The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202

(904) 353-0211 phone
(904) 353-9307 facsimile
www.bedellfirm.com

BEDELLFIRM

Litigation Excellence Since 1865.

Bedell, Dittmar, DeVault, Pillans & Coxe, P.A.
Attorneys at Law

Henry M. Coxe III
hmc@bedellfirm.com

May 14, 2020

(via FedEx)
The Florida Bar
c/o Ashley Morrison, Bar Counsel
Orlando Branch Office
1000 Legion Place, Ste. 1625
Orlando, FL 32803-1050

Re: Complaint by Robert Burns against Bryan Andrew Lober
The Florida Bar File No. 2020-30,580 (18B)

RESPONSE TO COMPLAINT

Dear Ms. Morrison:

This firm represents respondent Bryan Lober as to the above complaint. Please accept this letter as Lober's response to Robert Burns' complaint, submitted in accordance with Rule 4-8.4(g) of the Rules of Professional Conduct of the Rules Regulating The Florida Bar.

1. Introduction

Lober was admitted to The Florida Bar in 2011 and has never been disciplined by the Bar. He is an elected member of the Brevard County Board of County Commissioners ("Board"), and presently serves as Chairman of the Board. Before being elected to the Board, Lober served as President of the Brevard County Bar Association, while practicing law in Brevard County. He was recently reappointed to the Bar's Judicial Nominating Procedures Committee. Lober is rated "AV Preeminent" by Martindale-Hubbell. For years he has represented, pro bono, victims of domestic violence for Brevard County Legal Aid.

As an elected official and a citizen, Lober regularly engages in oral and written speech protected by the First Amendment of the U.S. Constitution. In his capacity as an elected Board member, he openly and publicly voices his opinions on various matters of a political nature, and is required to cast votes on measures before the Board, which are often the subject of disagreement and controversy. These actions often result in public discourse in the press and, in the modern political arena, on social media. Elected officials like Lober naturally develop friends and supporters, as well as enemies and detractors—such is the nature of the political process.

As discussed below, based on the facial deficiency of the Burns' complaint, it should be dismissed. Regrettably, this is an effort to weaponize the grievance process in an effort to chill Lober's right to free speech.

2. The complainant

Lober is generally familiar with complainant Robert Burns, who is the cousin of current City of Palm Bay Deputy Mayor Kenny Johnson. Burns was Johnson's campaign manager for the 2018 Palm Bay municipal elections. He also managed the campaign of an unsuccessful Board candidate who ran against Lober. To Lober's knowledge, Burns is the current campaign manager of Democrat congressional candidate Jim Kennedy.

Burns has publicly leveled numerous demonstrably false and baseless allegations against Lober in various attempts to malign him. These have included statements, and threats, made during Board meetings.[1] Lober has repeatedly corrected the record as to Burns' false claims, which appears to have frustrated Burns, and resulted in him retaliating against Lober via the filing of this Bar complaint, as well as the submission of a complaint to the Florida Elections Commission, and a public records complaint to the State Attorney's Office.[2]

Johnson was previously arrested and investigated as to a claim that he texted a lewd photograph of himself to an underaged student at a school in which he served as an assistant coach and substitute teacher. Until his volunteer status was suspended on March 5, 2020, Johnson volunteered with Brevard County Schools, in a position which allowed him close contact with underaged children. As a citizen and elected Board member, Lober has grave concerns as to

---

[1] For example, at the May 21, 2019 meeting, Burns issued the following threat during the public comments portion of the meeting: "I'm giving you yet one more opportunity to correct the misstatements that you made about me and the false statements that you made about your actions on social media before I proceed with two separate complaints that I have notarized to be filed today with two separate jurisdictions that you fall under. Not only are you subject to the laws and the regulations of this board but you also as an attorney, you fall under the professional ethics standards of the Florida Bar, which you have kind of lost your way and kind of surpassed the threshold that would substantiate a complaint for that. So today I'm giving you one more opportunity to correct the record before I go forward with any other message." *See* video of 5/21/19 mtg., https://www.youtube.com/watch?v=uNbs1_kDov0&list=PLuEpZvmp8Y9-f39hL_Fm82hJAAm-22InH&index=33, at 02:19:48 (last visited May 12, 2020).

[2] Burns' FEC complaint remains technically pending, but to Lober's knowledge the only remaining issue before the FEC concerns a scrivener's error Lober made on an FEC report, which Lober corrected *before* Burns filed his FEC complaint. The State Attorney has dismissed Burns' public records complaint. A copy of the State Attorney's letter dismissing Burns' complaint is attached as Exhibit 1.

Johnson volunteering with Brevard County Schools and holding public office in light of the credible allegations made against him. Lober has the right to voice his concerns in this respect. Burns' action with regard to filing a Bar complaint is little more than Burns following through on past threats, and Burns' effort to chill Lober's Constitutionally-protected right to free speech and retaliate against Lober for exercising such right.[3]

Burns also has a documented history of using fake identities. The Brevard County Sheriff's Office previously investigated whether Burns was behind Facebook posts that appeared to impersonate Lober. While Burns was not ultimately charged, the Sheriff's Office did trace the IP address used to impersonate Lober to Burns' home address. And, the Sheriff's Office traced the credit card associated with the impostor account to Burns. As stated by law enforcement, the only reason Burns was not charged was because it could not be shown that he was the individual behind the keyboard, and there was concern that the "beyond a reasonable doubt" burden of proof at trial might be difficult to meet. But, adding to the degree of certainty, Burns essentially outed himself by requesting details of the confidential investigation as it was still taking place. To Lober's understanding, when law enforcement made contact with Burns, he indicated he already had an attorney and refused to explain why his IP address and credit card were provided by Facebook.

In the Facebook post in question, the imposter attempted to portray Lober as attacking State Representative Randy Fine. On the same page, the imposter posted a photograph depicting Lober and Fine as the faces on two insects engaged in a sexual act. Burns has continued his attacks against Fine and Lober. FDLE recently investigated Burns for sending threatening text messages to Fine. A copy of the FDLE report in this respect is attached as Exhibit 2.

Burns and Johnson are known political opponents of Lober, who is a Republican, and is forthright in his political views. Burns has been an outspoken foe of several local Republicans, including Lober, over the last few years, and various articles have been written in local news publications concerning Burns' various disputes and interactions with local officials. Burns has misleadingly represented himself as a member of the news media in an attempt to gain additional access to governmental offices and officers, e.g., access to media-only events as are commonly held. An identification of who is a Republican and who is a Democrat is not important—the roles could be reversed. However, the Bar should view the complaint in the proper context, and recognize Burns is attempting to weaponize the complaint process against a personal and political opponent.

This entire response could be used to detail Burns' continuing obsession with Lober. In the interest of brevity, additional details will be provided only if requested by the Bar.

---

[3] To Lober's understanding, Burns is presently on pre-trial release for a felony in South Carolina, and has a criminal history in no less than four states, which includes a conviction for at least one violent offense.

3. Preliminary considerations

The First Amendment prohibits abridgments of the freedom of speech. First Amendment doctrine generally distinguishes between content-based and content-neutral regulations, and where regulations:

> target speech based on its communicative content, [they] are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. This stringent standard reflects the fundamental principle that governments have no power to restrict expression because of its message, its ideas, its subject matter, or its content.

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (internal citations and quotations omitted).

The U.S. Supreme Court has been very protective of a lawyer's speech in the non-advertising context. As explained in *Becerra*, "this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers." *Id.* at 2374 (citations and internal quotations omitted).

The Bar has an interest in regulating conduct that constitutes the practice of law, and in the protection of clients. But the Bar has no interest, let alone a compelling interest, in regulating the Facebook posts (or tweets, blogs, etc.) of its members that are wholly unrelated to the practice of law. Lober's statements, as discussed below, were made as a private citizen as to matters of a public or political concern. As such, his comments are protected by the First Amendment and the Bar has no compelling interest in regulating those statements.

Furthermore, it is important to recognize what Burns' complaint does not implicate. It does not implicate prior or active attorney-client relationships. It does not implicate actions of Lober taken while executing duties in the capacity of a practicing lawyer. And, it does not implicate an active or imminent legal or quasi-legal proceeding which involved Lober.

4. Burns does not assert a Bar rule violation, and his complaint should be dismissed

While the allegations in Burns' complaint are incomplete and at best misleading, even were they all true, they do not allege a *prima facie* violation of any rule.

On February 23, 2020, Lober posted the following statement on his Facebook account:

> I'm offering a $500 cash reward to the first person to provide me a copy of the Probable Cause Affidavit ("923") in Palm Bay Deputy Mayor Kenny Johnson's arrest for violation of 847.0133, Fla. Stat. I want to get to the bottom of this; Brevard has a right to know. I will keep your identity and that of the victim confidential unless I am legally obligated to release it. If you do not want me to know your identity, I can accommodate such a request. If you have the requested document, contact me for more details (e.g., 923 must be complete, unaltered, and in an unredacted state among other conditions) on the reward to confirm whether you qualify and to make arrangements for the exchange.

In a Facebook post later that day, Lober stated:

> This request is not being made in any official capacity but rather as a concerned resident of Brevard County. Moreover, the document appears to have been sealed or expunged, making it necessary to get it from someone who had access while it was still public record.

In its entirety, Burns' Bar complaint alleges:

> On February 23, 2020, County Commissioner and attorney Bryan Lober post (sic) a public post on his Personal Facebook account in which he also discusses County Business, which offered a reward of $500 for anyone who could produce and supply him with the Probable Cause Affidavit in a case that was dropped, expunged, and sealed.
>
> The case in question is against another elected official of which he has contention with and his associates. He goes on to ask for the 923 to be an unreacted copy and offers to protect the identity of the person who potentially illegally supplies this information for pay.
>
> He then goes on to make several false statements and implications in his comments on this post and others on other pages. A week prior to this post and prior to a robocall that went out to several thousand residents about this case, Lober made joking and disparaging comments about the individual and implying that he sent and confessed to sending "dick pics" to children without supplying any evidence to justify this statement.

> He also has not denied any involvement with the production of this inflammatory robocall that has insight (sic) the public to which many were afraid because of the manner in which the information was relayed to sound like an official government public notification.
>
> Commissioner Lober is encouraging someone to be in contempt of a court order and get around the wishes of the court to expunge and seal a record. And offering money to do so. He is also potentially violating this individuals (sic) civil rights through the implications and contrary assertions he is making in a case that has already been decided by the court. This has become a pattern of Bryan Lober against private citizens as well as elected officials. It is not ethical or professional by any stretch.

Burns does not, generally or specifically, cite to any provision of the Rules Regulating The Florida Bar which Lober has violated. As Burns' complaint is framed, Lober has no reasonable way of responding to it. Burns' complaint is the substantive equivalent of a civil court claimant filing a complaint which includes broadly-stated factual allegations, but never actually identifies or asserts a claim for relief. Such a complaint would be quickly dismissed under the Federal Rule of Civil Procedure or the Florida Rule of Civil Procedure. Burns' complaint should be treated similarly. Lober should not be made to guess as to the nature of the supposed Bar violation claim against him. Fairness and due process demand otherwise.

That said, Burns seems to imply Lober has in some way violated Florida law as to Johnson's expunged or sealed criminal investigation and prosecution file. Burns does not cite to any Florida statute or case law ruling which Lober has violated. Presumably, Burns is referring to Johnson's file having been expunged under section 943.0585, Fla. Stat. ("Court-ordered expunction of criminal history records"), or sealed under section 943.059, Fla. Stat. ("Court-ordered sealing of criminal history records.). Burns in no way specifies how Lober is violating section 943.0585 or section 943.059. Lober recognizes that to the extent Johnson's criminal investigation and prosecution file was expunged or sealed, it could not be produced or disseminated by any law enforcement agency, the clerk of court, or the state attorney's office (if expunged, the file should have been destroyed). His Facebook post does not suggest otherwise. But, to the extent a copy of the probable cause affidavit for Johnson's arrest was acquired from any law enforcement agency, the clerk of court, or the state attorney's office *before* any orders under section 943.0585 or section 943.059 as to Johnson's criminal investigation and prosecution file were issued, and are now in the hands of a member of the public, there are no provisions or prohibitions under sections 943.0585 or 943.059 which apply to such copy.

If Burns' complaint is interpreted to suggest Lober was targeting law enforcement, the clerk of court's office, or courthouse personnel with the offer, Lober's Facebook posts render such contention highly unlikely. Lober explicitly stated he was seeking to obtain the document "from someone who had access while it was still public record." That said, it might be noted that, having practiced law in Brevard County for roughly a decade, Lober has numerous friends and contacts who work in law enforcement, the clerk of court's office, and otherwise at the courthouse. Surely, if Lober was seeking to acquire a confidential document by nefarious means, he would have done so in a manner that did not involve a *public* request for the document. The assertion that his Facebook post sought to accomplish an illegal act is wholly illogical.

There is no support for the notion that an attorney who, in his personal capacity or capacity as an elected official, posts a statement on a social media platform which does not involve a client, opposing attorney, or a party in an active court proceeding, a judicial officer, or an active court proceeding, violates the Rules of Professional Conduct. Importantly, the posts at issue had nothing to do with an active court proceeding and did not concern any attorney-client relationship. Lober's Facebook posts—which implicate First Amendment protections—related to matters of a personal and/or political nature. In this respect, the Scope of the Preamble to Chapter 4 of the Rules Regulating The Florida Bar specifically warns:

> … the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. …

To the extent the discourse between and involving Burns and Johnson, and Lober, might be viewed as a form of "collateral" dispute, it does not provide Burns with standing to assert Lober has violated the Bar rules.

Lober is aware that the Bar has considered whether attorneys might be sanctioned for statements made on social media platforms. In this respect, he is aware of an instance where a Bar member, who is a member of the U.S. House of Representatives, along with receiving a Notice of No Probable Cause, received a Letter of Advice as to a statement made on Twitter. *See In re Gaetz*, TFB No. 2019-00,418 (1B). The Representative's statements were directed toward an individual who was scheduled to testify the next day before a House committee, implied the witness was having an extramarital affair, referenced members of the witness' family, and implied that the witness would be going to jail. The Grievance Committee issued a Notice of No Probable Cause. But it advised that, in its view, the Representative's actions were "not consistent with the high standards of our profession." That instance is distinguishable from the complaint against Lober. The Representative was communicating directly with a witness as to an active legal or quasi-legal proceeding; the Representative is an officer of the body before whom the witness

would be testifying; and the Representative's communications and implied threats related to the substance of the testimony to be provided. Remotely similar considerations do not apply to Lober.

In his complaint, Burns also mentions Lober's supposed involvement in a "robocall." Burns does not describe the "robocall" in any detail. Like his other assertions, Burns does not allege Lober has violated any Bar rule as to the supposed "robocall." Of course, an analysis of any "robocall" would naturally involve a consideration of First Amendment issues. *See Cahaly v. Larosa*, 796 F. 3d 399, 405 (4th Cir. 2015) (examining issues related to a robocall statute under a strict scrutiny analysis).

Without relying on any Bar rule Burns otherwise claims Lober made "joking and disparaging comments about" Johnson. Burns does not identify those comments, and any details thereof. As such, one cannot conclude such supposed comments concerned an active court proceeding, concerned a party to an active court proceeding, concerned a former or current client, or concerned a judicial officer. These fundamental considerations should be determinative as to whether such statements are of a disciplinary concern. Otherwise, whether Lober's statements were "disparaging" or otherwise offensive is irrelevant. Lober's statements are fully protected by the First Amendment:

> The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression.

U.S. v. Alvarez, 567 U.S. 709, 729-30 (2012); *see Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) ("an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site"); *Bond v. Floyd*, 385 U.S. 116, 135-36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy. The central commitment of the First Amendment… is that debate on public issues should be uninhibited, robust, and wide-open") (citation and internal quotation marks omitted).

We have examined Florida Supreme Court cases which have found "disparaging comments" amount to sanctionable Bar violations. As would be expected, cases where disparaging, uncivil, or demeaning statements resulted in sanctions occurred only in the context of active court proceedings and/or an attorney-client relationship. *See, e.g. Fla. Bar v. Martocci*, 791 So. 2d 1074, 1076-77 (Fla. 2001) (evidence supported referee's conclusion that attorney was guilty of violating disciplinary rule prohibiting conduct prejudicial to administration of justice; opposing

counsel in a divorce case recounted instances in the course of a case in which subject attorney made unethical, disparaging, and profane remarks to belittle and humiliate both opposing party and counsel, and there was evidence that in open court, the attorney threatened to beat the opposing party's father when he challenged a disparaging remark); *Fla. Bar v. Buckle*, 771 So. 2d 1131, 1133 (Fla. 2000) (held that a public reprimand was warranted against a criminal defense attorney who sent a victim of a crime an objectively humiliating and intimidating letter designed to cause her to abandon her criminal complaint); *Fla. Bar v. Sayler*, 721 So. 2d 1152 (Fla. 1998) (imposing a public reprimand where an attorney sent a frightening letter to opposing counsel in a workers' compensation matter which referenced the murder of a workers' compensation attorney and attached a copy of a newspaper article regarding the murder); *Fla. Bar v. Uhrig*, 666 So. 2d 887 (Fla. 1996) (attorney violated rule 4–8.4(d) by mailing insulting letter to an opposing party who was a member of a minority group); *Fla. Bar v. Johnson*, 511 So. 2d 295 (Fla. 1987) (imposing a public reprimand where an attorney sent several letters to a client with whom he had a fee dispute stating God told him the client would be visited with a variety of biblical curses unless he paid the money he owed).

If the Bar were to take up the policing of First Amendment-protected speech just because someone is offended or views a statement as "disparaging," the Bar would necessarily engage in a policing of all Bar member statements of a personal nature, political nature, or otherwise. Lober respectfully submits the Bar has no role in regulating the personal civility of political commentators, elected officials, legislators, politicians, bloggers, tweeters, or Facebook posters merely because they also happen to be attorneys.

5. Conclusion

Burns fails to cite to any Bar rules which proscribe the Facebook posts upon which his complaint is based. And, none of the statements were alleged to: have been made in connection with Lober's provision of legal services; relate to the skill or quality of representation provided to a client; or relate to Lober's interactions with an opposing attorney, a member of the judiciary, a witness in an active legal proceeding, or a court officer. Lober's statements were utterly unconnected to the practice of law. Absent a mandatory, on-point, rule prohibiting identifiable statements or conduct, simply applying a subjective standard as Burns suggests would call into question the integrity of the complaint process and inequitably politicize it.

Based on the facial deficiency of the Burns' complaint, it must be dismissed. Burns is clearly seeking to weaponize the grievance process to chill Lober's Constitutionally-protected right to free speech. Lober respectfully submits the Bar should not become an unwitting pawn in Burns' personal and political game.

We respectfully request that the Bar dismiss Burns' complaint and promptly close this matter.

Thank you for your attention to this matter. If you require any additional information or documentation, please do not hesitate to contact us.

Sincerely,

Henry M. Coxe III

HMC:gad
Enclosures

cc: Bryan A. Lober, Esq. (via e-mail)
Robert Burns (via U.S. mail)