

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

CASE NO. 07-21256-CIV-JORDAN

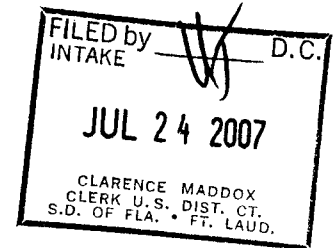
JOHN B. THOMPSON,

Plaintiff,

vs.

THE FLORIDA BAR and  
DAVA J. TUNIS,

Defendants.



**DEFENDANT JUDGE TUNIS' EMERGENCY MOTION  
TO STRIKE NOTICE AND FOR PROTECTIVE ORDER  
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Defendant, the Honorable Dava J. Tunis, Judge of the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida (hereafter, "Judge Tunis"), through her undersigned attorneys, and pursuant to Fed. R. Civ. P. 11 (f), 26(b) and (c) and 30(2)45(c)(3)(A) and Local Rules 7.1 (E) and 26.1(F), moves this Court to strike Plaintiff's Notice of Taking Deposition of Judge Tunis, issue a protective order, and stay discovery in the above captioned case, and submits:

1. Defendant Judge Tunis is a judge in the Circuit Court of the Eleventh Judicial Circuit of Florida serving as a referee in Florida Bar disciplinary proceedings against the Plaintiff. (See Amended Complaint, ¶ 3).
2. Plaintiff has filed this action in federal court seeking an injunction prohibiting the disciplinary action against him from proceeding or, alternatively, an injunction requiring that Defendants be required to afford

Plaintiff his interpretation of due process and equal protection. (Amended Complaint). The pro se Plaintiff also requests an award of attorney's fees against Judge Tunis, personally.

3. Judge Tunis has filed a Motion to Dismiss the Amended Complaint based on jurisdictional and other grounds, including:

1. Abstention pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).
2. Abstention pursuant to the Rooker-Feldman doctrine.
3. Abstention pursuant to Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).
4. Abstention pursuant to Railroad Commission of Texas v. Pullman Co.
5. There is no claim for an injunction against a judicial officer under 42 U.S.C. § 1983.
6. Judicial Immunity.
7. Qualified Immunity in Judge Tunis' individual capacity.
8. The Amended Complaint fails to state a cause of action.

4. Plaintiff has also filed an Emergency Verified Motion for Temporary Injunction, which has been denied without prejudice as moot.

5. Defendant, Judge Tunis, through her undersigned attorneys, **prior to her or their appearance in this matter**, was served with a "Notice of Taking Deposition" on July 19, 2007, by facsimile. See Exhibit A attached hereto. It requires Judge Tunis to appear for deposition on August 10, 2007. (Exh. A).

6. The notice was issued by "JOHN B. THOMPSON, Plaintiff."

7. Defendant, Judge Tunis objects to the notice of taking deposition as it is improper under Rules 26(b) and (c) and 30(2)45(c)(3)(A) and Local Rule 26.1(F), and information sought is governed by the doctrine of judicial privilege.

8. Additionally, Plaintiff is attempting to seek discovery prior to the conference of the parties required by Rule 26(f), Fed. R. Civ. P. in direct violation of Rules 26(b) and (c) and 30(2)45(c)(3)(A) and

Local Rule 26.1(F).

9. Further, discovery should not be permitted prior to the ruling on a dispositive motion to dismiss, especially where that motion raises jurisdictional grounds.

10. Defendant Judge Tunis cannot be compelled to testify on any matter regarding rulings, orders or opinions issued by her as a Circuit Court Judge or as a referee of Florida Bar disciplinary proceedings or relating to the mental processes of the Court in issuing an order or opinion, as those matters are absolutely privileged.

11. Mandating the appearance of Judge Tunis to appear at the deposition would cause unnecessary inconvenience, disruption, as well as undue burden upon the judicial system.

12. The notice was issued for the purpose of harassment or delay of the Florida Bar disciplinary action proceeding against the Plaintiff.

13. Defendant Judge Tunis submits that (1) this case should be dismissed for the reasons set forth in Judge Tunis' Motion to Dismiss and discovery should not be required prior to a ruling on that motion, (2) the notice is void ab initio as having been served prior to Judge Tunis' appearance in this action, (3) the notice is improper as having been served prior to the conference of the parties required by Rule 26(f), Fed. R. Civ. P. in direct violation of Rules 26(b) and (c) and 30(2)45(c)(3)(A) and Local Rule 26.1(F), and (4) information sought via the deposition concerned is absolutely exempt from discovery.

16. Accordingly, Judge Tunis requests the following relief: (1) that the notice of taking deposition be stricken, and (2) a protective order be issued precluding the deposition and that any discovery requested by Plaintiff be stayed until further order of this Court.

17. This motion is filed as an emergency motion and an expedited procedure is requested pursuant

to Local Rule 7.1(E) because, by the time that the periods established for filing an opposing memorandum and reply memorandum have expired, pursuant to Local Rule 7.1(C)(1)(a), the time set for the deposition, August 10, 2007, will have passed without a ruling on this motion and Judge Tunis will have been required to appear for the deposition or risk the possibility of sanctions or contempt of court.

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION TO STRIKE  
NOTICE AND MOTION FOR PROTECTIVE ORDER**

Fed. R. Civ. P. 11(f) authorizes this Court to strike any pleading which is redundant, immaterial, impertinent or scandalous.

The notice served upon Judge Tunis was served prior to her appearance in this action and prior to the conference of the parties required by Rule 26(f), Fed. R. Civ. P. in direct violation of Rules 26(b) and (c) and 30(2)45(c)(3)(A) and Local Rule 26.1(F) as having been served prior to the conference required by said rules. See Ex. A.

First, it appears that Plaintiff is seeking confidential deliberative processes or thoughts which entered into the decision making process behind Judge Tunis' rulings in the disciplinary action against Plaintiff by the Florida Bar, since Judge Tunis could have no relevant knowledge not already within the possession of the Plaintiff other than such thought processes.

For over a century it has been recognized that a member of the judiciary may not be compelled to testify regarding the reasoning behind judicial actions. United States v. Morgan, 313 U.S. 409 (1941); Fayerweather v. Ritch, 195 U.S. 276 (1904). The testimony of a judge should not be used as grounds for questioning judicial actions:

[N]o testimony should be received except of open and tangible facts --

matters which are susceptible of evidence on both sides. A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision.

Id. at 307. In Fayerweather a party attempted to use the testimony of a trial judge to ascertain the judge's reasons underlying a written decision as grounds for overturning a subsequent finding that the decision should be res judicata. The United States Supreme Court upheld the finding that the decision was res judicata and could not be challenged by use of the judge's testimony.

The State of Florida, in reliance upon several federal court cases, has addressed this issue and held that judicial officers may not be called as witnesses as to their mental processes in cases:

The law is well settled that a trial judge may not be compelled to testify in a cause concerning either (1) the meaning of an order previously entered by the judge in a pending or closed case, or (2) the judge's mental processes or reasoning in entering such an order. The underlying rationale for this rule is that the finality and integrity of judicial orders would be undermined if such orders could later be modified or supplemented by the oral testimony of the judge who entered it. The meaning of a judicial order must be ascertained from the language employed in the order itself, aided, when necessary, by appropriate rules of construction and the surrounding circumstances of the case. <sup>1</sup>

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<sup>1</sup> See, e.g., Fayerweather v. Ritch, 195 U.S. 276, 306-07, 25 S.Ct. 58, 67-68, 49 L.Ed. 193, 213-14 (1904); Gary W. v. State of La., Dep't. of Health & Human Resources, 861 F.2d 1366 (5th Cir.1988); Washington v. Strickland, 693 F.2d 1243 (5th Cir.1982), rev'd on other grounds, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Crouch, 566 F.2d 1311, 1316 (5th Cir.1978); Morrison v. Kimmelman, 650 F.Supp. 801, 805-06 (D.N.J.1986); United States v. Cross, 516 F.Supp. 700 (M.D.Ga.1981), aff'd, 742 F.2d 1279 (11th Cir.1984); Standard Packaging Corp. v. Curwood, Inc., 365 F.Supp. 134 (N.D.Ill.1973); Brown v. Brown, 497 P.2d 718 (Colo.Ct.App.1972); Gold v. Warden, State Prison, 222 Conn. 312, 610 A.2d 1153, 1156-58 (1992); Emerick v. Emerick, 28 Conn.App. 794, 613 A.2d 1351, 1357, cert. denied, 224 Conn. 915, 617 A.2d 171 (1992); Hirschberger v. Silverman, 80 Ohio App.3d 532, 609 N.E.2d 1301, 1305-06 (1992).

Stein v. Professional Center, S.A., 666 So.2d 264, 265-66 (Fla. 3d DCA 1990).

Thus, as set forth in footnote one to Stein, state and federal court cases also support striking Plaintiff's notice and granting a protective order. Further, in Peterson v. Sheran, 474 F.Supp. 1215 (D. Minn. 1979), the district court quashed a subpoena to the Chief Justice of the Minnesota Supreme Court after a party attempted to inquire into the reasons for the Minnesota Supreme Court's decision denying reinstatement of an attorney. "To require a judge to explain *why* he made the choice he did would be an intolerable invasion into the mental processes employed by him in making that decision." United States v. Cross, 516 F.Supp. 700, 708 (M.D. Ga. 1981), aff'd, 742 F.2d 1279 (11th Cir. 1984). In United States v. Dowdy, 440 F.Supp. 894, 895 (W.D. Va. 1977), the court quashed a subpoena seeking to require the testimony of a judge as to his reasons for a finding of contempt, holding that the judiciary would be open to "frivolous attacks upon its dignity and integrity, and interruption of its ordinary and proper functioning."

Judicial privilege also protects confidential communications among judges and their staffs in the performance of their judicial duties. See Matter of Certain Complaints Under Investigation by an Investigating Committee of Judicial Council of Eleventh Circuit, 783 F.2d 1488, 1520 (11th Cir. 1986) and cases cited therein. Further, the principle protecting the mental processes of judges has also been applied to other governmental officials acting in judicial or quasi-judicial capacities. It has included, for example, special masters (Gary W. v. Louisiana Dept. of Health and Human Resources, 861 F.2d 1366 (5th Cir. 1988)); executive officials (United States v. Morgan, *supra*; Montgomery Ward & Co. v. Zenith Radio Corp., 673 F.2d 1254 (3d Cir. 1982)); regulatory commissioners and their employees (United States v. American Telephone & Telegraphic Co., 524 F.Supp. 1381 (D.D.C. 1981)); and arbitrators (Andros

Compania Maritima v. March Rich & Co., 579 F.2d 691 (2d Cir. 1978)).

In the instant case, because Judge Tunis is clearly immune from testifying concerning either (1) the meaning of orders or opinions previously entered in a pending or closed case, or (2) the mental processes or reasoning in entering orders or opinions, this Court should strike the notice and issue a protective order preventing discovery without further order of this Court.

Second, the notice served upon Judge Tunis was served prior to her appearance in this action and prior to the conference of the parties required by Rule 26(f), Fed. R. Civ. P. in direct violation of Rules 26(b) and (c) and 30(2)45(c)(3)(A) and Local Rule 26.1(F) as having been served prior to the conference required by said rules. See Ex. A. Local Rule 26.1 (F) 1. specifically states that, "...a party may not seek discovery from any source before the parties have conferred as required by Federal Rule of Procedure 26(f)." The Rule 26(f) conference has not yet taken place and it is respectfully submitted that it would be inappropriate to hold such a conference prior to the appearance of the defendants in this matter.

Third, it is respectfully submitted that the Notice of Taking Deposition is void ab initio where it was served by facsimile on Judge Tunis' attorneys prior to the appearance of Judge Tunis or her attorneys in this action.

Fourth, a dispositive motion to dismiss is pending on numerous grounds, including jurisdictional problems. The Eleventh Circuit has held, in such circumstances, that:

... Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief should, however, be resolved before discovery begins. Such a dispute always presents a purely legal question: there are no issues of fact because the allegations contained in the pleading are presumed to be true. (Footnote omitted)

Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997). Therefore, the deposition of Judge Tunis should, in any case, not be permitted until subsequent to the ruling on the pending motion to dismiss.

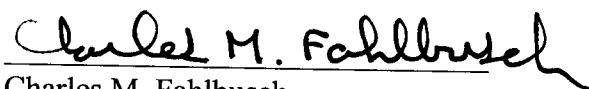
Finally, requiring Judge Tunis to appear for a deposition interferes with the performance of her official duties. Plaintiff's attempt to take her away from her duties is a clear attempt at harassment of the State of Florida and/or its officials and to further delay the disciplinary proceedings pending against him. At least two actions have been filed in this court against the Florida judges and justices based upon Plaintiff's perceived violations of his rights in disciplinary proceedings. (See, Thompson v. The Florida Bar, Case No. 07-20866). Plaintiff's attempt to harass Judge Tunis at this stage of his litigation by serving a Notice of Taking Deposition even prior to her appearance in the case in an attempt to take her deposition while a dispositive Motion to Dismiss is pending is highly improper.

Accordingly, for the reasons set forth herein, Judge Tunis seeks the protection of this Court by entry of an order (1) that the Notice of Taking Deposition be stricken, and (2) granting protective relief that any discovery requested be stayed until further order of this Court and be limited to those matters not covered by the deliberative process privilege set forth above.

Dated: July 24, 2007  
Fort Lauderdale, FL

Respectfully submitted,

BILL McCOLLUM  
ATTORNEY GENERAL



Charles M. Fahlbusch  
Fla. Bar No.: 0191948  
Senior Assistant Attorney General  
Charles.Fahlbusch@myfloridalegal.com



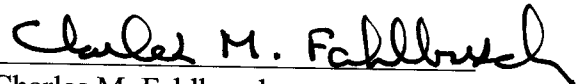
OFFICE OF THE ATTORNEY GENERAL  
Civil Litigation Division  
110 S.E. 6th Street, 10th Floor  
Fort Lauderdale, FL 33301  
(954) 712-4600, FAX: (954) 712-4700  
Attorney for Defendant, Judge Tunis

**NOTICE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(3)**

Pursuant to local rule 7.1(A)(3), counsel for Defendant Judge Tunis spoke with John B. Thompson on July 20, 2007, who stated that he objects to this Motion to Strike and Motion for Protective Order.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of July, 2007, I filed via U.S. Mail the foregoing document with the Clerk of the Court in Miami by conventional paper format, pursuant to Section 5F of the Southern District of Florida Case Management/Electronic Case Filing Procedures. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, via U.S. Mail.



Charles M. Fahlbusch  
Senior Assistant Attorney General

**SERVICE LIST**

Thompson v. The Florida Bar  
Case No.: 07-21256-CIV-JORDAN  
United States District Court, Southern District of Florida

[By U.S. Mail]:

John B. Thompson, Attorney

Plaintiff and Counsel

1172 South Dixie Hwy., Suite 111

Coral Gables, FL 33146

**EXHIBIT**

**A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA

JOHN B. THOMPSON,

Plaintiff,

v.

Case No. 07-21256 (Judge Adalberto Jordan)

THE FLORIDA BAR and  
DAVA J. TUNIS,

Defendants.

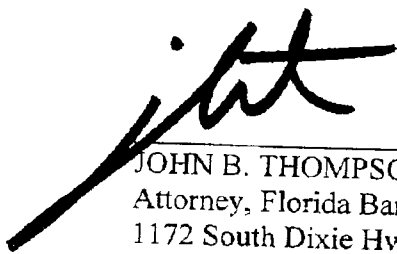
**NOTICE OF TAKING DEPOSITION**

COMES NOW plaintiff and provides notice to

Dava J. Tunis, Defendant  
1351 NW 12<sup>th</sup> Street  
Gerstein Justice Building  
Miami, Florida 33125

of the taking of her deposition, before a court reporter, in her chambers at the above-noted address on Friday, August 10, 2007, at nine o'clock a.m., by plaintiff.

I HEREBY CERTIFY that a copy of this notice has been sent by fax and mail this 19<sup>th</sup> day of July, 2007, to her counsel, Florida Attorney General, 110 SE 6<sup>th</sup> Street, Ft. Lauderdale, Florida 33301, fax #954-712-4700, and provided to The Florida Bar at its Tallahassee headquarters on the same date.



JOHN B. THOMPSON, Plaintiff  
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