IN THE SUPREME COURT OF FLORIDA

HARVEY M. ALPER, *et. al.*,

Petitioners, **Case No.: SC00-2004**

vs.

THE FLORIDA BAR, *et. al.*,

Respondents,

RESPONSE OF THE FLORIDA BAR TO PETITION FOR INJUNCTIVE RELIEF

The Petition in based upon flawed legal premises and erroneous statements of fact, and seeks relief which is beyond the authorized scope of direct petition to this Court.

The Petition rests upon erroneous legal propositions.

Petitioners assert that political positions taken by the Board of Governors of the Bar "are deem [sic] to be invested with the approval and endorsement of the Supreme Court of Florida." Petitioners then warn that if the Bar is permitted to take such positions "under the aegis of the Supreme Court of Florida and the state of Florida," then the legislative and executive branches of government "may be expected to employ the resources and imprimatur of the State of Florida to engage in political activities to influence the voters to change the basic form of democratic government in other ways." [Petition, ¶¶ 23, 64].

The underlying premise of these statements is that public officers, acting in their official capacities, are prohibited from advocating changes in the law. In fact, all three branches of government regularly and lawfully engage in such advocacy. The issue was addressed by this Court in *People Against Tax Revenue Mismanagement, Inc. v. County of Leon*, 583 So. 2d 1373 (Fla. 1991). The plaintiffs had challenged a local referendum authorizing a sales tax on the ground that local governmental agencies had unlawfully used public funds and resources for an information campaign in support of the referendum. The Court rejected the argument stating:

> At the proceeding below, PATRM's counsel argued that such acts were improper because they violated the "neutral forum" of the election.
>
> Such a position, however, is tantamount to saying that governmental officials may never use their offices to express an opinion about the best interests of the community simply because the matter is open to debate. A rule to that effect would render government feckless. One duty of a democratic government is to lead the people to make informed choices through fair persuasion. We recently saw an example of such persuasion in President Bush's arguments to the American people and his lobbying efforts regarding the war in Iraq. The acts came at a time of intense controversy, when congress was preparing to take a crucial vote either to support or condemn the use of military force in the

Middle East.

> In much the same sense, local governments are not bound to keep silent in the face of a controversial vote that will have profound consequences for the community. Leaders have both a duty and a right to say which course of action they think best, and to make fair use of their offices for this purpose.

Id. at 1375. The judiciary must exercise greater caution than the other two branches in order to avoid taking an advocacy position on a matter that might later come before it in its adjudicatory position. Nevertheless, justices of this Court, acting in their official capacities, have historically played active roles in advocating constitutional amendments affecting Florida's legal system.[1]

Petitioners' assertion that because the Bar acts as an arm of this Court, its political positions are deemed to be "invested with the approval and endorsement" of the Court is also without foundation. It is true that the Bar performs functions delegated to it by this Court. However, whether in the judicial or the public arena, positions taken by the Bar are not the positions of this

---

[1] One example was the 1980 referendum on the constitutional amendment to modify the jurisdiction of the Supreme Court and District Courts of Appeal. See Arthur J. England, Jr., Eleanor Mitchell Hunter, Richard C. Williams, Jr., *Constitutional Jurisdiction of the Supreme Court of Florida; 1980 Reform*, U. Fla. L. Rev. (Winter 1980), F. 159 ["During the period between November 28, 1979 and March 11, 1980, active public support for SJR 20-C was undertaken by six of the seven justices of the supreme court, the governor, the attorney general of Florida, and the organized bar."]

Court and are not deemed to be approved or endorsed by this Court. Pursuant to the By-Laws of the Bar, this Court does not participate in the development of Bar positions and does not review such positions unless they are appropriately challenged in proceedings such as the instant one. Just as the Bar's advocacy of a position in the judicial forum is independent of the position of this Court and subject the Court's review and reversal, so are the Bar's advocacy positions in the public arena.

The Bar's advocacy of merit selection and retention is within the scope its authorized political activity.

The Petition makes the inaccurate statement that, "the Supreme Court of Florida has never held that Board may spend Bar's money and resources to engage in political campaigns that are directed to influence how individual voters in the state vote in secret elections." [Petition, ¶ 23] In fact, the Court has authorized such advocacy on at least two occasions, one of which expressly approved the Bar's public support for merit selection. The first such authorization appeared in the case of *In the matter of The Florida Bar Board of Governors' Action on Adoption of a Proposed New State Constitution* 217 So. 2d 323 (Fla. 1969). The Petitioners in that case challenged the propriety of public advocacy by the Board of Governors of the adoption by referendum of the proposed new Florida Constitution. The Court denied the petition. In his concurring opinion, Justice Hopping stated:

> Since the inception of The Florida Bar, the Board of Governors has faced up to its professional responsibility of acting in the spirit of public service and has prepared and advocated adoption by the State Legislature of numerous enactments, including the Mechanics' Lien Law, the Uniform Commercial Code, the Public Defenders' Act, the law providing for filing of administrative rules in the Office of the Secretary of State, and major reforms in the substantive law of this State. It has sponsored adoption by the Legislature and the electors of Florida of several constitutional amendments including the amendment creating the District Courts of Appeal and the Judicial Qualification Commission.

* * * * *

> This grant of power is appropriate because the Board of Governors is the representative governing body elected by the active members of The Florida Bar, "under an apportionment formula that might well satisfy the federal courts." *In re: The Florida Bar*, 184 So. 2d 649, 651 (Fla. 1966) (concurring opinion). The Board of Governors is subject to re-election every two years. As the organized Bar's representative governing body, it should and does establish policy and speak for the membership of The Florida Bar.

Id. at 325. In 1983, the Court addressed even more directly the authorization of the Bar to engage in public advocacy of constitutional amendments relating to the judicial process. The petitioners had sought an amendment to the Integration Rule of The Florida Bar to prohibit the Board of Governors from engaging in any political activity, expending any money or employing any personnel for such purpose on behalf of The Florida Bar. Again, the Court denied the petition. In so doing, the Court found that the Bar had a compelling interest in speaking out on issues which are germane to the improvement of the administration of justice and the advancement of the science of jurisprudence. The Court stated:

> [W]e may take as representative the following activities of The Bar, noting that some are directed toward the Florida Legislature, some toward the citizens of the state and some toward the executive branch of the United States Government:
>
> (a) The Florida Bar actively assisted in efforts to revise the Florida Constitution in 1968, and thereafter, actively sought approval by the citizens of the State.
>
> (b) The Florida Bar actively supported in 1971 and 1972 the revision of Article V of the Florida Constitution before the Florida Legislature and the citizens of this State.
>
> (c) The Florida Bar recently actively supported before the Florida Legislature amendments to Article V of the Florida Constitution to

> restrict and adjust the jurisdiction of the Florida Supreme Court, and thereafter, encouraged the citizens of Florida to approve such amendment.
>
> (d) The Bar supported the establishment of the District Courts of Appeal, and thereafter, actively sought approval of the constitutional amendments by the citizens of this State.
>
> (e) ***The Florida Bar actively sought the amendment to the Florida Constitution providing for merit retention of appellate judges not only in the Legislature but with the citizens of the State.***
>
> (f) The Florida Bar actively supported the creation of the Judicial Qualifications Commission to provide a mechanism for the review and discipline of members of the judiciary.
>
> (g) In 1980 and 1981, The Florida Bar was actively involved with the Internal Revenue Service and the Federal Reserve Board in seeking approval of the "Interest on Trust Accounts" program.
>
> (h) The Florida Bar also actively supported the creation of Florida Legal Services, Inc. before the Florida Legislature.
>
> * * * * *
>
> Are these activities on the part of the Board of Governors of The Florida Bar germane to the improvement of the administration of justice and to the advancement of the science of jurisdiction? We hold that they are.

[emphasis added] *The Florida Bar In Re Amendment to the Integration Rule*, 439 So. 2d 213, 214 (Fla. 1983).

Thus, the Court not only authorized the Bar to engage in advocacy of proposed constitutional amendments, but expressly approved such advocacy with respect to merit retention of Florida Judges.

In 1988, the Court instructed the Judicial Council of Florida to study the question of what

lobbying activities of The Florida Bar are permissible and to report its recommendations back to the Court. In 1989, the Court adopted the recommendations of the Council and set forth the limits of Florida Bar political advocacy in *The Florida Bar re: Schwarz*, 552 So. 2d 1094 (Fla. 1989). The Court quoted from the Council report, including the following passage:

> It appears that the Bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the courts and the administration of justice and advise the legislative and executive branches of government of its collective wisdom with respect to these matters. To prohibit such communication would work a grave disservice to the people of this state and would infringe upon the free speech of the great majority of the state's attorneys. The Florida Bar has a reputation of pursuing improvements in the administration of justice and science of jurisprudence. The relative weight to be accorded these compelling interests appears to be of such great importance as to fully justify the relatively insignificant intrusion occasionally experienced by dissenting members of the Bar.

Id. at 1095. The Court then adopted the following criteria recommended by the Judicial Council:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and
>
> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

With respect to matters falling outside the above five items, the Court adopted the following additional three criteria to evaluate their permissibility:

> (1) That the issue be recognized as being of great public interest;

> (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and
>
> (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Id. at 1095.[2]

Nothing in the *Schwarz* opinion indicated that the Court intended to recede from its approval of the areas of Bar advocacy listed in its 1983 decision. In any case, the merit retention amendment clearly falls within the *Schwarz* criteria. The Bar suggests that it falls within the automatic authorization contained in item (2) of the criteria, "matters relating to the improvement of the functioning of the Court's judicial efficacy and efficiency."[3] Even if one were to conclude that merit retention does not fall within the scope of item (2), it surely falls within the additional three criteria. The methodology of selecting judges is undoubtedly an issue recognized as being of great public interest — a conclusion which automatically applies to a proposed amendment to the State's fundamental document — and it clearly

---

[2] The Bar is also required to comply with United States Supreme Court requirements for the use of compulsory bar dues for political purposes. However, as noted by the Eleventh Circuit in *Gibson v. The Florida Bar*, 798 F. 2d 1564 (11th Cir. 1986), the Supreme Court's restrictions apply only to the use of compulsory bar dues, and "the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members." *Id*. at 1570. The Bar's procedures to protect dissenting members have been expressly approved by the Eleventh Circuit in *Gibson v. The Florida Bar*, 906 F. 2d 624 (11th Cir. 1990).

[3] It should be remembered that the criteria do not require that there be a consensus that the Bar's position *will* improve the functioning of the courts, judicial efficacy or efficiency, only that the matter is one "relating" to those goals.

affects the rights of those likely to come into contact with the judicial system. The only remaining question is whether lawyers are especially suited by their training and experience to evaluate and explain the issue. If merit selection does not fall within that criterion, it is difficult to imagine a matter that would. Who but lawyers are in a better position to compare the quality of judges produced by contested election and by merit selection. And who would be better qualified to speak to the impact upon judicial objectivity and integrity — and the appearance of such — resulting from judges having to raise money from the lawyers who appear before them and having to contemplate the effect of controversial decisions upon their chances for re-election.

The Bar should not be prohibited from participating in the public debate on issues such as merit selection.

The Florida Bar is a hybrid entity, serving both as an official arm of the Court in the conduct of certain delegated

responsibilities, and as a unified voice of the Florida legal profession. The Court has recognized that the latter is a highly important function. *Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949); *In the Matter of The Florida Bar Board of Governors*, 217 So. 2d 323 (Fla. 1969). The Court has accommodated the necessary balance between the two roles by placing reasonable restrictions on the subject matter to which the Bar may speak. Methodology of judicial selection falls well within the boundaries.

The Board of Governors is a representative body elected "under an apportionment formula that might well satisfy the federal courts." *In Re The Florida Bar*, *supra*, and the Board's procedural rules "insure that The Florida Bar will take a political position only after first independently focusing on the question of whether the subject matter is one in which the organized bar should become actively involved." *The Florida Bar v. Schwarz*, 552 So. 2d 1094 (Fla. 1989). The rights of dissenting members are fully protected by Rule 2-9.3, Rules Regulating the Florida Bar. Under that rule, the Petitioners, like all other Bar members, are entitled, among other things, to demand return of a pro-rata share of their dues attributable to the support of a political position.

To hold that the Bar cannot speak out on a matter so directly and substantially affecting the legal process as selection of

judges would effectively emasculate the Bar's ability to participate meaningfully in public debate on the most crucial

aspects of our judicial system. Such a result would be a great disservice to both the public and the legal profession.

Petitioners' allegations regarding inaccuracies in the Bar's flyer are not properly before this Court.

In *The Florida Bar Re: Frankel*, 581 So. 2d 1294 (Fla. 1991), the Court authorized individual members of The Florida Bar to file petitions in the Court to enjoin the Bar from lobbying on positions outside the ambit of permissible bar lobbying activities. Neither in *Frankel* nor any other case has this Court authorized petitions seeking the Court's review of alleged inaccuracies in Bar publications. Such a process would be impracticable and unnecessary. Among other problems, the Court has no evidentiary record before it upon which to resolve the issue.

If the Petitioners are authorized to invoke this Court's jurisdiction with respect to alleged inaccuracies in the merit selection flyer, then there is nothing to stop other attorneys from doing the same with respect to every issue of the Florida Bar Journal or the Florida Bar News. This Court has made clear that it is not its intention to micromanage the activities of the Bar. The more appropriate forum for complaints regarding the accuracy of Bar publications is the staff office or committee producing the publication or the Board of Governors itself.

CONCLUSION

For the foregoing reasons, The Florida Bar respectfully urges that the petition be denied.

GREENBERG TRAURIG, P.A.
101 E. College Avenue
Post Office Drawer 1838
Tallahassee, FL 32302
(850) 222-6891 Phone
(850) 681-0207 Fax

_____
BARRY RICHARD
Florida Bar No. 105599

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing to Joseph W. Little, Esquire by fax at 352-392-3005 and e-mail at little@law.ufl.edu, and to Harvey Alper by e-mail at alperlaw@aol.com this _____ day of _____, 2000.

_____
BARRY RICHARD

TALL/RICHARDB/138993/2z8x01!.DOC/10/23/0/99999.645006