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.

**PLAINTIFF'S MOTION FOR LEAVE TO FILE MEMORANDUM DELINEATING THE FLORIDA BAR'S ONGOING FAILURE TO REFORM ITS DISCIPLINARY SYSTEM**

COMES NOW plaintiff, John B. Thompson, hereinafter Thompson, as an attorney on his own behalf, and hereby moves the court for leave to file this factual analysis of defendant The Florida Bar's disturbing failure to reform its system of lawyer discipline, stating:

The court has been apprised of the ABA's 1992 McKay Report, filed with the court previously. This Report analyzes what is structurally wrong with many state bar disciplinary systems, and why those flaws are consequential to persons such as Thompson when it comes to due process, fairness, etc. The lack of due process and fairness, even to the point of bad faith, exhibited by The Florida Bar against Thompson is at the core of this case. The Founders of this nation who drafted the U.S. Constitution while informed of the Lockean notion of "checks and balances" would be appalled by the structural defects in The Florida Bar's disciplinary machinery that the McKay Report identifies. Bad structure gives animus, bias, and bad faith opportunities they would otherwise not have.

Remarkably, as noted previously, The Bar's own John T. Berry helped generate the McKay Report. His failure to implement its stern recommendations underscores while personally participating in an exacerbation of The Bar's flaws at Thompson's expense constitutes an additional proof of bad faith. For example, note what the McKay Commission concludes about the involvement of Bar Governors in the disciplinary process:

*"The Need for Direct and Exclusive Judicial Control of Lawyer Discipline*

To strengthen judicial regulation of the profession, it must be distinguished from *self-*regulation. Control of the lawyer discipline system by elected officials of bar associations is self-regulation. It creates an appearance of conflicts of interest and of impropriety. In many states, bar officials still investigate, prosecute, and adjudicate disciplinary cases. The state high court should control the disciplinary process *exclusively*. It should appoint disciplinary officials who are independent of the organized bar. The Court should oversee the disciplinary system with as much care and attention as it devotes to deciding cases."

The McKay Report goes on:

"DIRECT AND EXCLUSIVE CONTROL OF LAWYER DISCIPLINE

Despite the many reforms made in the disciplinary process in the last twenty years, there is significant distrust of the fairness and impartiality of self-regulation. The Commission finds an important distinction between judicial regulation and self-regulation in the area of lawyer discipline. Neither the inherent powers doctrine nor the need for professional independence provides a rationale for disciplinary functions to be conducted by elected officers of bar associations.

The disciplinary system should be controlled and managed exclusively by the state's highest court and not by state or local bar associations. This is necessary for two primary reasons. First, the disciplinary process should be directed solely by the disciplinary policy of the Court and its appointees and not influenced by the internal politics of bar associations. Second, the disciplinary system should be free from even the appearance of conflicts of interest or impropriety. When elected bar officials control all or parts of the disciplinary process, these appearances are created, regardless of the actual fairness and impartiality of the system."

This court, in its latest omnibus order of October 15, ridicules Thompson for pointing out the impropriety of having partners of Bar officials sitting on this court's own Ad Hoc Committee. The McKay Report itself notes what a problem it is for Bar officials to be involved in the state's disciplinary machinery. What this court finds absurd the McKay Report finds is a *fatal* flaw in any disciplinary system.

How odd that John T. Berry could help author the McKay Report which asserts as follows:

**Recommendation 5**
**Independence of Disciplinary Officials**

**All jurisdictions should structure their lawyer disciplinary systems so that disciplinary officials are appointed by the highest court of the jurisdiction or by other disciplinary officials who are appointed by the Court. Disciplinary officials should possess sufficient independent authority to conduct the lawyer discipline function impartially:**

**5.1 Elected bar officials, their appointees and employees should provide only administrative and other services for the disciplinary system that support the operation of the system without impairing the independence of disciplinary officials.**

**5.2 Elected bar officials, their appointees and employees should have no investigative, prosecutorial, or adjudicative functions in the disciplinary process.**

This next finding of the McKay Report would deliver a crushing blow to The Bar's pursuit of Thompson if it were applied to this prosecution. This next recommendation deals with the independence of Bar prosecutors. Is there any in Florida? Is that a serious question? The Bar's Sheila Tuma stopped the "mediation" with Thompson to run off to Orlando to ask Steve Chaykin what she should do. Ms. Tuma and The Bar refuse to produce any documents showing collaboration between Tuma and the ideologues on the Board of Governors, even though Thompson received, by his own inadvertence, an email from Governor Jesse Diner showing Board animus. Note:

**Recommendation 6**
**Independence of Disciplinary Counsel**

**6.1 The <u>Court alone should appoint and remove disciplinary counsel and should provide sufficient authority for prosecutorial independence and discretion</u>. The Court should also promulgate rules providing that disciplinary counsel shall:**

**6.2 The Court should adopt a rule providing that <u>no disciplinary adjudicative official (including hearing committee members, disciplinary board members, or members of the Court) shall communicate ex parte with disciplinary counsel regarding an ongoing investigation or disciplinary matter</u>, except about administrative matters or to report information alleging the misconduct of a lawyer.**

**[emphases added]**

Are the Bar's Governors insulated from our state's disciplinary process and from the Bar's prosecutors, as the McKay Report sternly warns must be done? No, they are in the middle of it, to the point of sitting on the grievance committees themselves. This is a structural defect so obvious and so troubling that a layman would understand precisely why this is dangerous. This makes the "goose-stepping brigades" predicted in the *Lathrop* not a mere possibility but a certainty.

Take a look at the secrecy issue addressed in the McKay Report:

*"The Need to Increase Public Confidence in the Disciplinary System*

*Secret disciplinary proceedings generate* ***the most criticism*** *of the system.* …What does the public think of hearings held behind closed doors? …These do not sound like the judicial proceedings of a free society. Indeed, several federal and state courts have held that such provisions violate federal or state constitutional provisions. The public will never accept the claim that lawyers must protect their reputations by gag rules and secret proceedings." [emphases added]

What did The Florida Bar do to Thompson? It had secret grievance committee proceedings from which it excluded Thompson. There are no minutes of those meetings. Thompson has even been prevented, unconstitutionally, from taking the depositions of Ben Kuehne, who has assured how fair these proceedings have been, and of David Pollack, Thompson's "outside investigator," who also sat on the Grievance Committee. It is absurd for The Bar to assert that secret proceedings should be considered fair on the word of The Bar alone. The McKay Report, with John T. Berry's help, scoffed at such a notion.

It has been fifteen years since the McKay Report, with John Berry's help, came out. How swift has been The Florida Bar's response? Note from McKay:

*"The Need for Immediate Action*

…much of the criticism we heard is justified and accurate. Some practices must change **immediately** if regulation is to remain under the judiciary. The public views lawyer discipline as too slow, too secret, too soft, and too self-regulated. The Commission can report that most states discipline serious misconduct effectively. This is not enough. The profession and judiciary must face the problems we have identified. They must make

necessary reforms to improve both the practice of law and the system of regulating the profession. While no system will satisfy all complainants, these improvements will demonstrate to the public that judicial regulation is effective." [emphases added]

The McKay Report criticizes the haphazard way of processing bar complaints. Note this recommendation:

"Recommendation 3
Expanding the Scope of Public Protection

The Court should establish a system of regulation of the legal profession that consists of:

(d) voluntary arbitration of lawyer malpractice claims and other disputes,
(e) mediation,
3.2 a central intake office for the receipt of all complaints about lawyers"

In contrast with Recommendation 3, The Florida Bar eschews arbitration and mediation of disputes such as the one in which Thompson finds himself. There is no "central intake office for the receipt of all complaints." Instead, what The Bar has is this staff person in Orlando, Sheila Tuma, who has never practiced law, processing and pursuing Bar complaints from a remote location with Heaven knows what supervision.

Note the following from McKay in this regard:

- **Eliminating local discipline components**

All jurisdictions should restructure their disciplinary systems to ***eliminate local components***. All stages of disciplinary proceedings, including intake and screening of complaints, investigation, prosecution, hearing, and appeal should be conducted on a statewide or regional basis under the jurisdiction of a statewide disciplinary official or body, consistent with MRLDE 1, 3E(1), and 4B(1),(2),(3).

Comments

Despite the fact that eliminating local disciplinary enforcement was a major recommendation of the Clark Report, at least twelve jurisdictions still have significant local components in their disciplinary systems. Local components, such as local bar

investigative committees, foster cronyism as well as prejudice against unpopular respondents. Local components result in a lack of uniformity in procedures and in the application of the rules of professional conduct. Local components promote delay in the handling of disciplinary cases.

Look at what is contained in Recommendation 12 in the McKay Report:

- **Discovery**

**Respondent and disciplinary counsel should have the right to take depositions and to conduct limited discovery, consistent with MRLDE 15.**

Thompson has had *no discovery* over the unilaterial objection of Sheila Tuma. None.

Again, look at what is in Recommendation 12:

- **Automatic reinstatement of lawyers suspended for six months or less**

A lawyer who has been suspended for six months or less should be reinstated at the end of the period by filing an affidavit stating that he or she has fully complied with the requirements of the suspension order and has paid any required fees and costs, consistent with MRLDE 24.

The Florida Bar, by contrast, wants a three months and one day suspension for Thompson, which does not entail automatic reinstatement but an additional action by The Bar that Thompson has been sufficiently reprogrammed to be trusted to let out into the public again.

## FLORIDA BAR'S OWN REPORT ON REFORM OF LAWYER DISCIPLINE

It's bad enough that The Florida Bar has thumbed its nose at a 15-year-old ABA Report as to what it should have done to bring its disciplinary system into the 21st century. It is arguably just as bad that The Florida Bar had its own "Special Commission

on Lawyer Regulation" which issued a formal Report that it has ignored in its treatment of Thompson.

This is so patently ridiculous that Thompson could not dream up the following scenario, which actually happened: On May 15, 2006, Thompson sat with his lawyer in the offices of Barry Richard at Greenberg Traurig, and there in that room with them was then President of The Florida Bar Alan Bookman, Paul Hill, Bar in-house general counsel, Jack Harkness, a defendant herein and the Executive Director of The Bar, and finally Hank Coxe, then President Elect of The Bar and now immediate past President of The Bar. It's amazing how time flies when you're being deprived of your constitutional rights.

Hank Coxe was the Chair of the aforementioned Special Commission on Lawyer Regulation. Thompson repeatedly pointed out to Coxe and the others that the Bar complaints brought against him were not by the public, not by a client, but by opponents who had, on behalf of the shock radio and video game industries, sought to use SLAPP complaints as a means of collateral attack upon Thompson. Mr. Coxe, in particular, could not seem to process the point. Yet, this is from his own Commission Report filed two months after that meeting:

"3. Standing to File Complaints. Existing rules do not provide a requirement of standing to file a complaint. … The Commission recognizes that some adversaries …file complaints concerning the lawyer's conduct with the intent to gain an advantage in the dispute. Using the disciplinary process in such a manner is clearly improper and repugnant to the concept of fairness. …The Commission recommends that other procedures and processes be implemented to increase fairness and to expedite the process

so that improperly motivated and unsubstantiated allegations are dealt with in a timely and appropriate manner."

Norm Kent threatened a bar complaint if Thompson did not apologize for filing an FCC complaint against Howard Stern. Tew Cardenas filed a bar complaint to protect Al Cardenas' illicit financial and lobbying relationship with Jeb Bush. Blank Rome filed a bar complaint to destroy him after his appearance on *60 Minutes*.

This court simply must let this case go forward if for no other reason than Thompson has the *right,* in light of all of the above in this pleading an in light of Hank Coxe's saying one thing and doing another, how he and The Bar square its official stance opposing SLAPP Bar complaints and the reality that it is pursuing them against Thompson.

Referee Tunis WILL NOT SIGN A SUBPOENA allowing Thompson to take Coxe's deposition. Is she kidding? Is The Bar kidding?

I HEREBY CERTIFY that this has been served upon record counsel this 16th day of October, 2007, electronically.

/s/ JOHN B. THOMPSON, Plaintiff
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