

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

PHILIP J. STODDARD,

Plaintiff,

vs.

CASE NO.: 4:06-CV-414 RH/WCS

**THE FLORIDA BOARD OF BAR
EXAMINERS, et al.,**

Defendants.

_____ /

DEFENDANT CHIEF JUSTICE R. FRED LEWIS'S MOTION TO DISMISS

The Defendant, CHIEF JUSTICE R. FRED LEWIS¹, sued both in his official capacity as the Florida Supreme Court liaison to the Florida Board of Bar Examiners and in his individual capacity, pursuant to Rule 12, Federal Rules of Civil Procedure, moves this Court to enter an order dismissing the Complaint filed against him. As grounds therefor, Chief Justice Lewis states:

Plaintiff has filed a six-count Complaint, naming as Defendants the Florida Board of Bar Examiners, Thomas Arthur Pobjecky, Eleanor Mitchell Hunter, Leighton D. Yates, Jr., Terry Rigsby, Chief Justice Lewis and John Does One Through Twenty. All of the individually named defendants, save Mr. Yates, are sued in their official and individual capacities. Plaintiff seeks compensatory damages, punitive damages and declaratory and injunctive relief. P l a i n t i f f

¹/Effective July 1, 2006, the Honorable R. Fred Lewis became the chief justice of the Florida Supreme Court.

challenges various policies and rules which are purportedly being applied to Plaintiff, in the process of consideration of his application for admission to The Florida Bar.

Plaintiff also alleges the following sequence of events:

1. In November 1999, Plaintiff submitted an application for admission to The Florida Bar in November 1999. (Complaint, pg. 2)

2. In September 2001, counsel for The Florida Board of Bar Examiners, Thomas A. Pobjecky (one of the named Defendants in this action), prepared an investigative report. (Complaint, ¶17)

3. In November 2001, the Board served a notice of intent to deny plaintiff's application for admission to The Florida Bar, which contained written specifications detailing the allegations against Plaintiff. (Complaint, ¶¶18, 19, 42 and 48)

4. In February 2002, Plaintiff filed a suit in the United States District Court alleging agency misconduct in the processing of his application, in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §12131 *et seq.*² (Complaint, ¶20)

5. In April 2002, Plaintiff's application was "terminated" because Plaintiff chose not to proceed with a formal hearing to contest the allegations in the Specifications, because of his pending lawsuit. (Complaint, ¶21)

6. On July 7, 2004, Plaintiff paid \$425.00 and submitted a renewed application for admission to The Florida Bar. (Complaint, ¶22)

²/Chief Justice Lewis has filed a Motion for Judicial Notice contemporaneously with the filing of this motion. By the motion, Chief Justice Lewis seeks judicial notice of the original Complaint, the Amended Complaint, the Order dismissing the case, and the Eleventh Circuit opinion relating to the appeal, all filed in the 2002 action brought by Plaintiff.

7. On January 7, 2006, Plaintiff filed a motion with the Florida Board of Bar Examiners, seeking a waiver of Fla. Bar Admiss. R. 4-18.2.³ That request was denied on August 3, 2006. (Complaint, ¶23)

8. In August 2005, reportedly the Board served a second notice of intent to deny plaintiff's application for admission to The Florida Bar, which contained written specifications detailing the allegations against Plaintiff. (Complaint, pg. 2)

Plaintiff alleges that, in the context of the pending bar admissions proceeding, "Defendants" have "raised frivolous objections and harassed plaintiff with 'further inquiry' into personal matters that have no rational or relevant connection to his present fitness" for the practice of law. *Id.* (Complaint, pp. 3-4)

In part, Plaintiff seeks a declaration that "plaintiff currently possesses 'good moral character' sufficient for admission to the Florida Bar," as well as injunctive relief that "enjoins the 'defendants' from enforcing any decision that invalidates plaintiff's passing bar application scores," and "requires the 'defendants' to certify the plaintiff as being of 'good moral character' and to file that certification with the Florida Supreme Court." (Complaint, pp. 25-26)

Although the Complaint contains six causes of action, only the third and fourth causes of action apply to CHIEF JUSTICE LEWIS. The third cause of action asserts violations of Article

³/ Rule 4-18.2, Fla. Bar. Admiss. Rules, provides:

An applicant's successful completion of the Florida Bar Examination shall remain valid for a period of 5 years from the date of the administration of the last part of the Florida Bar Examination that was successfully completed. If the 5 year period expires without admission, an applicant shall, except for good cause shown, be required to retake the Florida Bar Examination and again pass all parts of the examination.

I, Section 10 of the United States Constitution, and 42 U.S.C. §12131. The fourth cause of action asserts a violation of Article I, Section 10, of the United States Constitution only. While the third cause of action references 42 U.S.C. §1983 in the title, the fourth cause of action does not. Chief Justice Lewis presumes that Plaintiff also intends to bring the fourth cause of action pursuant to §1983. Neither cause of action incorporates by reference any other allegations in the Complaint beyond the paragraphs actually contained in the cause of action.

The Complaint is largely poorly pled and contains erroneous statements of law, most of which are addressed herein.

Plaintiff's claims against CHIEF JUSTICE LEWIS must be dismissed for the following reasons:

1. Contrary to the legal statements made by Plaintiff in the Complaint (Complaint, ¶¶2-3), abstention pursuant to Younger v. Harris, 401 U.S. 37 (1971), bars this action to the extent that Plaintiff seeks declaratory and injunctive relief.
2. To the extent that Plaintiff sues Chief Justice Lewis for "publishing administrative orders affirming Board recommendations and issuing unpublished decisions ratifying arbitrary license denials," Chief Justice Lewis is entitled to absolute judicial immunity from suit.
3. To the extent that Plaintiff sues Chief Justice Lewis for failing to recommend modifications to Rules of the Supreme Court Relating to Admission to The Florida Bar, or for enacting said rules, Chief Justice Lewis is entitled to absolute legislative immunity from suit.

4. To the extent that Plaintiff seeks damages against Chief Justice Lewis in his official capacity pursuant to 42 U.S.C. §1983, the Eleventh Amendment to the United States Constitution bars such an action.
5. Assuming for argument purposes that Plaintiff alleges actions by Chief Justice Lewis that are neither adjudicative nor legislative in character, but rather executive acts, Plaintiff fails to state a cause of action for a violation of Article I, Section 10 of the United States Constitution.
6. Assuming for argument purposes that Plaintiff alleges purely executive acts by Chief Justice Lewis, Plaintiff fails to state a cause of action for a violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §12131 *et seq.*
7. Plaintiff fails to state a cause of action for declaratory relief against Chief Justice Lewis, because there exist adequate remedies at law to address Plaintiff's concerns.
8. Eleventh Amendment immunity bars an action for damages against Chief Justice Lewis, in his official capacity, for a violation of the ADA.
9. Assuming for argument purposes that Plaintiff alleges purely executive acts by Chief Justice Lewis, Plaintiff fails to state a cause of action against Chief Justice Lewis pursuant to 42 U.S.C. §1983.

MEMORANDUM OF LAW

I. STANDARD FOR MOTION TO DISMISS

The analysis of a 12(b)(6) motion, like the instant one, is limited primarily to the face of the complaint and attachments thereto. Brooks v. Blue Cross and Blue Shield of Florida, Inc.,

116 F.3d 1364, 1368 (11th Cir. 1997). Generally, on a motion to dismiss, this Court must accept as true the complaint's well-pleaded facts. Miccosukee Tribe of Indians of Florida v. Florida State Athletic Comm'n, 226 F.3d 1226, 1234 (11th Cir. 2000) (“We accept as true the complaint's well pleaded facts, even if disputed.”). Conclusory allegations will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. Mun. Utils. Bd. of Albertville v. Alabama Power Co., 934 F.2d 1493, 1501 (11th Cir. 1991).

II. RULES RELATING TO THE ADMISSIONS PROCESS FOR FLORIDA LAWYERS.

As noted above, this case involves an application by Plaintiff for admission to The Florida Bar. Pursuant to Article 5, Section 15 of the Florida Constitution, the Florida Supreme Court has exclusive jurisdiction to regulate the admission of persons to the practice of law in Florida. *See also* § 454.021(2), Fla. Stat. (2003).

The Florida Supreme Court has adopted rules establishing the procedures to be followed for admission of persons to the practice of law. *See* Rules of the Supreme Court Relating to Admissions to the Bar.⁴

III. THE ROLE OF MEMBERS OF THE LIAISON COMMITTEE, AS ESTABLISHED IN RULE.

Plaintiff sues Chief Justice Lewis because he is reportedly a “liaison” to the Florida Board of Bar Examiners. (Complaint, ¶11) Plaintiff alleges that Chief Justice Lewis “is primarily responsible for overseeing the operation of that agency [presumably the Florida Board of Bar

⁴The citation to these rules is Fla. Bar Admiss. R. ____.

Examiners] and advising the agency as to the scope of discretion to be applied in character and fitness investigations.” *Id.*

The role of the Liaison Committee for the Florida Board of Bar Examiners is described in rule. The Liaison Committee is a “permanent committee to coordinate the work of the Bench, Bar, law schools and bar examiners [] ***established to make recommendations to the Court.***” Fla. Bar Admiss. R. 1-26.1 (emphasis supplied). The membership of the Liaison Committee “shall consist of two members of the Supreme Court to be designated by the Court, two members of the Board of Bar Examiners to be designated by the Board, two members of The Florida Bar to be designated by the Board of Governors of The Florida Bar, the Deans of all accredited Florida law schools or colleges, and such law student representation as the Court may designate.” Fla. Bar Admiss. R. 1-26.2.

The Liaison Committee “shall convene at the pleasure of the committee members from the Supreme Court, one of whom shall be the presiding officer.” Fla. Bar Admiss. R. 1-26.3.

Contrary to Plaintiff’s allegations, Chief Justice Lewis is not “primarily responsible for overseeing the operation of the Florida Board of Bar Examiners and advising the Board as to the scope of discretion to be applied in character and fitness investigations.” No rule, statute or constitutional provision imposes this duty on Chief Justice Lewis.⁵

⁵By rule, the Supreme Court, acting as a corporate body, appoints the members of the Florida Board of Bar Examiners. Fla. Bar Admiss. 1-22.2. Also, acting as a corporate body, the Supreme Court modifies or creates rules relating to the admission of applicants to The Florida Bar. Fla. Bar Admiss. 1-13. These rules would govern the activities of the Board in relation to applicants for admission.

To the extent that Plaintiff sues Chief Justice Lewis as a liaison to the Florida Board of Bar Examiners, the Complaint fails to allege acts or omissions on the part of Chief Justice Lewis as a liaison which would justify relief under 42 U.S.C. §1983. *See* further argument below at Part IX below.

IV. TO THE EXTENT THAT PLAINTIFF SEEKS DECLARATORY AND INJUNCTIVE RELIEF, THE COURT SHOULD ABSTAIN FROM CONSIDERING THIS ACTION BASED ON THE PRINCIPLES ENUNCIATED IN YOUNGER V. HARRIS.

Plaintiff's declaratory and injunctive relief claims against Chief Justice Lewis must be dismissed pursuant to the abstention doctrine enunciated in Younger v. Harris, 91 S.Ct. 746 (1971), because, as Plaintiff has conceded, he has a pending bar admissions proceeding below. Presently, the proceeding is before the Florida Board of Bar Examiners. However, Plaintiff may seek review of any adverse determination by the Board before the Florida Supreme Court. Thus, any declaratory or injunctive relief granted by this Court would interfere with on-going state court proceedings.

Younger abstention is a doctrine essential to maintaining the balance in state-federal relations. "The Younger abstention doctrine derives from 'the vital consideration of comity between the state and national governments' . . . as 'sensitivity to the legitimate interests of both State and National Governments.'" Pompey v. Broward County, 95 F.3d 1543, 1546-47 (11th Cir. 1996). Younger and its progeny "reflect the longstanding national public policy, based on principles of federalism, of allowing state courts to try cases - - already pending in state court - - free from federal court interference." Butler v. Alabama Judicial Inquiry Comm'n, 245 F.3d 1257, 1261 (11th Cir. 2001). Under Younger, federal courts must avoid enjoining pending state

court proceedings except under “special circumstances.” Old Republic Union Ins. Co. v. Tillis Trucking Co., 124 F.3d 1258, 1261 (11th Cir. 1997). Moreover, “the principles of Younger apply to declaratory judgments that would effectively enjoin state proceedings.” Id. Finally, federal courts should only refrain from abstaining when there is a compelling demonstration of bad faith or harassment,⁶ or when there is no realistic opportunity to present federal claims in the state proceeding. Younger, 401 U.S., at 49; Butler v. Alabama Judicial Inquiry Comm’n, 245 F.3d 1257, 1262 (11th Cir. 2001); Old Republic Union, 124 F.3d at 1261.

The policies underlying Younger abstention are fully applicable to noncriminal judicial proceedings when important state interests are involved. Middlesex County Ethics Comm. v. Garden State Bar Ass’n, 457 U.S. 423, 102 S.Ct. 2515, 2521, 73 L. Ed. 2d 116 (1982).⁷ In applying Younger principles to a noncriminal judicial proceeding, the inquiry is threefold:

- (1) Do the proceedings constitute an ongoing state judicial proceeding?
- (2) Do the proceedings implicate important state interests?

⁶ Trainor v. Hernandez, 97 S.Ct. 1911, 1919 (1977).

⁷ In Middlesex County, the Supreme Court reviewed an opinion reversing an order dismissing a case brought by lawyers against a grievance committee, which challenged the constitutionality of New Jersey Bar disciplinary procedures. The action was filed after a disciplinary proceeding was initiated against the lawyers, involving the rules at issue. The Supreme Court determined that Younger abstention was appropriate in that instance, and reversed the appellate opinion. The Court stated:

Because respondent Hinds had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," and because no bad faith, harassment, or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings.
(Citation omitted)

Middlesex County Ethics Comm., 457 U.S., at 437.

- (3) Is there an adequate opportunity in the state proceedings to raise constitutional challenges?

Middlesex, 102 S.Ct. at 2521. The answer to each of these questions in this case is yes.

The Eleventh Circuit has stated: “an essential part of the first Middlesex factor in Younger abstention analysis is whether the federal proceeding will interfere with an ongoing state court proceeding. If there is no interference, then abstention is not required.” 31 Foster Children v. Bush, 329 F.3d 1255, 1276 (11th Cir. 2003) As noted above, Plaintiff’s bar application proceedings are clearly on-going state judicial proceedings. Plaintiff alleges that he is presently at the stage where a notice of intent to deny admission has been issued. Consistent with the Rules of the Supreme Court Relating to Admission to The Florida Bar, the notice would include specifications detailing the concerns regarding Plaintiff’s application. Fla. Bar Admiss. R. 3-23. The next step in the process is a formal evidentiary hearing. Fla Bar. Admiss. R. 3-23.2. After the formal hearing, if the Florida Board of Bar Examiners does anything other than determine that Plaintiff meets the moral character and fitness requirements, Findings of Fact and Conclusions of Law must be prepared. Fla. Bar. Admiss. R. 3-23.7. If, after issuance of the Findings of Fact and Conclusion of Law, Plaintiff is dissatisfied with the outcome of the proceeding, he can petition the Board for reconsideration (however, the petition must contain new and material evidence which by due diligence could not have been produced at the formal hearing). Fla. Bar. Admiss. R. 3-30.

The relief sought by Plaintiff (a declaration that plaintiff currently possesses “good moral character” sufficient for admission to the Florida Bar, and injunctions that preclude Defendants from enforcing any decision that invalidates Plaintiff’s passing bar scores on the basis of age, and

that require the Board of Bar Examiners to certify Plaintiff as being of “good moral character” and to file that certification with the Florida Supreme Court) clearly would interfere with this ongoing judicial proceeding. Accordingly, the first prong of Middlesex is met.

Second, the regulation of the admissions of persons to the practice of law implicates important state interests. *See Ippolito v. Florida*, 824 F.Supp. 1562 (M.D. Fla. 1993) (“The reason for judicial regulation, therefore, is to preserve the judiciary’s integrity, independence, and autonomy.”). The Rules of the Florida Supreme Court Relating to Admission to The Florida Bar also explain that the “primary purpose of the character and fitness screening before admission to The Florida Bar is to protect the public and safeguard the judicial system.” Fla. Bar Admiss. R. 1-14.1. The State of Florida has a clear interest in the attorney admission process. *See Florida Board of Bar Examiners re: Applicant*, 443 So. 2d 71, 75 (Fla. 1983) (“[T]he state's interest in ensuring that only those fit to practice law are admitted to the Bar is a compelling state interest.”). Accordingly, the second prong of Middlesex is met.

Third, there is an adequate opportunity in the state proceedings to raise constitutional or statutory challenges. Any applicant who is dissatisfied with the Board’s recommendation as to that applicant’s character and fitness may petition the Supreme Court of Florida for review. Fla. Bar Admiss. R. 2-30.2 and 3-40.1. Bar applicants thus have the opportunity to raise constitutional challenges and other arguments in the petition before the Florida Supreme Court. *See Florida Board of Bar Examiners re: S.G.*, 707 So. 2d 323 (Fla. 1998) (considering bar applicant’s ADA arguments in connection with application for admission); and *Florida Board of Bar Examiners re: Applicant*, 443 So.2d 71, 76 (Fla. 1983).

In the Complaint, Plaintiff raises two arguments in opposition to Younger abstention. Plaintiff asserts that he has reserved his federal claims for litigation in this court pursuant to England v. Louisiana Board of Medical Examiners, 375 U.S. 411 (1964). (Complaint, ¶3) However, as this Court has previously noted: “England dealt with abstention under Railroad Comm'n v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), and has no applicability under Younger.” Lawrence v. Schwiep, 2005 U.S. Dist. LEXIS 35471 *8-10 (N.D. Fla. October 7, 2005) (*citing* United Parcel Service, Inc. v. Cal. Pub. Utils. Comm'n, 77 F.3d 1178, 1184 n.5 (9th Cir. 1996); Ivy Club v. Edwards, 943 F.2d 270, 280 (3d Cir. 1991); Temple of Lost Sheep v. Abrams, 930 F.2d 178, 182-83 (2d Cir. 1991); Duty Free Shop, Inc. v. Administracion de Terrenos, 889 F.2d 1181, 1183 (1st Cir. 1989)).

Additionally, Plaintiff asserts that, because he initiated and prosecuted the application for admission to The Florida Bar, the underlying matter is remedial and not coercive in nature. As a result, Plaintiff argues that Younger abstention is inapplicable. (Complaint, ¶2) However, this argument ignores the fact that this Court and others have determined that bar admissions proceedings are sufficient to implicate Younger abstention. Lawrence v. Schwiep, 2005 U.S. Dist. LEXIS 35471 (N. D. Fla. October 7, 2005), *affirmed sub nom* Lawrence v. Rigsby, 2006 U.S. App. LEXIS 24072 (11th Cir. September 21, 2006); and Triffin v. Pettit, 1991 U.S. Dist. LEXIS 6100 (D. Pa. 1991).

It should be noted that Younger does not generally apply to claims for damages. Addiction Specialists, Inc. v. Twp. of Hampton, 411 F.3d 399, 413 (3d Cir. 2005). Here, Plaintiff seeks damages. However, where a judgment for the plaintiff would have preclusive effects on a pending state-court proceeding, Younger abstention may apply to actions at law. D.L. v. Unified

Sch. Dist. No. 497, 392 F.3d 1223, 1228 (10th Cir. 2004); and Gilbertson v. Albright, 381 F.3d 965, 968 (9th Cir. 2004). In that event, D.L. and Gilbertson recommend staying the damages' portion of the action, pending conclusion of the state court proceeding.

In this case, for the reasons set forth below, the damages' portion of this action must be dismissed on other grounds. Therefore, there is no impediment to dismissal of this action as to Chief Justice Lewis, on the basis of Younger abstention, and this Court should abstain from considering Plaintiff's claims. *Accord*, Edwards v. Illinois Bd. of Admissions to Bar, 261 F.3d 723 (7th Cir. 2001).

V. TO THE EXTENT THAT PLAINTIFF SUES CHIEF JUSTICE LEWIS IN HIS OFFICIAL CAPACITY FOR DAMAGES UNDER 42 U.S.C. §1983, ELEVENTH AMENDMENT IMMUNITY BARS SUCH RELIEF.

Plaintiff's Complaint is not a model of clarity in specifying the capacity in which he sues Chief Justice Lewis for damages. To the extent that Chief Justice Lewis is sued in his official capacity for damages, pursuant to 42 U.S.C. § 1983, he is not a "person," and Plaintiff fails to state a claim for damages against him. Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). Accordingly, Plaintiff's Complaint must be dismissed to the extent Plaintiff sues Chief Justice Lewis in his official capacity for damages.

Additionally, the Eleventh Amendment to the United States Constitution bars this action, to the extent that Plaintiff sues Chief Justice Lewis in his official capacity for damages pursuant to §1983. The Eleventh Amendment to the United States Constitution provides that:

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign state.

Absent its consent, a state may not be sued in federal court unless Congress has clearly and unequivocally abrogated the state's Eleventh Amendment immunity by exercising its power with respect to rights protected by the Fourteenth Amendment. DeKalb County School Dist. v. Schrenko, 109 F.3d 680, 688 (11th Cir. 1997) [citing Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984)]. A suit against a state official in his or her official capacity for damages is not a suit against the official but rather is a suit against the official's office. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

In the instant case, Plaintiff cannot demonstrate any waiver by Congress or the State of Florida of Eleventh Amendment immunity, to the extent that the Chief Justice Lewis is sued in his official capacity for damages pursuant to Title 42 U.S.C. §1983. Gamble v. Fla. Dept. of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986); and Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987). Accordingly, any official capacity claims for damages brought pursuant to §1983 must be dismissed with prejudice.

VI. CHIEF JUSTICE LEWIS IS ABSOLUTELY JUDICIALLY IMMUNE FROM RELIEF IN THIS ACTION, TO THE EXTENT THAT PLAINTIFF SUES HIM FOR “PUBLISHING ADMINISTRATIVE ORDERS AFFIRMING BOARD RECOMMENDATIONS AND ISSUING UNPUBLISHED DECISIONS RATIFYING ARBITRARY LICENSE DENIALS.”

A. Claims brought pursuant to 42 U.S.C. §1983.

Plaintiff seeks relief in this action pursuant to 42 U.S.C. §1983 which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, *except that in*

any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.
(Emphasis supplied)

Plaintiff alleges that Defendant Lewis ratified the “adverse matters standards”⁸ by publishing ***administrative orders affirming Board recommendations*** and ***issuing unpublished decisions ratifying arbitrary license denials.***⁹ (Complaint, ¶46; emphasis supplied) The issuance of such orders is clearly a judicial action undertaken in Chief Justice Lewis’ judicial capacity. Accordingly, given the plain language of §1983, injunctive relief cannot be granted unless a declaratory decree was violated or declaratory relief was unavailable. Further, Chief Justice Lewis has absolute judicial immunity from damages for judicial acts.

The Supreme Court has visited the issue of the scope and parameters of judicial immunity several times in the past. Uniformly, the decisions of the Court are in agreement on this point: if a judge is acting in his judicial capacity and does not act with a complete absence of jurisdiction, then judicial immunity will operate to bar any action for damages. *See e.g. Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 734-735, 100 S.Ct. 1967, 1976, 64 L.Ed.2d 641, 655 (1980); *Pulliam v. Allen*, 466 U.S. 522, 545, 104 S. Ct. 1970, 1982, 80 L. Ed. 2d 565, 581 (1984); *Forrester v. White*, 484 U.S. 219, 226-227, 108 S.Ct. 538,

⁸/This phrase is used by Plaintiff to apparently capture those kinds of matters considered by the Florida Board of Bar Examiners in evaluating applicant’s character and fitness, pursuant to Fla. Bar Admiss. R. 3-11.

⁹/It is not clear that Plaintiff has alleged standing to challenge “administrative orders” or “unpublished decisions” because Plaintiff does not allege that any such orders or decisions have been issued with respect to Plaintiff in the pending bar admissions proceeding.

544, 98 L.Ed.2d 555, 564-565 (1988); Mireles v. Waco, 502 U.S. 9, 9-10, 112 S.Ct. 286, 116 L.Ed.2d 9, 13 (1991).

A functional approach is used in determining whether absolute judicial immunity will apply to particular acts or omissions by a judge. Forrester, 484 U.S. 219, 226. In Mireles, the Supreme Court stated:

This Court in Stump made clear that “whether an act by a judge is a ‘judicial’ one relate[s] to the nature of the act itself, I. e., whether it is a function normally performed by a judge, and to the expectations of the parties, I. e., whether they dealt with the judge in his judicial capacity.”

Mireles, 502 U.S. 9, 12 (*citing* Stump v. Sparkman, 435 U.S. 349, 362, 98 S. Ct. 1099, 1107, 55 L. Ed. 2d 331, 342 (1978)).

In applying a functional approach to actions by a judge, the Supreme Court has determined that acting in an “enforcement capacity” with respect to attorneys practicing before the court is not a “judicial act.” Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 737.¹⁰ However, in Consumers Union of the United States, the Supreme Court noted

¹⁰In describing what constituted “enforcement capacity,” the Supreme Court noted that court rules gave “the Virginia Court the independent authority of its own to initiate proceedings against attorneys.” *Id.* This authority was likened to that of a prosecutor initiating an action. Discussion in the opinion suggests that prosecutorial immunity would operate to bar a damages action against the judge acting in his or her enforcement capacity, but that it would not operate to bar an action for declaratory or injunctive relief, for this type of conduct. 446 U.S., 719, 736-737. Plaintiff’s Complaint contains no nonconclusory allegations that Chief Justice Lewis exercised “enforcement power” as this term is explained in Consumer Union of United States. The process used in bar admission proceedings in Florida is such that it would be unlikely that Plaintiff could allege, in a nonfrivolous manner, that Chief Justice Lewis exercised his enforcement power *vis a vis* Plaintiff in the pending bar admission proceeding, by initiating that proceeding.

In LeClerc v. Webb, 270 F.Supp. 2d 779, 791-792 (E.D. La. 2003), *affirmed*, 419 F.3d 405, 414 (5th Cir. 2005), the Fifth Circuit concluded that the Louisiana Supreme Court was not

that a court acts in an adjudicative role when it enforces a Bar Code in a judicial proceeding, similar to the role a court plays in enforcing a statute. *Id.* at 723-724. The Court also noted that propounding a Bar rule is not an act of adjudication, but rather an act of rulemaking.¹¹ Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 731. Decisions to demote or discharge staff are not judicial acts subject to absolute judicial immunity. Forrester, 484 U.S. 219, 230.

In the instant case, Plaintiff complains about the issuance of what he characterizes as “administrative orders” affirming decisions made by the Board or “unpublished decisions” ratifying license denials. These actions are clearly, by nature, judicial acts. The fact that Plaintiff characterizes the license denials as “arbitrary” (Complaint, pg. 46) does not change the nature of

absolutely immune from suit to the extent that it acted in its enforcement capacity (in enforcing its rules against bar applicants). In reaching this conclusion, the Fifth Circuit relied upon Consumer Union of the United States. However, this result does not follow in the instant matter for two reasons. First, Plaintiff complains about the application of rules to him in a pending bar admission proceeding. In LeClerc, the district court noted that one distinguishing feature between the case brought by plaintiffs there and actions upholding judicial immunity was that the challenge brought by named plaintiffs there involved a facial challenge to rules and not the adjudication of an individual application. 270 F.Supp. 2d 779, 791. Here, Plaintiff challenges the adjudication of his application.

Second, as noted above, the enforcement authority at issue in Consumer Union of the United States was the ability of the court to enforce rules against attorneys by initiating an enforcement proceeding (which would then, under Virginia’s rules, be handled by a different judge). Here, the Supreme Court does not initiate the bar admission proceedings. Rather, those proceedings are initiated through the Florida Board of Bar Examiners. The Court’s involvement in such proceedings does not constitute enforcement but rather is adjudicative in nature.

¹¹/However, if the issue in this case was simply either the adoption of challenged rules or the failure to modify rules, then Chief Justice Lewis and the other members of the Florida Supreme Court would be absolutely immune from suit, while acting in their legislative capacity, as discussed further below. Supreme Court of Virginia v. Consumer Union of the United States, 446 U.S. 719, 734.

the act. As the Supreme Court stated: “judicial immunity is not overcome by allegations of bad faith or malice, the existence of which cannot be resolved without engaging in discovery and eventual trial.” Mireles, 502 U.S. 9, 11. Rather, if the acts at issue are “judicial actions,” then judicial immunity may only be overcome upon a showing that the actions, while judicial in nature, were “taken in the complete absence of all jurisdiction. Mireles, 502 U.S. 9, 12. Here, no such showing can be made. Chief Justice Lewis and the other members of the Florida Supreme Court have exclusive jurisdiction to handle bar admission proceedings. Art. 5, § 15, Fla. Const. Therefore, judicial immunity bars any action for damages flowing from the alleged judicial acts, to the extent that Plaintiff brings his claim pursuant to 42 U.S.C. §1983.

Additionally, the claims for declaratory and injunctive relief brought against Chief Justice Lewis for judicial acts must also be dismissed, based on judicial immunity. In Pulliam v. Allen, 466 U.S. 522, the Supreme Court concluded that absolute judicial immunity did not bar prospective claims for declaratory and injunctive relief, sought pursuant to 42 U.S.C. §1983. Congress, dissatisfied with this result, enacted the Federal Courts Improvement Act of 1996, which amended 42 U.S.C. §1983 as follows:

©) CIVIL ACTION FOR DEPRIVATION OF RIGHTS. -- Section 1979 of the Revised Statutes (42 U.S.C. 1983) is amended by inserting before the period at the end of the first sentence: “, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”

Pub.L. No. 104-317, 110 Stat. 3847, 3853 (Oct. 19, 1996).

In Acuna v. Fireside Thrift Co., Inc., 2006 U.S. Dist. LEXIS 30102 (D. Ariz. May 11, 2006), in discussing the purpose of the above-referenced changes, the court noted:

The Senate report indicates that the amendment fully "restores the doctrine of judicial immunity to the status it occupied prior to Pulliam" because Pulliam created a departure from "400 years of common law tradition and weakened judicial immunity protections." S. Rep. 104-366, at 36-37, 1996 U.S.C.C.A.N. 4202, 4216-17.

Specifically, the noted change expressly extended judicial immunity to include actions for injunctive relief, except in extraordinary circumstances (where a party alleges and demonstrates that a declaratory decree was violated or declaratory relief was unavailable). *See also* Bolin v. Story, 225 F.3d 1234, 1242 (11th Cir. 2000) (noting that, "in 1996, Congress enacted the Federal Courts Improvement Act ("FCIA"), Pub.L. No. 104-317, 110 Stat. 3847 (1996), in which it amended § 1983 to provide that 'injunctive relief shall not be granted' in an action brought against "a judicial officer for an act or omission taken in such officer's judicial capacity ... unless a declaratory decree was violated or declaratory relief was unavailable."); Roth v. King, 449 F.3d 1272, 1286-1287 (D.C. Cir. 2006) (concluding that the district court erred in concluding that appellees might be able to obtain injunctive relief against individuals acting in a judicial capacity, in light of the changes to Federal Courts Improvement Act); Montero v. Travis, 171 F.3d 757, 761 (2d Cir. 1999) ("Absolute immunity bars not only Montero's § 1983 claim for damages but also his claim for injunctive relief"); Azubuko v. Ashley, 443 F.3d 302 (3rd Cir. 2006) (doctrine of judicial immunity applies even when plaintiff seeks declaratory relief, unless plaintiff alleges that a declaratory judgment was violated or declaratory relief is not available); and Willner v. Frey, 421 F. Supp. 2d 913, 926 n. 18 (E. D. Va. 2006) (noting that Congress effectively reversed the Supreme Court's holding in Pulliam by enacting the Federal Courts Improvement Act of 1996 ("FCIA"), Pub.L. No. 104-317, 110 Stat. 3847 (1996)).

In Acuna, because of the Congressional intent supporting the relevant change to the Federal Courts Improvement Act of 1996 (i.e., to restore the doctrine of judicial immunity to the status occupied prior to Pulliam), the court determined that “if a defendant can successfully assert judicial immunity from damages, that immunity will also bar declaratory and injunctive relief.” Acuna, 2006 U.S. Dist. LEXIS 30102 *14. In Bolin, the Eleventh Circuit appears to have determined that absolute immunity applied to preclude declaratory relief as well as injunctive relief and damages stating: “Even were the defendant judges not entitled to absolute immunity, the remaining claims for declaratory relief against them would be properly dismissed for this reason as well.” 225 F.3d 1234, 1243 n. 7.

Here, Plaintiff does not allege that Chief Justice Lewis has violated a declaratory judgment or that declaratory relief is unavailable. Accordingly, judicial immunity operates to bar all claims brought pursuant to 42 U.S.C. §1983, to the extent that Plaintiff sues Chief Justice Lewis for judicial acts as described above.

B. ADA claims

Judicial immunity will also bar the action for damages brought against Chief Justice Lewis pursuant to the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*, to the extent that the activities alleged constituted judicial acts. Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001) (Ninth Circuit concluded that action for damages brought pursuant to Title II of the ADA, 42 U.S.C. §12131 *et seq.*, was barred by judicial immunity to the extent that Judge Kruse, a defendant, was sued for activities which constituted judicial acts such as issuing an order on a request for a reasonable accommodation).

Judicial immunity should also apply to declaratory and injunctive relief sought against Chief Justice Lewis pursuant to the Americans with Disabilities Act. Some courts have extended the application of changes made in the Federal Courts Improvement Act of 1996 to other types of claims. In Acuna, the Act was applied to injunctive and declaratory relief claims made pursuant to 42 U.S.C. §§1981, 1983, 1985 and 1986. *See also Brooks* (concluding that judicial immunity applied to injunctive relief claims brought pursuant to 42 U.S.C. §§1983 and 1985). In Bolin, statutorily created judicial immunity from injunctive relief was extended to Bivens¹¹ actions. In Weissbrod v. Hous. Part of the Civ. Court, 293 F. Supp. 2d 349 (S.D. N.Y. 2003), the district court concluded that judicial immunity from injunctive relief applied in an action where Plaintiff claimed violations of 42 U.S.C. §1983 and the Americans with Disabilities Act.

The above-quoted provisions of the Federal Courts Improvement Act of 1996 evidence Congressional intent to apply judicial immunity more broadly to cover not only damages but other relief as well. Consistent with that intent, judicial immunity should apply in this case to bar declaratory and injunctive relief against Chief Justice Lewis, to the extent that he is sued for judicial acts pursuant to the ADA.

VII. CHIEF JUSTICE LEWIS RETAINS LEGISLATIVE IMMUNITY FROM SUIT TO THE EXTENT THAT PLAINTIFF CLAIMS CHIEF JUSTICE LEWIS FAILED TO RECOMMEND MODIFICATION OR REPEAL OF RULES WHICH PLAINTIFF ALLEGES ARE UNCONSTITUTIONAL AS APPLIED TO HIM.

Should Plaintiff argue that he sues Chief Justice Lewis not for judicial acts, but for failing to modify (or more precisely failing to recommend modification of) rules relating to admission

¹¹/Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

to The Florida Bar, absolute legislative immunity would bar this action. The Supreme Court has already determined that absolute legislative immunity bars suit for the issuance of, or failure to amend rules relating to the admission to or practice by lawyers. Supreme Court of Virginia v. Consumers Union of United States, 446 U.S. 719, 734 (concluding that the Virginia Court was absolutely immune from suit when acting in a legislative capacity which would include the issuance of rules and the failure to modify rules). The doctrine of legislative immunity applies to actions for both damages and injunctive relief, and by implication declaratory relief as well. Spallone v. United States, 493 U.S. 265, 278 (1990); and Franklin v. Massachusetts, 505 U.S. 788, 828 n. 3 (1992) (noting that nothing in Powell v. McCormack, 395 U.S. 486, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969), suggested that declaratory relief could be awarded in a case where legislative immunity applied). Accordingly, to the extent that Plaintiff sues Chief Justice Lewis because he did not cause or recommend that challenged rules be modified (or for voting in favor of enactment of certain rules), this suit is barred by absolute legislative immunity.

VIII. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR DECLARATORY OR INJUNCTIVE RELIEF AGAINST CHIEF JUSTICE LEWIS, BECAUSE HE FAILS TO ALLEGE THAT THERE EXISTS NO ADEQUATE REMEDY AT LAW.

Should the Court determine that the previous arguments do not bar injunctive and declaratory relief in this matter, Plaintiff fails to state a cause of action for declaratory or injunctive relief in this matter, because Plaintiff fails to allege facts which would show that there exists no adequate remedy at law. In Bolin, the Eleventh Circuit stated:

In order to receive declaratory or injunctive relief, plaintiffs must establish that there was a violation, that there is a serious risk of continuing irreparable injury if the relief is not granted, and the absence of an adequate remedy at law.

225 F.3d 1234, 1243.

Here, Plaintiff fails to state a cause of action for declaratory or injunctive relief because there exist adequate remedies at law. First, if Plaintiff believes that certain of the Rules relating to admission to The Florida Bar are unconstitutional, and, therefore, require modification, he may petition the Florida Supreme Court to modify the rules. Fla. Bar. Admiss. R. 1-13. To the extent that Plaintiff is dissatisfied with decisions made regarding his application for admission to the Florida Supreme Court, he may raise those issues through a petition for review of the recommendations of the Florida Board of Bar Examiners. Fla. Bar Admiss. R. 2-30.2 and 3-40.1. As noted above, a bar applicant may raise constitutional and federal law claims in the petition for Supreme Court review.

Finally, certiorari review may be available from the United States Supreme Court to consider decisions made by the Florida Supreme Court on federal constitutional and statutory claims relating to a bar admissions application.

For all of the foregoing reasons, there are adequate remedies at law available to Plaintiff, and, therefore, declaratory and injunctive relief is inappropriate. Declaratory and injunctive relief is also inappropriate because Plaintiff fails to state a cause of action for a violation of federal law as noted below.

IX. SHOULD THIS COURT DECIDE NOT TO ABSTAIN FROM CONSIDERATION OF THIS MATTER PURSUANT TO YOUNGER, PLAINTIFF FAILS TO STATE A CLAIM UNDER 42 U.S.C. §1983 FOR DECLARATORY AND INJUNCTIVE RELIEF.

A. General Case law regarding §1983 claims.

Plaintiff seeks relief in this action pursuant to 42 U.S.C. §1983. To prevail on a claim under § 1983, a plaintiff must demonstrate both (1) that Chief Justice Lewis deprived Plaintiff of a right secured under the Constitution or federal law and (2) that such a deprivation occurred under color of state law. Arrington v. Cobb County, 139 F.3d 865, 872 (11th Cir. 1998).

1. Causal nexus

Here Plaintiff sues Chief Justice Lewis because he was a “liaison” between the Florida Supreme Court and the Florida Board of Bar Examiners. Plaintiff goes so far as to state that Chief Justice Lewis was “primarily responsible for overseeing the operation of the Florida Board of Bar Examiners and advising the Board as to the scope of discretion to be applied in character and fitness investigations.” (Complaint, ¶11) This statement is incorrect as a matter of law (*see* Fla. Bar Admiss. R. 1-26.1). Clearly, by rule the Liaison Committee (and not just a member of the Liaison Committee) makes *recommendations to the Florida Supreme Court* about potential changes to the admissions process. The Liaison Committee and Chief Justice Lewis are not responsible for making recommendations to the Florida Board of Bar Examiners, or for overseeing the Florida Board of Bar Examiners. But see footnote 5 above.

Assuming for argument purposes that Plaintiff was properly suing Chief Justice Lewis for his actions as a supervisor of the Board, Plaintiff fails to allege an adequate causal nexus between any alleged violation of federal law or the constitution and any act or omission by Chief Justice Lewis. It is well established that Plaintiff must allege and prove a causal connection between the actions taken by Chief Justice Lewis "under color of state law" and any alleged constitutional or federal law deprivation. Williams v. Bennett, 689 F.2d 1370, 1380 (11th Cir. 1982). “Moreover, ‘when individuals are being sued in their individual capacities for damages for personal injuries,

the causation inquiry must be more refined and focused than that undertaken . . . where only declaratory and injunctive relief [are] sought for constitutional violations pervading an entire prison system.” Zatler v. Wainwright, 802 F.2d 397, 401 (11th Cir. 1986).

The requisite causal connection may be shown by personal participation or a breach of duty imposed by state or local law. Williams, 689 F.2d 1370, 1381. “An official may also be liable [under §1983] where a policy or custom that he established or utilized results in” a violation of federal or constitutional law. Zatler v. Wainwright, 802 F.2d 397, 401. Additionally, the requisite causal connection may be shown “where a history of widespread prior abuse puts the official on notice of the need for improved training or supervision”. Wilson v. Attaway, 757 F.2d 1227, 1241 (11th Cir. 1985). “Another theory . . . is that a supervisory defendant is subject to § 1983 liability when he breaches a duty imposed by state or local law, and this breach causes plaintiff’s constitutional injury.” Zatler v. Wainwright, 802 F.2d 397, 401.

Here, Plaintiff fails to allege facts (as distinct from conclusions) sufficient to establish a causal nexus between any act or omission of Chief Justice Lewis, while acting in his capacity as a Liaison Committee member, and any constitutional violation. Specifically, Plaintiff fails to allege nonconclusory facts to establish either (1) Chief Justice Lewis’ personal participation in any alleged violations of the federal constitution or federal statute; (2) that Chief Justice Lewis established or utilized a policy or custom which resulted in the alleged violations of the federal constitution or federal statute; (3) Chief Justice Lewis breached a duty imposed by state or local law, which breach caused Plaintiff’s constitutional injury; or (4) a history of widespread prior abuse that puts Chief Justice Lewis on notice of the need for improved training or supervision.

Accordingly, Plaintiff fails to plead a causal nexus between any asserted violation of federal law or the federal constitution and any act or omission by Chief Justice Lewis.

Plaintiff only mentions Chief Justice Lewis a handful of times in the entire 27 page Complaint. Chief Justice Lewis is mentioned in paragraphs 11 and 46, and in the title of the fourth cause of action. Otherwise, Plaintiff simply refers to “defendants” and makes no effort to articulate in a “refined and focused” manner, what acts or omissions (beyond those brief statements made in paragraphs 11 and 46) have caused harm to Plaintiff.¹²

Accordingly, to the extent that Plaintiff sues Chief Justice Lewis in his position as a “liaison” between the Florida Supreme Court and the Florida Board of Bar Examiners (as distinct from allegations that Chief Justice Lewis “publish[ed] administrative orders affirming Board recommendations and issu[ed] unpublished decisions ratifying arbitrary license denials”), Plaintiff fails to allege facts which establish the required causal nexus between acts or omissions by Chief Justice Lewis and any legally cognizable harm to Plaintiff.

2. Acting under color of state law

“The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” W. v. Atkins, 487 U.S. 42, 49 (1988). *See also* Dossett v. First State Bank, 399 F.3d 940, 949 (8th Cir. 2005). It does not appear that Chief Justice Lewis’ activities as a member of the Liaison Committee constitute

¹²/Should this court find that Chief Justice Lewis is not immune from damages in his individual capacity by virtue of absolute judicial immunity and absolute legislative immunity, then Chief Justice Lewis enjoys qualified immunity from suit.

action “under color of state law.” This is so because state law does not confer any “power” on Chief Justice Lewis in this position. He has only the power to, along with the other members of the Liaison Committee “‘coordinate’ the work of the Bench, Bar, law schools and bar examiners, by making recommendations to the Florida Supreme Court.” Fla. Bar Admiss. R. 1-26.1. The “power” conferred on Chief Justice Lewis in his capacity as a member of the Liaison Committee (as distinct from his position as a sitting Chief Justice of the Florida Supreme Court) is insufficient to constitute “action under color of state law.”

B. Plaintiff fails to allege a violation of Article I, Section 10 of the United States Constitution.

“A bill of attainder, forbidden by U.S. Const. Art. I § 9, cl. 3 and § 10, cl. 1, has been described as ‘a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.’” Little v. North Miami, 805 F.2d 962, 965 (11th Cir. 1986) (quoting Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 846-47, 104 S. Ct. 3348, 3352, 82 L. Ed. 2d 632 (1984), which in turn quoted Nixon v. Administrator of General Services, 433 U.S. 425, 468, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977)). The Supreme Court has further stated: “A bill of attainder is a *legislative act* which inflicts punishment without a judicial trial.” United States v. Lovett, 328 U.S. 303, 315 (1946) (emphasis supplied).

The purpose of the Bill of Attainder Clause is described as follows:

The Bill of Attainder Clause implements the doctrine of separation of powers. “Just as Article III confines the Judiciary to the task of adjudicating concrete ‘cases or controversies,’ so too the Bill of Attainder Clause was found to ‘reflect . . . the Framers’ belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the

blameworthiness of, and levying appropriate punishment upon, specific persons.”
(Citations omitted)

Seariver Mar. Fin. Holdings v. Mineta, 309 F.3d 662, 668 (9th Cir. 2002) (*quoting* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977), *which in turn quoted* United States v. Brown, 381 U.S. 437, 445, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965)).

Plaintiff challenges various policies in this action. (Complaint, pg. 3-4, ¶¶1, 4, 5, 6, 8, 9 and 11) However, these policies do not meet the first element of a Bill of Attainder violation, because these policies are not laws, and they are not legislative acts. The Bill of Attainder Clause only applies to laws. Little v. North Miami, 805 F.2d 962, 965.¹³ “The constitutional prohibitions against bills of attainder apply only to acts of legislatures, and not to acts of administrative agencies.” Walmer v. United States DOD, 835 F. Supp. 1307, 1314 (D. Kan. 1993), *affirmed* 52 F.3d 851, 855 (10th Cir.), *cert. denied* 516 U.S. 974, 116 S. Ct. 474, 133 L. Ed. 2d 403 (1995). *See also* Dehainaut v. Pena, 1993 U.S. Dist. LEXIS 13861 (N. D. Ill. 1993) (Concluding that a disbursement policy was not a legislative act, but an act of the executive branch, and as such the Bill of Attainder was inapplicable); and Wroblewski v. Washburn, 1990 U.S. Dist. LEXIS 20025 (W. D. Wis. 1990) (concluding that the city’s negotiating policy is not a law, and did not constitute punishment, and therefore did not violate the Bill of Attainder clause).

¹³/In Little, the Eleventh Circuit concluded that a resolution passed by the City Council for the City of North Miami was not a legislative act having the force of law. The Eleventh Circuit further noted that “the resolution is not ‘a regulation of general and permanent nature . . . enforceable as a local law.’” Little, 805 F.2d, 962, 966. In the same vein, any nonrule policies challenged by Plaintiff, by their very nature, lack the “permanent nature” of a law, and therefore, are not subject to the Bill of Attainder.

In light of the fact that Plaintiff does not allege that challenged policies are “laws” or “legislative acts,” Plaintiff fails to allege a Bill of Attainder violation with respect to said policies.

Further, the rule provisions challenged by Plaintiff do not constitute unlawful bills of attainder. In describing the purpose of the Bill of Attainder Clause, the Eleventh Circuit has stated:

The Bill of Attainder Clause “was not intended to serve as a variant of the equal protection doctrine, invalidating every Act of Congress or the State that legislatively burdens some persons or groups but not all other plausible individuals. In short, the Bill of Attainder Clause serves as an important ‘bulwark against tyranny,’ . . . It does not do so by limiting Congress to the choice of legislating fro the universe, or legislating only benefits, or not legislating at all.

Whitney v. Heckler, 780 F.2d 963, 974 (11th Cir. 1986). Assuming for argument purposes that Plaintiff is correct and unspecified rules relating to admission to The Florida Bar burden some groups [in this case, it is not clear whether the asserted burden falls just on those who are disabled; or whether Plaintiff is asserting that it also falls people who are “simply disliked and [who have] lived long enough to have passed through embarrassing personal and/or business difficulties, such as extended unemployment, divorce, disputes with employers or creditors, minor brushes with law enforcement and pro se litigation” (Complaint, ¶43)] and not others, this alone does not indicate that the challenged Rules of the Supreme Court Relating to Admission to The Florida Bar constitute a Bill of Attainder. Rather, as noted above, a legislative act must “determine[] guilt and inflict[] punishment upon an identifiable individual without provision of the protections of a judicial trial.” Little.

Plaintiff's challenge to rules fail because those rules (1) are not directed to an identifiable individual or class of individuals; (2) do not constitute punishment; and (3) do not attempt to determine guilt without the protections of a judicial trial.

1. Rules 3-11 and 3-13 are not directed to an identifiable individual or class of individuals, but rather are directed to all applicants for admission to The Florida Bar.

In Seariver Maritime Financial Holdings, Inc., 309 F.3d 662, 669 (9th Cir. 2002), the Ninth Circuit described the following “guideposts” to be used in determining whether legislation singles out a person or class within the meaning of the Bill of Attainder Clause:

First, we look to whether the statute or provision explicitly names the individual or class, or instead, describes the affected population in terms of general applicability. Our second focus, intricately connected with the first, is whether the identity of the individual or class was “easily ascertainable” when the legislation was passed. Third, we examine whether the legislation defines the individual or class by “past conduct [that] operates only as a designation of particular persons.” Finally, we review whether the past conduct defining the affected individual or group consists of “irrevocable acts committed by them.” (Citations omitted)

The first three factors described in Seariver are self explanatory. The final factor (whether a legislative act defines the specific class of persons affected by the “irreversible acts committed by them”) requires some explanation. In Seariver, the Ninth Circuit noted that “if the defining act is irrevocable, the individual or class may not escape the effect of the legislation by correcting the past conduct, thereby exiting the target class.” *Id.* Accordingly, the key component regarding the fourth factor is the ability of the individual to correct past conduct and exit the target class. An application of the guideposts or criteria detailed in Seariver leads to the inescapable conclusion that the challenged Rules of the Supreme Court Relating to Admission to The Florida Bar are not focused on an identifiable person or class.

Addressing Plaintiff's bill of attainder claim is challenging because he fails to allege which rule or rules he believes run afoul of Article I, §10 of the United States Constitution.¹⁴ It appears that, in the third cause of action, Plaintiff challenges Fla. Bar Admiss. R. 3-11 as amounting to an unlawful bill of attainder.¹⁵ (Complaint, ¶43) This cause of action is directed to the "further inquiry" which is required when specified conduct (including evidence of emotional or mental instability) is discovered or revealed. The fourth cause of action may include a challenge to Fla. Bar Admiss. R. 3-13,¹⁶ which contains the elements and manner of proof of rehabilitation from prior acts which bear adversely on the determination of character and fitness. (Complaint, ¶50)

Rule 3-11 does not identify a particular individual or class. The rules does not explicitly name anyone. It uses terms which are generally applied to all applicants for admission to The Florida Bar. The identity of a particular person or class was not "easily ascertainable" when the rules were enacted. Rule 3-11 does not define an individual or class by "past conduct [that] operates only as a designation of particular persons." Finally, Rule 3-11 does not define past conduct in a manner which is irrevocable. Rather, prior conduct is only to be the subject of further inquiry to determine present character and whether rehabilitation has occurred. Fla. Bar.

¹⁴/In lieu of rule cites, Plaintiff includes summary descriptions of the rules. (Complaint, pp. 3-4)

¹⁵/The "adverse matters" which are the subject of "further inquiry," as described in the Complaint (Complaint, ¶¶43 and 44), are detailed in Fla. Bar Admiss. Rule 3-11.

¹⁶/In the fourth cause of action, Plaintiff also challenges the actual Specifications filed against him as being a "bill of attainder." (Complaint, ¶49) Clearly such a claim must fail because, again, the Specifications are not a legislative act or law, and, therefore, cannot satisfy the requirements for a violation of the Bill of Attainder clause.

Admiss. R. 3-12 and 3-13. Specifically, Rule 3-11 does not contain language which absolutely prohibits individuals who have any of the listed matters present in their application from ultimately being admitted to practice law.¹⁷ Rather, it only provides for further inquiry when specified elements are present.

In the same vein, Rule 3-13 does not identify a particular individual or class. The rule does not explicitly name anyone or identify any group. It uses terms which are generally applied to all applicants for admission to The Florida Bar, who have prior acts which would be considered adversely on the issue of character. The identity of a particular person or class was not “easily ascertainable” when the rules were enacted. Rule 3-13 does not define an individual or class by “past conduct [that] operates only as a designation of particular persons.” Finally, Rule 3-13 does not define past conduct in a manner which is irrevocable. In fact, the opposite is true. Rule 3-13 describes the elements of rehabilitation, and how it should be proven.

For the foregoing reasons, Plaintiff cannot demonstrate that the challenged rules identify an individual or class, and target that individual or class for punishment.

2. Rules 3-11 and 3-13 do not impose punishment.

In determining whether a statute imposes punishment, the Court must determine whether (1) the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, “viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes”, and (3) whether the legislative record

¹⁷/Rule 3-11 only provides, in part, that “A record manifesting a deficiency in the honesty, trustworthiness, diligence, or reliability of an applicant or registrant *may* constitute a basis for denial of admission.” (Emphasis supplied)

suggests a legislative intent to punish. Little v. North Miami, 805 F.2d 962, 966 (*quoting Selective Service System*, 468 U.S. at 852, 104 S. Ct. at 3355, *which in turn quoted Nixon*, 433 U.S. 425 at 473, 475-76, 478, 97 S. Ct. 2777, 2805, 2806-07, 2809, 53 L. Ed. 2d 867)).

While “[d]isqualification from the pursuits of a lawful avocation has been imposed as punishment,” United States v. Brown, 381 U.S. 437, 448 (1965), Rule 3-11 does not on its face mandate disqualification from a chosen profession if the listed elements are present. Rule 3-11 simply permits further inquiry if those elements are present. Further inquiry about specified issues can hardly meet the historical definition of punishment. In the same vein, Rule 3-13, which details the elements of rehabilitation and describes how it must be proven, can hardly meet the historical definition of punishment.

Additionally, Rule 3-11 does not meet the second test for punishment, to the extent that this rule permits further inquiry when specified elements are present. This rule clearly does not impose an excessive burden on applicants, to the extent that it permits “further inquiry.” This inquiry is part of the character and fitness screening conducted by the Board. The purpose of this character and fitness screening conducted by the Florida Board of Bar Examiners is to protect the public and safeguard the judicial system. Fla. Bar Admiss. R. 1-14.1. Clearly, the criteria described in Rule 3-11 are rationally related to that end.¹⁸

In the same vein, Rule 3-13 does not meet the second test for punishment. While it does require Plaintiff to prove rehabilitation by “clear and convincing evidence,” this requirement is

¹⁸/As reflected in Fla. Bar. Admiss. R. 3-11 and 3-12, inquiry regarding emotional and mental instability would be for the purpose of determining present character and fitness. A history of mental illness alone, therefore, would not be a disqualifying event.

justified by a nonpunitive remedial legislative purpose. Specifically, it ensures that, prior to admitting Plaintiff to practice law in the State of Florida, the Board has before it the appropriate evidence necessary to establish that Plaintiff has rehabilitated himself from prior acts, and that Plaintiff's present character and fitness are adequate for admission. This further serves the purpose of protection of the public and safeguarding the judicial profession.

As to the third test for punishment, Plaintiff does not allege the existence of any information which would establish legislative intent to punish Plaintiff or a class of identifiable persons to which Plaintiff belongs.

Accordingly, Plaintiff fails to allege facts from which this Court could conclude that Plaintiff has challenged a rule or rules which imposes punishment on an identifiable person or class.

3. Plaintiff fails to allege that any challenged rule inflicts punishment without the protection of a judicial trial.

Plaintiff does not allege facts and cannot demonstrate that either Rule 3-11 or Rule 3-13 inflicts punishment without provision of the protections of a judicial trial. The Rules of the Supreme Court Relating to Admission to the Florida Bar provide for a judicial process to challenge preliminary determinations of character and fitness. Plaintiff has a right to a formal hearing, which is an evidentiary hearing, to contest any Specifications filed against him. He also has a right to seek judicial review from the Florida Supreme Court, to the extent that a recommendation is made that he not be admitted to practice law in this state.

For all of the foregoing reasons, Plaintiff cannot state a cause of action for an unlawful bill of attainder.

X. PLAINTIFF FAILS TO STATE A CAUSE OF ACTION FOR A VIOLATION OF THE AMERICANS WITH DISABILITIES ACT.

Title 42 U.S.C. §12132, provides:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.

“To state a claim under Title II of the ADA, a plaintiff must allege: (1) that he is a ‘qualified individual with a disability;’ (2) that he was ‘excluded from participation in or ... denied the benefits of the services, programs, or activities of a public entity’ or otherwise ‘discriminated [against] by such entity;’ (3) ‘by reason of such disability.’” Shotz v. Cates, 256 F.3d 1077, 1079 (11th Cir. 2001). In the instant case, Plaintiff fails to allege a cause of action under Title II of the ADA.

Plaintiff fails to allege that he is a qualified individual with a disability. The phrase “qualified individual with a disability” is defined in statute as: “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. §12131(2).

The application of §12131(2) in the context of licensure is explained further as follows: “Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a ‘qualified individual with a disability’ with respect to licensing or

certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see § 35.104).” 42 C.F.R. Part 35, Appendix A.

Plaintiff alleges that he has established a “prima facie case for good moral character.” (Complaint, ¶13) He also alleges that he is disabled, as the term is used in the ADA. (Complaint, ¶14) He lists information in his investigative file with the Florida Board of Bar Examiners. (Complaint, ¶15) However, he never asserts that, with or without reasonable accommodations, he meets the essential requirements to become admitted to practice law in the State of Florida. (Complaint)

Additionally, Plaintiff fails to allege that he has been discriminated against by reason of his disability. (Complaint) In fact, the allegations in the Complaint suggest several reasons why further inquiry has been necessary in the pending bar admission proceeding, such as defaulting on child support obligations, problems with filing his tax returns and other unspecified financial issues. (Complaint, ¶15) While Plaintiff appears to assert that these problems are all the result of and excused by prior mental illness, or his prior motorcycle accident, these allegations would appear to defeat any claim that Plaintiff was discriminated against *by reason of mental illness*.

For all of the foregoing reasons, Plaintiff fails to allege a violation of Title II of the ADA.

XI. SHOULD THE COURT FIND THAT PLAINTIFF SUES CHIEF JUSTICE LEWIS FOR DAMAGES, FOR ANY ACTS OR OMISSIONS WHICH ARE NEITHER LEGISLATIVE OR JUDICIAL IN NATURE, CHIEF JUSTICE LEWIS IS NOT SUBJECT TO INDIVIDUAL LIABILITY FOR DAMAGES UNDER TITLE II OF THE ADA.

Should this Court conclude that Chief Justice Lewis is being sued for any acts or omissions which are not judicial or legislative in character (and therefore not subject to either absolute judicial or legislative immunity), Plaintiff may not sue Chief Justice Lewis in his individual capacity for damages. As noted above, Title II prohibits discrimination by public entities. In relationship to suits against states, the phrase “public entity” means (A) any State or local government; or (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government. 42 U.S.C. §12131(1).

On its face, Title II does not permit suits against persons in their individual capacities. “In suits under Title II of the ADA . . . the proper defendant usually is an organization rather than a natural person Thus, as a rule, there is no personal liability under Title II.” Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000). Accordingly, Plaintiff may not seek individual liability against Chief Justice Lewis, under the ADA.

XII. SHOULD THE COURT FIND THAT PLAINTIFF SUES CHIEF JUSTICE LEWIS FOR DAMAGES FOR ANY ACTS OR OMISSIONS WHICH ARE NOT JUDICIAL OR LEGISLATIVE IN CHARACTER, ELEVENTH AMENDMENT IMMUNITY BARS A SUIT FOR DAMAGES AGAINST CHIEF JUSTICE LEWIS IN HIS OFFICIAL CAPACITY FOR VIOLATIONS OF THE ADA.

To the extent that Plaintiff sues Chief Justice Lewis in his official capacity for damages for violations of the Americans with Disabilities Act, if judicial and legislative immunity were inapplicable, Eleventh Amendment immunity would still bar Plaintiff’s claims because Congress has not lawfully abrogated Eleventh Amendment immunity with respect to Title II of the ADA, as it relates to the claims brought by Plaintiff in the case at bar. In U. S. v. Georgia, ___ U.S. ___, 126 S.Ct. 877, 882, 163 L.Ed.2d 650, 659 (2006), the Supreme

Court concluded that “insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” In that case, the Court found that Plaintiff, a disabled inmate, stated a cause of action for violations of the Eighth Amendment’s prohibition against cruel and unusual punishment. Accordingly, the Court concluded that there was a valid abrogation of sovereign immunity for such an action brought under Title II of the ADA.

Accordingly, the question here, in determining whether there has been a valid abrogation of immunity, is whether the cause of action brought by Plaintiff actually violates the Fourteenth Amendment. Plaintiff appears to allege that certain policies and rules as applied to him, discriminate based on his disability. This claim is most closely akin to an asserted equal protection violation. “[T]o properly plead an equal protection claim, a plaintiff need only allege that through state action, similarly situated persons have been treated disparately.” Thigpen v. Bibb County, 223 F.3d 1231, 1237 (11th Cir. 2000). Here, Plaintiff does not allege that he is treated differently than similarly situated persons.

Additionally, should Plaintiff state a cause of action for disparate treatment, there exists a rational basis for any disparate treatment. Disabled persons are not a suspect class. Board of Trustees of the University of Alabama, 531 U.S. 356, 366, 121 S. Ct. 955, 963, 148 L. Ed. 2d 866, 878-879 (2001). *See also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (declining to find that individuals with mental retardation were a quasi-suspect category). Accordingly, disparate treatment involving individuals with disabilities is analyzed using rational basis review.

In Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367, 121 S.Ct. 955, 963-

964, the Supreme Court noted:

Under rational-basis review, where a group possesses “distinguishing characteristics relevant to interests the State has the authority to implement,” a State's decision to act on the basis of those differences does not give rise to a constitutional violation. “Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” Moreover, the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative “any reasonably conceivable state of facts that could provide a rational basis for the classification.” (Emphasis supplied)

In light of Garrett, disparate treatment between Plaintiff and others similarly situated will be upheld if there exists a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, “any conceivable state of facts” can provide a rational basis for such disparate treatment.

Here, the provisions of Rule 3-11 pass rational basis review, because they are designed to ensure that individuals who seek membership in The Florida Bar meet the character and fitness requirements for such admission. “Further inquiry” as it relates to the matters listed enables the Florida Board of Bar Examiners to determine present character, and to determine whether rehabilitation has occurred. Since part of practicing law may include having access to client funds and having access to trust accounts, the state has a legitimate state interest in evaluating an applicant’s prior and current financial responsibility. Since a lawyer is tasked with upholding the law, inquiry about prior acts of misconduct (whether they be criminal in nature, violations of lawful orders or other kinds of misconduct) may be relevant to the lawyer’s character and fitness. Finally, the State has a legitimate interest in ensuring the

present mental and emotional stability of individuals who are admitted to The Florida Bar. Information about prior mental health issues may be pertinent to establish current fitness to practice. Here, Plaintiff alleges that he was tentatively diagnosed with a bipolar disorder in September 2001, and that he has been hospitalized for mental illness in the past. (Complaint, pg. 9) Prior problems may or may not provide indicators of present problems. Further inquiry is necessary to determine whether present problems exist.

Additionally, inquiry about the prior mental health issues may be appropriate to determine how, if at all, those issues are related to other problematic areas which may arise in the course of considering fitness to practice law. Here, Plaintiff would have Defendants assume that any areas of past conduct which may be considered adversely in the pending bar admission proceeding, were themselves the result of prior mental health issues or his motorcycle accident, or that the past conduct just doesn't matter. Respectfully, Defendants have a responsibility to protect the public by conducting their own inquiry to determine whether Plaintiff is correct.

In sum, assuming Plaintiff were to allege and prove that he was treated differently *vis a vis* similarly situated individuals, there exists a rational basis for any disparate treatment. For all of the foregoing reasons, the instant cause of action does not constitute a violation of the Fourteenth Amendment. Accordingly, consistent with U.S. v. Georgia, there has been no valid abrogation of Eleventh Amendment immunity as it relates to Plaintiff's ADA claim.

The same result would follow if Plaintiff asserts that it is the violation of Article I, Section 10, U. S. Const., which is the constitutional violation which gives rise to the ADA

violation. As noted previously, Plaintiff fails to allege a cause of action for a violation of the Bill of Attainder Clause.

WHEREFORE Chief Justice Lewis moves this Honorable Court to enter an order dismissing Plaintiff's Complaint as it relates to Chief Justice Lewis.

Respectfully Submitted,

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ATTORNEY GENERAL

s/ Stephanie A. Daniel
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by Notice of Electronic Filing, to JEFFREY H. NORTHCUTT, ESQUIRE, at 1814 Cedar River Drive, Jacksonville, Florida 32210, and to JAMES J. DEAN, ESQUIRE, at Post Office Box 1876, Tallahassee, Florida 32302-1876, this 23rd day of October, 2006.

s/ Stephanie A. Daniel
Stephanie A. Daniel
Senior Assistant Attorney General