IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 92,841

THE FLORIDA BAR'S RESPONSE TO COMMENTARY OF RESPONDENT DAVID P. FRANKEL

THE FLORIDA BAR (Bar) provides the following observations in response to the commentary of Respondent David P. Frankel (Respondent/Frankel) filed herein:

I

Respondent urges modification of those portions of the Bar's original petition in this action which seek amendments to rule 1-4.1 and bylaw 2-3.3, Rules Regulating The Florida Bar -- both of which would refine 1997 changes in the composition of the Bar's governing board by calculating the number of future "at-large" representatives for nonresident licensees based on a hypothetical 21st circuit, counted at 50 percent of the total nonresident member population and thereafter subjected to existing reapportionment rules.

Respondent seeks adoption of some alternative at-large representation system, or board representation for nonresident Bar members that is proportionally equal to the representation now provided to resident members. He challenges the Bar's proposals on the basis of the Privileges and

Immunities Clause of the United States Constitution, and the Equal Protection Clauses of both the Federal and Florida Constitutions.

II

The development of nonresident representation within Florida Bar governance is chronicled in a series of four cases: *In the Matter of The Florida Bar (Reapportion Board of Governors)*, 355 So.2d 426 (Fla. 1978) (Bar invited to consider direct representation of non-resident lawyers on governing board); *The Florida Bar re: Petition to Amend Integration Rule and Bylaws (Nonresident Board of Governors Seat)*, 366 So.2d 1176 (Fla. 1979) (single board seat created); *The Florida Bar in re Amendments to Integration Rule (Article III, Sections 2 and 6)*, 462 So.2d 467 (Fla.1985) (second board seat created); *The Florida Bar re Amendments to the Rules Regulating The Florida Bar (Reapportionment)*, 518 So.2d 251 (Fla. 1987) (third board seat created); and *The Florida Bar re Amendments to Rules Regulating The Florida Bar*, 697 So.2d 115 (Fla. 1997) (fourth board seat created).

These opinions recount the tremendous amount of member study and the extreme depth of judicial review directed to the issue of appropriate nonresident apportionment of the Bar's governing board. It would probably not be an exaggeration to state that this topic has been studied, analyzed and debated on an ongoing basis since the formation of The Florida Bar as an integrated body in 1949.

III

As noted by the Bar in last year's rules filings, the requested increase in out-of-state board seats was a concept universally endorsed by all nonresident board members, as well as the executive council of the Out-of-State Practitioners Division of The Florida Bar. The revisions were

characterized by proponents as both fair and representative, and deemed to be merited because of the added contributions and participation of nonresident members within this organization (to include a Pennsylvania-based attorney who served as the 1996-97 president of the Young Lawyers Division, apparently unknown to Respondent).

Mr. Frankel challenges the general premise of the apportionment scheme that was so conscientiously considered by this Court only one year ago. He also questions the specifics of the suggested refinement of two apportionment provisions in the Bar's current rules filing. Fairness in Bar governance is a topic whose consideration should never be foreclosed, and Respondent's observations on other matters affecting this organization have been well taken on at least one other occasion. *The Florida Bar re Frankel*, 581 So.2d 1294 (Fla. 1991) (permissible legislative lobbying). However, a one-person, one-vote philosophy for Bar apportionment has been expressly addressed by this Court, and the Bar considers Respondent's commentary on this subject to be unconvincing, and essentially devoid of any argument that has not already been well considered throughout the evolution of this organization's governance processes.

Indeed, The Florida Bar would like to think that all of the issues raised in Respondent's comments have been quite adequately considered. Last year, this Court accepted a revised board apportionment scheme that upped the number of voting members from 50 to 51, and increased out-of-state seats for 3 to 4. This year, the Bar's proposals are essentially an editorial rewrite of last year's submissions. If applied to current Bar membership, the suggested revisions of the Bar's apportionment formula would effect no immediate change in the existing configuration of four out-of-state board seats. More importantly, under this proposed new computation devised by the Bar's Special Study Committee on Board Composition, any stigma of set-aside seats would be removed

from out-of-state governance, and nonresidents would be guaranteed additional elected representatives in the event of sufficient increases in the number of out-of-state licensees.

IV

Respondent's reliance on the Privileges and Immunities Clause of the United States Constitution to question these new proposals is misplaced. The recent opinion in *Parnell v. Supreme Court of Appeals of West Virginia*, 110 F.3d 1077 (4th Cir. 1997) more properly interprets Privileges and Immunities in this context, and clarifies the true relevance of those cases cited in Frankel's commentary.

The *Parnell* opinion reiterated the United States Supreme Court's two-step analysis for determining whether residency-based restrictions on an activity offend Privileges and Immunities protections: (1) a "fundamental right" must be implicated; and (2) if the challenged restriction deprives nonresidents of a protected privilege, the provision should be invalidated only if it is not closely related to the advancement of a substantial state interest. 110 F.3d at 1080. *Parnell* further recognized that the Supreme Court has held "the opportunity to practice law" is a fundamental right under the Privileges and Immunities Clause." 110 F.3d at 1081, citing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 at 281-82 (1985).

Parnell, a nonresident member of the West Virginia State Bar, questioned a practice rule that disallowed his sponsorship of pro hac vice applicants solely because of his nonresident status. West Virginia's rules otherwise left Parnell free to perform the essential tasks of a litigator practicing within his area of specialty. The Fourth United Stats Circuit Court of Appeals found that pro hac vice sponsorship was not a fundamental component of the right to practice law, and declined to further

consider whether West Virginia's rule satisfied the "substantial state interest" prong of Privileges and Immunities analysis.

A nonresident member's putative right to one-person, one-vote representation on the governing board of their unified bar is quite distinctive from that individual's basic "opportunity to practice law." This Court has appeared to recognize that difference throughout its oversight of Florida Bar matters. The distinction also seems to be appreciated in the federal courts. In *Brady v. State Bar of California*, 533 F.2d 502 (9th Cir. 1976), the court maintained: "The Supreme Court has held that malapportionment of representation on a state bar governing body is not a violation of fourteenth amendment rights." 533 F.2d at 502-3, citing *Sullivan v. Alabama State Bar*, 295 F.Supp. 1216 (M.D. Ala.) *aff'd* 394 U.S. 812 (1969). The *Brady* court apparently saw no arguable Privileges and Immunities aspect of this issue either, adding: "There is, thus, no substantial unsettled federal question on such malapportionment..." 533 F.2d 502 at 503.

V

Not only does Respondent's claim fail to implicate any fundamental right, he cites no actual discriminatory treatment by the Bar. Frankel readily acknowledges that he pays the same amount of compulsory membership fees as Floridians, is subject to the same disciplinary rules, and must observe trust account and pro bono reporting requirements that are also imposed upon resident Bar members. [R. Regulating Fla. Bar 1-7.3, 4-8.5, Chapter 5, and 4-6.1, respectively]. Respondent otherwise has made no claim that any action of the board of governors of The Florida Bar may have affected his opportunity as a nonresident member to practice law in this state on terms substantially equal to those of resident attorneys.

Citing the same Privileges and Immunities opinions as Frankel, the *Parnell* opinion suggests that a federal court, if confronted with such a claim in this situation, would: "recognize the importance of not interfering with the ability of a state to regulate those who practice law within its borders." 110 F.3d at 1082, fn. 4. Indeed, state bar membership rules that have required otherwise qualified attorneys to maintain an office and attend continuing education courses conducted in a particular state have been upheld despite challenges based on a Privileges and Immunities argument. *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (3d Cir. 1997). Absent any claim of regulatory discrimination -- and given the extent to which much more burdensome residence-based bar regulation is tolerated in other states under Privileges and Immunities analysis -- Frankel's arguments should be rejected as a matter of administrative policy.

VI

Even if one-person, one-vote representation for out-of-state Bar members might arguably be considered as "sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause" [*Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988)], the heritage of this issue in Florida court opinions reflects substantial reasons for the difference in nonresident apportionment, and presents ample explanation of the relationship between that situation and the state's objectives. Case law from other jurisdictions further validates The Florida Bar's apportionment system.

Pursuant to Article V, Section 15 of the Constitution of the State of Florida, The Florida Bar is established as "an official arm" of the Supreme Court of Florida. R. Regulating Fla. Bar, Introduction. Federal courts have also recognized that the Bar is an integral part of the judicial

branch of government of this state. *Dacey v. The Florida Bar*, 414 F.2d 195 (5th Cir. 1969); *Ippolito v. State of Florida*, 824 F.Supp 1562 (M.D. Fla. 1993). "Article V, section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts *of this State*." *TGI Friday's, Inc. v. Dvorak*, 663 So.2d 606, 611 (Fla. 1995), ***reh'g denied*** (emphasis added). "The practice of law and conduct of state judges *in Florida* are matters solely within the plenary jurisdiction of the Florida Supreme Court." *Zeller v. The Florida Bar*, 909 F.Supp. 1518. (N.D. Fla.1995) (emphasis added). Understandably, this Court's jurisdiction has limits to its territorial reach and the comity accorded it by other sovereign states. Much of The Florida Bar's focus must be, realistically, on matters of practice and procedure within this state. The Out-of-State Practitioners Committee, in a still -timely 1987 resolution, recognized "the distinction between an in-state member of The Florida Bar with daily contacts in the State of Florida and and [*sic*] out-of-stater with limited contacts with the State of Florida."

Professional regulation is probably The Florida Bar's central and most important purpose, in furtherance of this Court's responsibilities under Article V, Section 15 of the Florida Constitution. The Bar's premier regulatory system necessarily benefits from the collective support of all its licensees, consistent with unification of the legal profession. *Petition of Florida State Bar Association*, 40 So.2d 902 (Fla. 1949). Disciplinary matters may well occupy the bulk of the resources of the Bar's governing board. Yet, because many of The Florida Bar's nonresident members primarily practice in other states -- and possess multiple bar licenses -- much of the board's regulatory activity regarding these individuals is derivative of, and effectively subordinate to, some separate disciplinary proceeding brought by officials of that lawyer's home state. R. Regulating Fla. Bar 3-4.6 & 3-7.2.

In the opinion of the Bar's governing board, because in-state practice and disciplinary matters are the more significant component of The Florida Bar's regulatory activity, an apportionment scheme that addresses this reality -- further shaped by actual membership distribution and the ideals of unification -- has a rational basis. The precise nature of this Bar's business as a regulatory arm of this state court, and its role as a public trust for Florida's judicial branch are substantial reasons for this organization's emphasis on state-based apportionment, responsibly tempered with considerations of lawyer population.

VII

Frankel's additional belief that the Bar's present or proposed forms of apportionment offend Equal Protection principles is also off base, as *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099 (3d Cir. 1997) emphasizes. Under Equal Protection analysis, if a questioned regulation establishes a classification that implicates fundamental rights, it must meet strict scrutiny review; if the measure is generally economic or social in nature, the regulation need only be rationally related to a legitimate state interest. 111 F.3d at 1113-14.

For Fourteenth Amendment - Equal Protection purposes, the practice of law is not considered a fundamental right. see *Leis v. Flint*, 439 U.S. 438 (1979); *Edelstein v. Wilentz*, 812 F.2d 128 (3d Cir. 1987). Yet, like the unsuccessful appellant in *Tolchin*, Respondent is attempting to bootstrap an alleged Privileges and Immunities right into the jurisprudence of Equal Protection, where such concepts simply are not interchangeable. 111 F.3d at 114.

Again, Frankel has not convincingly asserted a fundamental right to fully proportional representation on the Bar's governing board. Therefore, case law holds that a rational basis analysis

of board apportionment is appropriate. Controlling federal opinions regarding Equal Protection aspects of residency matters are relevant and persuasive in determining whether Florida's constitutional safeguards have been violated. *Osterndorf v Turner*, 426 So.2d 539 (Fla. 1983). Under rational basis consideration of an Equal Protection claim, both federal and Florida opinions emphasize that a party who claims that a particular regulatory classification denies some protection has the burden of showing that the questioned provision does not bear some rational relationship to a legitimate state purpose. *Lite v. State*, 617 So.2d 1058 (1993). Those who complain of unjust discrimination are obligated to show that the challenged act has no conceivable basis, under any conditions, sufficient to justify its application. *Lewis v. Mathis*, 345 So.2d 1066 (Fla. 1977).

And, the test that is used in any Equal Protection examination of such a provision is whether the classification rests on a difference that bears some reasonable relation to the object of the regulation. If there is such a basis for the classification, the measure will be sustained. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Iacovone v. State*, 639 So.2d 1108 (Fla. 2d DCA 1994), affirmed 660 So.2d 1371 (Fla. 1995).

The right to practice law and an entitlement to a fully proportionate board representation are not fundamental rights for purposes of the Equal Protection Clause. Thus, Respondent's claim fails because the present and proposed rules are rationally related to responsible allocation of the Bar's regulatory resources at the highest levels within this organization. Frankel has not met his burden under state or federal Equal Protection standards, regardless of whether he truly has had to speculate as to the rationale for the Bar's governance system. Consequently, Respondent's other suggestions for at-large board representation -- which would abandon Florida's circuit court framework for Bar apportionment -- need not be further considered.

If Frankel has had to speculate in any of his argument, however, it seems that he has done so in his imagined concern that a privilege or immunity may be affected via some future action of a reconfigured board of governors -- even though predecessor versions of that allegedly malapportioned body have been most fair in their consideration of nonresident Bar issues. In reality, The Florida Bar and this Court have a commendable record in their treatment of out-of-state members. Certain Bar rules and processes are particularly accommodating and respectful of nonresident status. R. Regulating Fla. Bar 4-6.1 (professional responsibility to provide pro bono public service may be fulfilled by nonresident members in the states in which they practice or reside); R. Regulating Fla. Bar 6-10.3(c)(3) (out-of-state members not delivering legal services or advice on matters or issues governed by Florida law are exempt from continuing legal education requirement).

The two proposals that Mr. Frankel questions are merely the latest in the ongoing process within the Bar that features regular review of its governance system. The Bar's Special Committee on Board Composition -- whose report was presented to this Court and recognized in last year's opinion -- proposed the concept of having the out-of-state membership considered as a hypothetical 21st circuit for purposes of board apportionment. 697 So.2d at 117, fn.9. This suggested reform is but another good faith effort by the Bar toward fair and representative nonresident apportionment. It seems somewhat incongruous that the minimal revisions are at issue when they are merely tendered to make the codified process for calculating entitlement to board seats more editorially consistent for both resident and nonresident members, and the amendments would assure automatic growth in board representation for nonresidents based on future increases in their membership.

VIII

Notwithstanding what may have been the circumstances regarding the disposition of Mr. Frankel's July 7, 1997 correspondence to The Florida Bar, the points raised in that letter were well-known to the special committee members who conscientiously considered the legal and policy aspects of Bar apportionment, and who responsibly recommended this form of governance. Florida Bar archives contain at least four other letters from respondent, dating back to 1987 on the subject of nonresident representation [*see* Exhibit 1]. Frankel's previous written comments left little room for Bar officials to speculate as to his sentiments -- which espoused one-person, one-vote reapportionment in much the same manner as his July 1997 letter does. Appreciating Mr. Frankel's legal concerns nevertheless, all three nonresident members of the board of governors and the executive council of the Out-of-State Practitioners Division uniformly endorsed the apportionment formula now within current rules. And, following special committee presentation of these pending revisions, they were similarly endorsed by the division and then summarily approved by the Board of Governors. If Mr. Frankel is dissatisfied with the performance of his nonresident representatives or the out-of-state division, he has adequate opportunity to address those separate concerns through the Bar's existing political processes.

IX

Last year the Out-of-State Practitioners Division and all nonresident governors represented to this Court that the proposed apportionment for governance of this unified Bar was "consistent with this Court's directives on fair representation of 'all of the Bar's members.'" This Court, in thoughtful commentary has observed that Bar governance must feature "equitable representation for nonresident

members" [*The Florida Bar re: Petition to Amend Integration Rule and Bylaws (Nonresident Board of Governors Seat)*, 366 So.2d 1176 (Fla. 1979)] and that "the board should be apportioned fairly and should represent all of the bar's members" [*The Florida Bar re Amendments to the Rules Regulating The Florida Bar (Reapportionment)*, 518 So.2d 251 at 252 (Fla. 1987)].

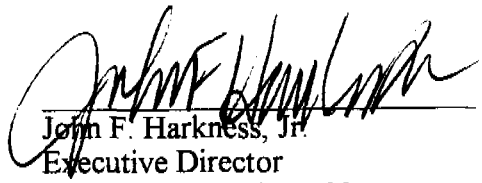
The Supreme Court of Florida has never been particularly reluctant or passive in its commentary or actions relating to its oversight of Bar administrative matters. If The Florida Bar needs to be more responsive to Mr. Frankel's sentiments or those of any other member, this case is the appropriate vehicle for further dialogue on that subject.

However, at this time in the development of the unified bar of this sovereign state, the representative officials for the 10,962 nonresidents within the 58,080 active members of The Florida Bar emphatically reiterate that they accept the current four-member allotment of seats on the Bar's governing board -- and urge this Court to adopt these two technical revisions of rule 1-4.1 and bylaw 2-3.3 from last year's rules filing, along with all other revisions within the initial petition filed in this action.

X

WHEREFORE, The Florida Bar prays this Court will enter an order amending the Rules Regulating The Florida Bar in the manner originally sought herein.

Respectfully submitted,



John F. Harkness, Jr.
Executive Director
Florida Bar Number 123390

Edward R. Blumberg
President
Florida Bar Number 190870

Howard C. Coker
President-elect
Florida Bar Number 141540

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail on this 8th day of June 1998, to: David P. Frankel, 4336 Garrison Street, N.W., Washington, D.C. 20016-4035.

John F. Harkness, Jr.
Executive Director
Florida Bar Number 123390

EXHIBIT 1

4336 Garrison Street, N.W.
Washington, D.C. 20016
June 1, 1987

Chesterfield H. Smith, Esq.
Holland & Knight
P.O. Box 015441
Miami, Florida 33101

Re: Reapportionment of Florida Bar Board of Governors

Dear Mr. Smith:

You may recall that on January 19, 1987, I wrote to you to express my grave concern with a statement that was attributed to you in an article published in the January 15, 1987 issue of The Florida Bar News. That statement was that "resident members have a greater interest in Bar governance than nonresidents." In February 1987, I received a letter from James H. Shimberg, Jr. of your firm which proported to be a response to my letter. Mr. Shimberg's letter, however, did not respond to my letter since it did not relay to me your views on the important issues I raised in my letter to you.

I recently received the May 15, 1987 issue of The Florida Bar News. On page 5 of that issue, you are quoted as having argued to the Supreme Court of Florida that with respect to out-of-state members of the Florida Bar "basically, all they are concerned with is the amount of dues they have to pay--they're not concerned with the administration of justice in this state." As with my January 19, 1987 letter to you, the remainder of this letter assumes that the quote is accurate. Once again, I offer apologies if I am incorrect.

I sincerely hope that you have been misquoted and that you do not adhere to such an arrogant view. Of course, all good lawyers are capable of citing authorities in support of their positions. You have the reputation of being a fine lawyer. What support do you have for the proposition that non-resident Florida Bar members are only concerned with their dues payments and not with the administration of justice in Florida?

Put in a slightly different context, what have the elected out-of-state members of the Board of Governors been doing for the past several years at the Board of Governors' meetings? Taking your statement to its logical conclusion, why should out-of-state members or their representatives be permitted to vote on any issues of interest to the Florida Bar other than the payment of dues? Indeed, why not disenfranchise them entirely. The bar could collect dues from and provide no representation for non-resident members. Would you say that Messrs. Varney and Hughes, the two non-resident Florida Bar members who intervened in the

reapportionment proceeding before the Supreme Court of Florida, are "not concerned with the administration of justice in" Florida?

I also want to address your point on another level. What if low income Americans were only interested in obtaining a disproportionately high amount of government services and in reducing their taxes. For purposes of this hypothetical, suppose these individuals were not interested in such matters as foreign policy, military procurement, the environment, energy independence, nuclear proliferation, the space program, the organization and administration of the government, etc. Would that be a sufficient reason to reduce their representation in Congress? In my view, all Americans, whether rich or poor, are entitled to proportionate representation in government. I fail to see why this analysis should not apply to non-resident members of the Florida Bar.

Need I repeat to you that since I became a member of the Florida Bar in December 1980, I have taken an interest in the activities of the bar? I honestly believe that I am better informed about the activities and structure of the Florida Bar than the vast majority of resident bar members. I sincerely want Florida to offer the best system of justice possible and I am happy to work to support such a goal -- <u>even though I do not reside in Florida</u>.

Let's examine for a moment what is meant by your choice of phrase: "administration of justice." I read the phrase broadly to include equality of opportunity for all -- not just clients appearing in civil and criminal matters. You may not agree, but I also read the phrase as declining to create artificial distinctions and classifications among groups of people merely to suit narrow interests. This may sound a little "corny", but I think your argument to the Court does not further the administration of justice to non-resident members of the Florida Bar. It strikes me that only the narrow, pecuniary interests of resident bar members are served by diminishing the representation of non-resident bar members on the Board of Governors.

With no disrespect intended to Mr. Shimberg, I would be very interested in hearing <u>your</u> views on this important subject.

Best regards.

Sincerely yours,

David P. Frankel

David P. Frankel

cc: Joseph J. Reiter, Esq.
John R. Varney, Esq.

4336 Garrison Street, N.W.
Washington, D.C. 20016
April 4, 1988

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: In re Florida Bar (Reapportionment) 518 So. 2d 251 (Fla. 1987)

Dear Mr. Harkness:

This morning I received my copy of the April 1, 1988 issue of The Florida Bar News. On page one of that issue there is an article entitled: "Reapportionment of Bar Board is challenged." At the end of that article it states: "The Florida Bar had not formulated its response to Varney's petition as this News went to press." I am writing to express my strong support for Mr. Varney's petition and to request that The Florida Bar also support Mr. Varney's petition. I also request that I be kept fully informed of any developments on this issue.

For more than one year, I have been writing to Bar officials to express my view that reapportionment of The Florida Bar must be accomplished on the principle of "one person, one vote." This principle must also include out-of-state members. There is no legitimate reason for providing out-of-state Bar members with less proportional representation than in-state Bar members. Indeed, the only reason I can fathom for the distinction is to protect the pecuniary interests of resident Bar members, whose hold on Bar governance may be diminished or threatened by a true "one person, one vote" reapportionment.

Rather than repeat arguments I have made in the past, I have enclosed a photocopy of my June 1, 1987 letter to Chesterfield H. Smith, Esq. on this important subject. I should note that neither Mr. Smith nor then-Florida Bar President Joseph J. Reiter, Esq. responded to my letter.

Sincerely yours,

David P. Frankel

David P. Frankel

Enclosure
cc: John R. Varney
Frederick J. Bosch
Ray Ferrero, Jr.

4336 Garrison Street, N.W.
Washington, D.C. 20016
April 21, 1988

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: In re Florida Bar (Reapportionment) 518 So. 2d 251 (Fla. 1987)

Dear Mr. Harkness:

Thank you for your letter dated April 15, 1988 concerning The Florida Bar's position with respect to Mr. Varney's appeal of the above-captioned decision of the Supreme Court of Florida.

Your letter indicates that "[t]he stance of the Board of Governors with respect to apportionment has not changed since this issue was argued before the Florida Supreme Court last May." When this issue was before the Supreme Court of Florida, the only information I had concerning the Board of Governors' position was the information provided in The Florida Bar News. Thus, I do not know exactly why the Board of Governors took the position that out-of-state members of The Florida Bar are not entitled to the same level of proportionate representation on the Board of Governors as resident members of The Florida Bar. I therefore request that you provide me with any briefs or bar position papers that explain the rationale for this distinction.

As you know, I have examined the reasons given by Chesterfield H. Smith for the distinction he drew between resident and out-of-state bar members. He argued first that "resident members have a greater interest in Bar governance than nonresidents" and second that "basically, all [out-of-state members] are concerned with is the amount of dues they have to pay--they're not concerned with the administration of justice in this state." Needless to say, I disagree entirely with Mr. Smith and I hope the Board of Governors does not adhere to such pompous and fallacious views.

Sincerely yours,

David P. Frankel

David P. Frankel

cc: John R. Varney
Frederick J. Bosch
Chesterfield H. Smith
Ray Ferrero, Jr.

4336 Garrison Street, N.W.
Washington, D.C. 20016
May 13, 1988

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: Reapportionment of The Florida Bar

Dear Mr. Harkness:

Yesterday, I received your letter dated May 4 and the accompanying materials concerning The Florida Bar's "rationale" for providing out-of-state members with less proportionate representation on the Board of Governors than in-state members. In reading through the materials, I was particularly struck by the fact that there is in fact no logical reason provided for this discriminatory treatment of out-of-state members.

The Florida Bar's Response and Counterpetition (at pages 18 to 19) makes three arguments. First, it states that the organized arm of the Bar's nonresident members "do not, at least for now, seek additional representation and, in fact, support the Bar's position in this proceeding." Of course, that is not a justification for the discriminatory treatment. Rather, it is only a statement that some Bar leaders do not, at present, oppose the discriminatory treatment. In any event, I will be quite interested to see what position the organized arm of the Bar's nonresident members takes with respect to the Resolution I have submitted for the Bar's consideration at the upcoming annual meeting.

Second, the Counterpetition argues that the Bar is presently considering whether it should institute an inactive class of Bar membership with reduced dues. The Board of Governors has been pursuing this issue for more than one year, with no results that I have seen -- despite the fact that a very large majority of all Bar members (as I recall, about 80%) support the proposal. In addition, just because the Bar is considering the inactive membership class is not an excuse for discriminating against out-of-state members. Indeed, I have stated before that even if such a membership class is created, I plan on remaining an active member. Where is my proportionate membership on the Board of Governors? There is no reason I can think of why the Bar could not immediately implement the proportionate representation for out-of-state members and then readjust it (if necessary) after the inactive status become effective. This may have the salutary effect of encouraging the Board of Governors to accelerate its consideration of the inactive status issue.

Third, the Counterpetition argues that in any event, the Bar's proposal is better than the Petitioner's proposed plan because the Bar's proposal called for increasing the out-of-state representation on the Board of Governors from two to three (rather than keep the representation at two). The fact that the Bar's proposal is better does not make it right and again is not a justification for discrimination.

If the Bar has any further arguments in support of the discriminatory treatment accorded to out-of-state members, I would appreciate it if you would send them to me.

I truly appreciate your taking the time and making the effort to send me the materials I requested.

Sincerely yours,

David P. Frankel

David P. Frankel

cc: Frederick J. Bosch, Esq.
John Varney, Esq.