken by the board of governors under these rules, order that actions previously taken be rescinded, or otherwise direct the actions and activities of The Florida Bar and its board of governors.

See Rule 1-4.2(a), (c).

Rule 2-3.1 of the Rules Regulating The Florida Bar sets forth a more detailed description of the scope of authority the Court has delegated to the Board:

> The board of governors shall be the governing body of The Florida Bar. The board of governors shall have the power and duty to administer the Rules Regulating The Florida Bar, including the power to employ necessary personnel. Subject to the authority of the Supreme Court of Florida, the board of governors, as the governing body of The Florida Bar, shall be vested with exclusive power and authority to formulate, fix, determine, and adopt matters of policy concerning the activities, affairs, or organization of The Florida Bar. The board of governors shall be charged with the duty and responsibility of enforcing and carrying into effect the provisions of the rules Regulating The Florida Bar and the accomplishment of the aims and purposes of The Florida Bar. The board of governors shall direct the manner in which all funds of The Florida Bar are disbursed and the purposes therefor and shall adopt and approve a budget for each fiscal year. The board of governors shall perform all other duties imposed under the Rules Regulating The Florida Bar and shall have full power to exercise such functions as may be necessary, expedient, or incidental to the full exercise of any powers bestowed upon the board of governors by said rules or any amendment thereto or by this chapter.

At present, the Board of Governors consists of 52 members, 51 of whom have the right to vote. *See* Rule 1-4.1. Forty-two of the Board's voting members are chosen through a complicated apportionment formula that allocates those seats according to the median number of Bar members in good standing residing in the state's 20 judicial circuits. *See* Rule 2-3.3. In essence, those judicial circuits in which the greatest number of Bar members in good standing reside are allocated the most seats on the Board. Those judicial circuits in which the lowest number of Bar members in good standing reside are allocated the fewest seats on the Board. No judicial circuit is allocated less than one seat on the Board.[2] Of the remaining nine Board

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[2] For example, the 1997/98 Board of Governors has ten members from the Eleventh (continued...)

"voting" seats, one is held by the President, one by the President-Elect, one by the Young Lawyers Division, two by residents of the state of Florida who are not members of The Florida Bar, and four by nonresident members.

The June 15, 1997 issue of the *Florida Bar News* (at page 4) reported that the Board of Governors intended to consider or take final action at its July 24-25, 1997 meeting with respect to various proposed amendments to the rules regulating The Florida Bar. Among those proposed rules was one which would create a hypothetical 21st out-of-state judicial circuit with a circuit population equal to 50 percent of the number of members of The Florida Bar in good standing outside of the state of Florida. This proposed formula was then to be used to determine the composition of the Board of Governors.

When Frankel learned of this proposal, he sent a letter to John F. Harkness, Jr., Executive Director of The Florida Bar, stating his "strong objection to the proposed Board of Governors apportionment formula that would provide out-of-state bar members with 50 percent of the proportionate representation on the Board of Governors accorded to resident members." *See* Exhibit 1 (Letter from Frankel to Harkness, dated July 7, 1997). In his letter, Frankel pointed out that "the 50 percent formula scheme violates the civil rights of all out-of-state members in good standing." Frankel wrote that the Board "owes it to its out-of-state members to provide a detailed, persuasive rationale for this scheme." He also asked Mr. Harkness: "What justification is there for apportioning out-of-state members according to a ratio that is less than their whole

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[2](...continued)
Judicial Circuit and only one member each from the First, Third, Fifth, Seventh, Eighth, Tenth, Twelfth, Fourteenth, Sixteenth, Eighteenth, Nineteenth, and Twentieth Circuits.

number?" Frankel requested that Mr. Harkness provide his letter "to each member of the Board of Governors prior to its scheduled meeting." Frankel never received a substantive response to his letter.

Over Frankel's strong objection, the Board of Governors adopted the 50 percent apportionment formula for nonresident Bar members. The Board's proposal was finally filed with the Supreme Court of Florida on April 21, 1998. As written, the proposed rules would create "a hypothetical out-of-state judicial circuit with a circuit population equal to 50% of the number of members of The Florida Bar in good standing residing outside of the state of Florida." *See* Proposed Rule 2-3.3(a). If and when this hypothetical nonresident judicial circuit is added to the existing 20 judicial circuits, the effect will be to provide nonresident Bar members with no more than one half of the proportional representation on the Board of Governors accorded to resident Bar members.[3]

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[3] Actually, nonresident Bar members are at an even greater disadvantage than is indicated in the text. Rule 1-4.1 of The Rules Regulating The Florida Bar requires that the two public members of the Board be "residents of the state of Florida." In addition, Frankel is unaware of any President or President-Elect of The Florida Bar or the Young Lawyers Division of The Florida Bar who has ever been a nonresident member. The nominations rule that requires any candidate for President-Elect of the Bar to submit petitions "signed by not fewer than 1 percent of the members of The Florida Bar in good standing" places nonresident members at a distinct disadvantage in seeking those offices. *See* Rule 2-4.5(a). As pointed out in note 5, *infra*, out-of-state Bar members reside throughout the United States, its territories and in many foreign countries. Gathering 400 or more Bar member signatures is a formidable task for nonresident Bar members. Thus, from a practical standpoint, nonresident Bar members such as Frankel have even less than 50% proportional representation of the Board of Governors.

II. THE EXISTING AND PROPOSED REAPPORTIONMENT FORMULAS VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE UNITED STATES CONSTITUTION

The Board seeks to make explicit, an apportionment scheme whereby nonresident members of The Florida Bar, such as Frankel, receive no more than 50 percent of the voting representation accorded resident Bar members. This proposal violates the Privileges and Immunities Clause of Article IV of the United States Constitution, which provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2.[4]

The Supreme Court of the United States has established the following standard when evaluating whether a state's action violates the Privileges and Immunities Clause: "When a challenged restriction deprives nonresidents of a privilege or immunity protected by this Clause, it is invalid unless '(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989) (quoting *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985)).

Significantly, the *Barnard* Court wrote: "It is by now well settled that the practice of law is a privilege protected by Article IV, § 2, and that a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause." *See id.*

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[4] The United States Constitution, as originally adopted, apportioned the House of Representatives, by counting slaves at the ratio of three fifths, rather than according to their whole number. U.S. Const. art. I, § 2, cl.3. In 1868, after the Civil War, this gross inequity was rectified by the adoption of the fourteenth amendment. *See id.* amend. XIV, § 2. The similarities between the subsequently-rejected apportionment scheme of the House of Representatives and the proposed reapportionment of the Board of Governors of The Florida Bar are obvious.

at 553 (citing *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, at 65 (1988)). Thus, since Frankel and other nonresident Bar members have passed the Florida bar examination and otherwise qualify for practice in Florida, they have "an interest protected by the" Privileges and Immunities Clause. Moreover, the Rules Regulating The Florida Bar make clear that the Board of Governors plays an integral role in regulating the practice of law and the conduct of all members of The Florida Bar, both resident and nonresident. Since the Court has already determined that *resident* Bar members have an interest in representation on the Board in accordance with their population by geographic area, there is no substantial reason to treat *nonresident* Bar members any differently.

Applying the analysis employed by the *Barnard* Court, the Supreme Court of Florida needs to consider here only whether there are substantial reasons to support treating qualified nonresident attorneys differently, and whether the means recommended by the Board of Governors -- disproportionately-low representation on the Board -- bear a close or substantial relation to the Bar's legitimate objectives. *See id.* As written, the Board must satisfy *both* prongs of the test.

Frankel now turns to the first prong of this analysis: Are there *substantial* reasons to support treating qualified nonresident attorneys differently (*i.e.*, providing nonresident Florida Bar members with disproportionately-low representation on the Board of Governors)?

First, it must be emphasized that, despite a specific request from Frankel, the Bar has refused to provide *any* rationale for providing nonresident Florida Bar members with disproportionately-low representation on the Board. Thus, Frankel is at a severe disadvantage in that he must speculate as to the rationale for the Board's proposed reapportionment scheme.

From reading the *Florida Bar News* and the *Florida Bar Journal* for many years and from speaking with nonresident representatives on the Board, Frankel has concluded that the decision to provide nonresident Bar members with unequally-low representation on the Board was primarily, if not solely, the result of a political compromise. Apparently, the Board wants to keep its membership to a "manageable" number of approximately 50 members and wants to apportion the vast majority of those seats according to a geographic system. There are 20 judicial circuits in Florida and each has been deemed worthy of at least one seat on the Board. Since judicial circuits vary greatly in the number of Bar members residing in them, circuits with disproportionately greater numbers of Bar members demanded greater representation on the Board. Nonresident Bar members, lacking both substantial clout on the Board and a ready means to organize thousands of members scattered throughout the United States and the world,[5] have been unable to muster the political strength to obtain their proportionate share of Board seats.

Assuming this is the rationale for the disproportionate treatment accorded nonresident Bar members, it does not constitute a substantial reason to support treating qualified nonresident attorneys differently. As indicated, it is merely a political compromise. Such a compromise should not be permitted to degrade a constitutional privilege.

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[5] As of September, 1997, nonresident Florida Bar members resided in 48 states, the District of Columbia, Guam, Puerto Rico, the Virgin Islands, American Samoa, and approximately 38 foreign countries. *See Florida Bar Journal*, Sept. 1997 at 407-31. While Frankel does not know the precise numerical breakdown between resident and nonresident Bar members, this Court stated last year that nonresident Bar members comprise "almost 20% of the Bar's membership." *See Florida Bar Re Amendments to Rules Regulating The Florida Bar*, 697 So. 2d 115, 117 (Fla. 1997).

Turning to the second prong of the Privileges and Immunities analysis applied by the *Barnard* Court, the Board must also demonstrate that "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Barnard,* 489 U.S. at 552. In applying this prong, the Court stated: "In deciding whether the discrimination bears a substantial relation to the State's objective, we consider, among other things, whether less restrictive means of regulation are available." *See id.* at 552-53 (citing *Piper*, 470 U.S. at 284).

Since the Board has not identified the objective it seeks to achieve by providing nonresident Bar members with disproportionately-low representation, it is difficult to address how the discrimination against nonresident Bar members helps meet those objectives. In any event, the Bar has available to it any number of alternative Board representation schemes that would not discriminate against nonresident Bar members.[6]

For example, the Bar could simply move to an "at-large" Board membership system. In such a system, each Bar member would be entitled to vote for Board members who would serve "at large" and not for any designated geographic area. Under such a system, a Bar member residing in Dade County might choose to vote for nonresident or Duval County resident Bar members running for the Board. Alternatively, that same Dade County resident Bar member

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[6] In *Barnard*, the Virgin Island Bar Association offered five justifications for its residency requirement. The "more substantial" justification was that nonresidents would not be available to accept appointments to appear on behalf of indigent criminal defendants. Nevertheless, the Court found that this offered justification -- which implicated the sixth amendment right to counsel -- was not sufficient to trump the Privileges and Immunities Clause. Rather, there was a less restrictive alternative whereby nonresident bar members could "substitute a colleague in the event he is unable to attend a particular appearance." *See Barnard,* 489 U.S. at 558.

might choose to vote only for Dade County resident Bar members. Likewise, other resident and nonresident Bar members would have similar choices under an "at-large" system.[7]

Another less restrictive alternative that would not violate the Privileges and Immunities Clause, but which would retain the basic elements of the Board's proposed geographic allocation scheme is as follows: The Board would remain capped at approximately 50 voting members. The state might then be divided by geographic regions that are larger than the 20 existing judicial circuits. One example might call for the division of the state along the geographic boundaries of the five District Courts of Appeal. Each district would be apportioned membership on the Board much the same as is done now for the 20 judicial circuits. However, nonresident Bar members would be treated as a hypothetical "sixth" district. The nonresident Bar members would be apportioned representation on the Board on an equal basis as resident Bar members. Thus, if the Board were capped at 50 members and nonresidents accounted for approximately 20 percent of the total Bar membership in good standing, nonresident Bar members would be eligible to elect up to 10 Board members. The remaining 40 Board members would be allocated much as is done at present. This system would preserve the geographic diversity apparently sought by the Board, but would comport fully with the constitutional requirements of the Privileges and Immunities Clause. It therefore qualifies as a "less restrictive," but constitutionally-acceptable, alternative to the Board's proposal that is pending before this Court.

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[7] Frankel is also a member of the District of Columbia bar. The DC bar employs an at-large voting system for its Board of Governors. In a typical DC bar election, many (perhaps most) of the candidates are nonresidents of the District of Columbia.

Thus, the Board's reapportionment proposal violates the Privileges and Immunities Clause of the United States Constitution. It deprives nonresident Bar members of privileges protected by the Clause -- the right to practice law on terms equal to resident Bar members and the right to vote for those who regulate their activities on terms equal to resident Bar members. There is no substantial reason for the difference in treatment and the discrimination practiced against nonresident Bar members bears no substantial relationship to any legitimate state objective. Furthermore, less restrictive means of regulation are available to accomplish the Board of Governors' objectives that are not violative of the Privileges and Immunities Clause.

III. THE EXISTING AND PROPOSED APPORTIONMENT FORMULAS VIOLATE THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS

Nonresident members of The Florida Bar pay the same per capita dues as resident Bar members. Nonresident Bar members are also subject to the same disciplinary rules and trust account and *pro bono* reporting requirements as resident Bar members. Under these circumstances, nonresident Bar members are entitled to a proportionally equal say in the organization and administration of the Bar. The present and proposed schemes for apportioning the Board of Governors fail to treat similarly-situated citizens (*i.e.*, members of The Florida Bar) equally. The unequal treatment accorded nonresident Bar members vis-a-vis resident Bar members violates the equal protection clauses of the United States Constitution and the Florida Constitution.

The fourteenth amendment to the United States Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction[8] the equal protection of the laws." U.S. Const. amend. XIV, § 1. Similarly, the Florida Constitution provides in part: "All natural persons are equal before the law . . . ." Fla. Const. art. I, § 2.

The existing and proposed apportionment formulas provide unequally-low weight to the votes of nonresident members of The Florida Bar vis-a-vis resident Bar members. Indeed, this inequity was recognized by the Supreme Court of Florida last year, when it wrote:

> At present, there is approximately one Board seat for every 1,000 in-state Bar members, as compared to one Board seat for approximately every 3500 out-of-state members. . . . Recognizing that the group [of nonresident Bar members] now comprises almost 20% of the Bar's membership but only holds approximately 6% (or 3 of 51) of the Board seats, a fourth Board seat would mean the non-residents occupy approximately 7.5% of the Board seats. We conclude that this is a reasonable request which still leaves the out-of-state practitioners proportionally under-represented but certainly improves their numbers.

Florida Bar re Amendments to Rules Regulating The Florida Bar, 697 So. 2d at 117 (approving Board of Governors' proposal to increase nonresident representation on the Board from 3 to 4 members).[9] Unfortunately, the Court did not explain why it condoned a result that it conceded "still leaves the out-of-state practitioners proportionally under-represented."

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[8] Ever since the Supreme Court of Florida established an integrated Bar, nonresident Bar members have been "within the jurisdiction" of the state. *See Petition of Florida State Bar Association*, 40 So. 2d 902 (Fla. 1949). A typical example of how that jurisdiction is asserted occurs any time a nonresident Bar member is subjected to disciplinary sanctions by The Florida Bar or this Court for activities that take place wholly outside Florida and have no impact on any Florida residents or businesses.

[9] In 1985, the Court granted the Board's petition to increase nonresident representation on the Board from one to two members. *See Florida Bar in re Amendments to Integration Rule (Article III, Sections 2 and 6)*, 462 So. 2d 467 (Fla. 1985). According to that decision, nonresidents apparently first gained representation on the Board in 1979.

In *Florida Bar re Amendments to the Rules Regulating The Florida Bar (Reapportionment)*, 518 So. 2d 251 (Fla. 1987), this Court adopted the essence of the existing geographic apportionment system for the Board of Governors. In its decision, the Court distinguished and rejected the "one person, one vote" principle set forth in *Reynolds v. Sims*, 377 U.S. 533 (1964). In doing so, the Court stated:

> If an elective body's powers are limited and disproportionately affect members of a particular group, . . . the [Supreme] Court [of the United States] has found the one person, one vote principle inapplicable. *E.g., Ball v. James*, 451 U.S. 355, 101 S.Ct. 1811, 68 L.Ed.2d 150 (1981) (directors of agricultural improvement district); *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L.Ed.2d 659 (1973) (water storage district directors).

518 So. 2d at 252.

The cases cited by this Court in its 1987 decision are not applicable to the equal protection issues raised by Frankel. Unlike the *Ball* and *Salyer* cases, the unequal voting representation at issue here simultaneously implicates two provisions of the United States Constitution, the Equal Protection Clause and the Privileges and Immunities Clause. Thus, while it may not constitute a violation of the Equal Protection Clause of the United States Constitution to decline to apply the one person, one vote principle in some limited cases to persons *within one state*, a state may not choose to disregard the one person, one vote principle where that decision derogates the privileges of nonresidents who bear the same obligations to pay dues or taxes and abide by other regulations imposed on residents. Thus, the existing and proposed voting apportionment schemes for the Board of Governors violates the equal protection guarantees set forth in the United States Constitution and the Florida Constitution.

CONCLUSION

For the foregoing reasons, Frankel respectfully requests that this Court reject both the existing and proposed apportionment schemes for the Board of Governors. In place thereof, Frankel respectfully requests that the Court adopt either an at-large representation system or a system that provides nonresident members of The Florida Bar with representation on the Board of Governors that is proportionally equal to representation provided to resident Bar members.

Dated May 13, 1998

Respectfully submitted,

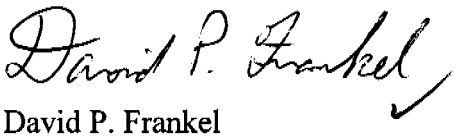

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EXHIBIT 1

4336 Garrison Street, N.W.
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July 7, 1997

John F. Harkness, Jr.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300

Re: Proposed Amendments to Rules Regulating The Florida Bar

Dear Mr. Harkness:

I am writing to express my strong objection to the proposed Board of Governors apportionment formula that would provide out-of-state bar members with 50 percent of the proportionate representation on the Board of Governors accorded to resident bar members (the "50 percent formula"). I request that you provide this letter to each member of the Board of Governors prior to its scheduled meeting on this subject along with a recommendation that out-of-state bar members be accorded equal representation with resident bar members. If the Board of Governors decides to move ahead with the 50 percent formula, it owes it to its out-of-state members to provide a detailed, persuasive rationale for this scheme.

The June 15, 1997 issue of The Florida Bar News (page 4) reported that the Board of Governors of The Florida Bar intends to consider or take final action at its July 24-25, 1997 meeting with respect to various proposed amendments to the rules regulating The Florida Bar. Among those proposed rules is one which would create a hypothetical 21st out-of-state judicial circuit with a circuit population equal to 50 percent of the number of members of The Florida Bar in good standing outside of the state of Florida. See Proposed Bylaw 2-3.3. This proposed formula would then be used to determine the composition of the Board of Governors. See Proposed Bylaw 1-4.1.

The 50 percent formula appears to be derived from a preliminary recommendation of the Special Committee to Study Composition of the Board of Governors. According to an article that appeared in the April 15, 1997 issue of The Florida Bar News, that Special Committee put forth a reapportionment scheme whereby out-of-state bar members would be covered by a newly-created "21st circuit." The number of out-of-state bar members would "be halved and then the number of seats would be determined by the normal Bar apportionment formula." No explanation or rationale was ever provided to the general membership for the Special Committee's preliminary recommendation.

When our founding fathers wrote the Constitution of the United States, the House of Representatives was also apportioned according to the number of people living in the respective states. Free persons and indentured servants were counted according to their whole number; "Indians" were not counted if not taxed; and all other persons (i.e., slaves) were counted at the ratio of three fifths. U.S. Const. art. I, § 2, cl. 3. This gross civil rights violation was not rectified until the adoption of the Fourteenth Amendment in 1868. See id. amend. XIV, § 2.

Active out-of-state members of the Florida Bar pay the same dues as active resident members. What justification is there for apportioning out-of-state members according to a ratio that is less than their whole number? I urge the Board of Governors to reject this proposed rule change and to provide out-of-state bar members with equal representation in all bar activities.

If the Board of Governors proceeds with this 50 percent formula scheme (or some other apportionment scheme that provides unequal, lesser representation to out-of-state bar members) then I will give serious consideration to challenging any final rule in court. At a minimum, the Bar must provide some rational basis or compelling state interest for its proposal. As proposed, the 50 percent formula scheme violates the civil rights of all out-of-state members in good standing.

Thank you in advance for considering my views.

Sincerely yours,

David P. Frankel

David P. Frankel
Florida Bar Number 311596

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of Florida Bar Member David P. Frankel was served via first class mail, postage prepaid, this 13th day of May, 1998, upon John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

David P. Frankel

David P. Frankel