

UNITED STATES DISTRICT COURT
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.

**THE FLORIDA BAR'S MOTION TO STAY DISCOVERY PENDING
DISPOSITION OF MOTION TO DISMISS, MOTION FOR PROTECTIVE
ORDER, MOTION TO STRIKE NOTICE OF DEPOSITION TO BEN KUEHNE
AND INCORPORATED MEMORANDUM OF LAW**

Defendant, The Florida Bar, moves to stay discovery pending disposition by this Court of Defendant's Motion to Dismiss, and moves for a protective order and motion to strike deposition notices on behalf of Florida Bar Governor Ben Kuehne. The particular grounds for this motion and supporting authorities are discussed in the following memorandum of law.

John B. Thompson ("Plaintiff") served an Amended Complaint for Declaratory Judgment, for Injunctive Relief and for Attorney's Fees on July 5, 2007. The Florida Bar filed its Motion to Dismiss July 25, 2007. However, on July 22, 2007, prior to The Florida Bar or its counsel's appearance in this matter, Plaintiff filed a Notice of

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Deposition to Ben Kuehne. Mr. Kuehne is a Governor of The Florida Bar, and until recently was the Designated Reviewer in Plaintiff's pending disciplinary proceedings.

As it currently stands, The Florida Bar anticipates that Plaintiff will seek to inquire about confidential and privileged matters in the pending current disciplinary proceeding. The eliciting of such testimony would be wholly inappropriate and would undermine the investigatory and discipline process. Accordingly, The Florida Bar seeks a stay or protective order prohibiting or limiting discovery, including the deposition of Mr. Kuehne and any written discovery.

MEMORANDUM OF LAW

I. IT IS APPROPRIATE TO STAY DISCOVERY UNTIL RESOLUTION OF PENDING, DISPOSITIVE MOTIONS.

United States District Courts have "broad inherent power to stay discovery until preliminary issues can be settled which may be dispositive of some important aspect of the case." *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997). The Court must, in deciding whether to stay discovery, balance the harm produced by a delay in discovery against the likelihood that the motion will be granted, eliminating the need for such discovery. *Id.* The likelihood of success on The Florida Bar's Motion to Dismiss greatly outweighs any potential harm that could conceivably be produced by a delay in discovery.

"It is well settled that discovery is generally considered inappropriate while a motion that would be thoroughly dispositive of the Complaint is pending." *Chavous v. District of Columbia Financial Responsibility and Management Assistance Authority*, 201 F.R.D. *1 (D.D.C. 2001). The pending Motion to Dismiss is dispositive and would

eliminate the need for the requested discovery if granted. The motion and supporting memorandum illustrate that: (1) under the *Younger* abstention doctrine, federal courts, out of great deference, abstain from hearing federal constitutional claims that involve or call into question ongoing state procedures; and (2) the Eleventh Amendment prohibits actions by citizens against a state, including The Florida Bar, in federal court. Consequently, if the Motion is granted, this Court would abstain from further proceedings, proving truly dispositive and rendering discovery unnecessary. Other considerations, including the unwarranted interference with ongoing state proceedings, further demand a stay of discovery.

Furthermore, the grounds asserted in Defendant's Motion to Dismiss are based solely upon Plaintiff's allegations in the Amended Complaint. Discovery would not assist this Court in determining whether abstention is necessary pursuant to the *Younger* abstention doctrine or the Eleventh Amendment. Delay of discovery would therefore be proper because discovery of a purely legal question is not necessary prior to ruling on the motion. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1368 (11th Cir. 1997).

Given that the Motion to Dismiss is dispositive, a stay of discovery pending disposition of the Motion will promote efficiency and judicial economy. A stay will protect both parties from unnecessary expenditure of resources on what may be moot discovery requests. *See O'Keefe v. O'Keefe*, 522 So.2d 460, 461 (Fla. 3d DCA 1988) (granting stay of discovery on all issues that could be moot pending resolution of those issues). Similarly, a stay is in the interest of judicial economy since it will prevent this Court from needlessly resolving potentially moot discovery disputes related to Plaintiff's discovery requests. *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U.S.

689, 694 (1933) (noting the “principle of judicial parsimony” whereby discovery that may be rendered moot by the resolution of a separate issue should be postponed pending the outcome of that issue).

Discovery should therefore be delayed pending the outcome of the Motion to Dismiss because: (1) the harm produced by delay does not outweigh the likelihood that the Motion to Dismiss will be granted, entirely eliminating the need for such discovery; (2) the granting of the Motion to Dismiss will likely dispose of the entire case; (3) discovery is not necessary to gather facts to defend against the Motion to Dismiss; (4) a stay of discovery would prevent unnecessary expenditure of resources; and (5) a stay would promote judicial economy.

II. GOOD CAUSE EXISTS TO SUPPORT ENTRY OF A PROTECTIVE ORDER FOR THE FLORIDA BAR, ITS AGENTS AND REPRESENTATIVES.

The Florida Bar also moves for a protective order. This Court is authorized to “make any order [concerning discovery] which justice requires to protect a party.” Fed. R. Civ. P. Rule 26(c). In doing so, a “district court has broad discretion when fashioning protective orders.” *Id.*, 820 F.2d at 357. The “sole criterion for determining the validity of a protective order is the statutory requirement [under Rule 26] of ‘good cause.’” *Id.*, 820 F.2d at 356 (citations omitted).

It is undisputed that as an official arm of the Florida Supreme Court, The Florida Bar is responsible for administering, enforcing, and carrying into effect the Rules Regulating The Florida Bar, including the power to discipline Bar members. *See Rules Regulating The Florida Bar*, Chapter 1, Introduction, Rules 2-3.1 and 3-3.1. The Florida Bar’s disciplinary proceedings are quasi-judicial in nature. *See R. Regulating Fla. Bar 3-*

7.6(f)(1) (“A disciplinary proceeding is neither civil nor criminal but is a quasi-judicial administrative proceeding”). See also *In the Matter of Calvo*, 88 F.3d 962, 965 (11th Cir. 1996); *American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1493 n.15 (11th Cir. 1993); *Tindall v. The Florida Bar*, No. 97-387-CIV-T-17C, 1997 WL 689636 at *4 (M.D. Fla. 1997), aff’d, 163 F.3d 1358 (11th Cir. 1998). Even the early stages of a bar’s disciplinary procedures are considered part of the judicial proceeding. *Middlesex County Ethics Committee v. Garden State Bar Ass’n*, 457 U.S. 423, 433 (1982) (“[f]rom the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee”). See also *Amanatullah v. Colorado Bd. of Medical Examiners*, 187 F.3d 1160, 1163 (10th Cir. 1999); *Wightman v. Texas Supreme Court*, 84 F.3d 188 (5th Cir. 1996); *Stein v. Legal Advertising Comm. of the Disciplinary Bd.*, 272 F. Supp.2d 1260 (D. N.M. 2003).

Good cause exists to support entry of a protective order in this case to protect the on-going state process and the privileged, confidential information obtained in the course of the Bar’s disciplinary proceeding. Discovery should not be used as a tool to harass, whether intentional or unintentional, especially when the parties are involved in pending disciplinary proceedings. In the instant case, Plaintiff has filed multiple lawsuits against The Florida Bar in an apparent attempt to disrupt the pending disciplinary proceeding. See *John B. Thompson v. The Florida Bar*, et al, (Case No. 07-20866, United States Southern District of Florida); *John B. Thompson v. The Florida Bar*, (Case No. 07-728, Ninth Judicial Circuit Court of Orange County, Florida). Now, Plaintiff seeks to depose the current Referee and the former Designated Reviewer assigned to his pending disciplinary proceeding. As an agent of The Florida Bar, the Designated Reviewer is

entitled to the judicial privileges and immunities that courts have afforded government officials acting in judicial or quasi-judicial capacities. See *Gary W. v. Louisiana Dept. of Health and Human Resources*, 861 F.2d 1366 (5th Cir. 1988); *United States v. Morgan*, 313 U.S. 409 (1941); *Montgomery Ward & Co. v. Zenith Radio Corp.*, 673 F.2d 1254 (3d Cir. 1982); *United States v. American Telephone & Telegraph Co.* 524 F.Supp 1381 (D.D.C. 1981).

III. PLAINTIFF'S NOTICE OF DEPOSITION VIOLATES THIS COURT'S LOCAL RULES AND THE FEDERAL RULES OF CIVIL PROCEDURE.

Plaintiff's deposition notice was issued prematurely. See Local Rules 7.1(E) and 26.1(f) ("A party may not seek discovery from any source before the parties have conferred as required by Federal Rule of Civil Procedure 26 (f)") (*emphasis added*).

IV. CONCLUSION.

For the foregoing reasons, The Florida Bar respectfully requests that this Court (1) grant the Motion to Stay Discovery Pending Disposition of the Motion to Dismiss; (2) enter a protective order for the good cause presented; and (3) strike Plaintiff's Notice of Deposition to Ben Kuehne as it is premature.

s/ Karusha Y. Sharpe
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CERTIFICATE OF GOOD FAITH COMPLIANCE
WITH LOCAL RULE 7.1(A)(3)

In accordance with local rule 7.1(A)(3), S.D. Fla., counsel for The Florida Bar has conferred with Mr. Thompson concerning the requested relief and made a good faith effort to resolve the issues presented by this Motion. Counsel represents that Mr. Thompson does not object to the postponement of discovery he is seeking from Ben Kuehne.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 31, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to the following:

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| John B. Thompson, Esq. 1172 South Dixie Hwy., Suite 111 Coral Gables, Florida 33146 | Charles M. Fahlbusch, Esq. Senior Assistant Attorney General Office of the Attorney General Civil Litigation Division 110 S.E. 6 th Street, 10 th Floor Fort Lauderdale, Florida 33301 |
|---|---|

s/ Karusha Y. Sharpe
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ATTORNEY