

**IN THE SUPREME COURT OF FLORIDA**

Case No.: SC09-3

---

**ADVISORY OPINION TO THE GOVERNOR**

**RE: COMMISSION OF ELECTED JUDGE**

---

**INITIAL BRIEF OF WILLIAM S. ABRAMSON**

---

**MESSER, CAPARELLO & SELF, P.A.**

**MARK HERRON, ESQ.**

Florida Bar No.: 199737

**ROBERT J. TELFER III, ESQ.**

Florida Bar No.: 0128694

P.O. Box 15579

Tallahassee, FL 32317

Telephone: (850) 222-0720

Facsimile: (850) 224-4359

*Attorneys for William S. Abramson*

## **TABLE OF CONTENTS**

Table of Contents.....	i
Table of Authorities.....	ii - iii
Statement of the Case.....	1
Summary of Argument.....	3
Argument.....	4
I.    Abramson is, and has been for the preceding five years, a member of the Florida Bar, and is thus eligible to be commissioned as a Circuit Judge.....	4
II.   The Governor has a ministerial duty to commission Abramson as Circuit Judge.....	13
Conclusion.....	14
Certificate of Service.....	15
Certificate of Compliance.....	15

## **TABLE OF AUTHORITIES**

### **CASES:**

<i>Benjamin v. Tandem Healthcare, Inc.</i> , 2008 WL 5333646, *2 (Fla. Dec. 23, 2008).....	8
<i>Coastal Florida Police Benevolent Association, Inc. v. Williams</i> , 838 So. 2d 543, 548 (Fla. 2003).....	11
<i>Ervin v. Collins</i> , 85 So. 2d 852, 855 (Fla. 1956).....	11, 12
<i>Fla. Soc’y of Opthamology v. Fla. Optometric Ass’n</i> , 489 So. 2d 1118, 1119 (Fla. 1986).....	8
<i>Ford v. Browning</i> , 992 So. 2d 132, 136 (Fla. 2008).....	8
<i>In Re Advisory Opinion to the Governor</i> , 192 So. 2d 757, 759 (Fla. 1966).....	5
<i>In Re Advisory Opinion to the Governor</i> , 223 So. 2d 35, 39 (Fla. 1969).....	11
<i>In Re Advisory Opinion to the Governor</i> , 156 Fla. 48, 22 So. 2d 398, 399 (Fla. 1945).....	11
<i>Slaughter v. Dickinson</i> , 226 So. 2d 97, 98 (Fla. 1969).....	13
<i>State ex rel. Bisbee v. Drew</i> , 17 Fla. 67 (Fla. 1879).....	13
<i>State ex rel. Davis v. Giblin</i> , 98 Fla. 802, 804, 124 So. 375, 376 (Fla. 1929).....	13
<i>The Florida Bar v. Abramson</i> , Case No. SC07-713 (Fla. Jan. 8, 2009).....	2, 6
<i>The Florida Bar v. Ross</i> , 732 So. 2d 1037, 1040 (Fla. 1998).....	7
<i>The Florida Bar v. Solomon</i> , 589 So. 2d 286, 287 (Fla. 1991).....	7
<i>Wennet v. Abramson</i> , Case No. 1D08-5638 (1st DCA Dec. 19, 2008).....	1

## **FLORIDA CONSTITUTION:**

Article IV, Section 1(a).....	3, 4, 13, 14
Article IV, Section 1(c).....	1, 3
Article IV, Section 19.....	11
Article V, Section 8.....	2, 3, 8, 9, 10, 11, 12
Article IX, Section 2.....	11
Article IX, Section 10.....	11

## **RULES REGULATING THE FLORIDA BAR:**

Rule 3-5.1(e).....	7, 8
Rule 3-5.1(f).....	7
Rule 3-5.1(j).....	7

## **STATEMENT OF THE CASE**

Pursuant to this Court's Order dated January 7, 2009, and Article IV, Section 1(c), Florida Constitution, William S. Abramson ("Abramson") submits the following Initial Brief as an interested party to the Governor's request for an advisory opinion regarding his authority to commission recently-elected Abramson as Circuit Judge, in and for the Fifteenth Judicial Circuit, in light of Abramson serving a suspension from the practice of law at the time he is to take office as Circuit Judge.

On November 23, 1992, Abramson was admitted to The Florida Bar. He has never been disbarred, nor has he resigned his membership in The Florida Bar in the face of disciplinary proceedings.

In an election held on August 26, 2008, Abramson defeated incumbent Circuit Judge Richard Wennet for the office of Circuit Judge in and for the Fifteenth Judicial Circuit, Group 23.<sup>1</sup> The Elections Canvassing Commission ultimately certified Abramson the winner of that election on September 29, 2008.<sup>2</sup>

---

<sup>1</sup> The circumstances surrounding the counting and recounting of the ballots cast in this election, as well as the determination of the ultimate winner, was litigated in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, Case No. 2008-CA-2944. The trial court ultimately held that the recount that occurred was lawful, and that Abramson was certified the winner of the election. *See* Declaratory Judgment and Order Denying Motion for New Election, Appendix Tab A. The First District Court of Appeal affirmed the trial court in a *per curiam* affirmed opinion. *See Wennet v. Abramson*, Case No. 1D08-5638 (1st DCA Dec. 19, 2008), Appendix Tab B.

As this Court is aware, in an Order dated December 18, 2008, the Court suspended Abramson from the practice of law for 91 days, which took effect on January 2, 2009. The Court thereafter issued an opinion that articulated its reasoning for the punishment. *See The Florida Bar v. Abramson*, Case No. SC07-713 (Fla. Jan. 8, 2009).

In light of Abramson's suspension, Chief Judge Kroll, as stated in a December 23, 2008 letter to Chief Justice Quince, and later in a January 5, 2009 letter to Governor Crist, is unclear as to the position of judge-elect Abramson. In her letter to Governor Crist, Chief Judge Kroll states:

Article V section 8 of the Florida Constitution provides that "no person shall be eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida." The Rules Regulating the Florida Bar are somewhat inconsistent. While Rule 3-5.1(e) states that during a suspension the respondent shall continue to be a member of the Florida Bar but without the privilege of practicing, the rule further states that if the attorney receives a suspension greater than ninety (90) days that the attorney must apply for reinstatement. Moreover, Rule 3-7.8(g) of the Rules Regulating the Florida Bar states that admission or reinstatement of attorneys disbarred or suspended by proceedings in circuit courts shall be governed as elsewhere provided in these rules. Thus it appears that upon the ninety-second (92) day, when the

---

<sup>2</sup> A copy of the "Official Certificate of the State Elections Canvassing Commission of the Nonpartisan Election Held on the Twenty-Sixth Day of August, A.D., 2008," which certifies the election returns and reflects Abramson as the winner, is located in the Appendix at Tab C. Governor Crist was a member of this State Canvassing Commission.

suspension expires, Mr. Abramson will no longer be a member of the bar unless and until he has been reinstated. Should Mr. Abramson not be reinstated to membership in the Florida Bar, then it appears he would not meet the qualifications to be eligible for the office of circuit judge as the Florida Constitution so requires.

In response to Chief Judge Kroll's letter, Governor Crist requested an Advisory Opinion pursuant to Article IV, Section 1(c) of the Florida Constitution. Governor Crist specifically requests this Court to interpret "the Governor's authority under Article IV, Section 1(a) to commission a circuit judge-elect who is serving a suspension from the practice of law at the time the judge-elect is to take office."

### **SUMMARY OF THE ARGUMENT**

Despite his suspension, Abramson is and has been a member of The Florida Bar for the five years preceding his taking office, and thus possesses the requisite eligibility to become a circuit judge as provided in Article V, Section 8, Florida Constitution. Thus, the Governor must fulfill his ministerial duty pursuant to Article IV, Section 1(a), Florida Constitution and commission Abramson as a circuit judge, in and for the Fifteenth Judicial Circuit.

## ARGUMENT

### **I. ABRAMSON IS, AND HAS BEEN FOR THE PRECEDING FIVE YEARS, A MEMBER OF THE FLORIDA BAR, AND IS THUS ELIGIBLE TO BE COMMISSIONED AS A CIRCUIT JUDGE.**

The issue presented by the Governor in this proceeding is whether he has the authority under Article IV, Section 1(a) to commission judge-elect Abramson, in light of his serving a suspension from the practice of law at the time he is to take office.

The Governor's question necessarily requires review of Article V, Section 8, Florida Constitution, which governs the eligibility of justices and judges in Florida, and provides as follows:

No person shall be eligible for office of justice or judge of any court unless the person is an elector of the state and resides in the territorial jurisdiction of the court. No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served. No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless the person is, and has been for the preceding ten years, a member of the bar of Florida. ***No person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida.*** Unless otherwise provided by general law, no person is eligible for the office of county court judge unless the person is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county judge in a county having a population of 40,000 or less if the person is a member in good standing of the bar of Florida.



(Emphasis added). The constitutional requirements for eligibility of the office of circuit judge is that the person: (1) be an elector of the state of Florida; (2) reside in the territorial jurisdiction of the court; (3) not attain the age of seventy years; and (4) is, and has been for the preceding five years, a member of the bar of Florida.<sup>3</sup>

Construing an amendment to the State Constitution adapted at the general election of November 1966 which added the following language to the qualifications for the office of circuit judge of the circuit court unless he is a citizen of this state and unless he is, and for a period of five (5) years has been, a member of the Florida Bar, “this Court refers to the time of assuming office and not at the time of qualification or election to office.” *In Re Advisory Opinion to the Governor*, 192 So. 2d 757, 759 (Fla. 1966). The language of the 1966 amendment to the State Constitution is virtually identical to the language at issue in this case. Accordingly, Abramson must be, and have been for the preceding five years, a member of the Florida Bar at the time he assumes office.

Abramson was admitted to practice in Florida on November 23, 1992, and his term of office for circuit judge commenced on January 6, 2009. On December

---

<sup>3</sup> Neither Chief Judge Kroll nor Governor Crist raise whether Abramson is ineligible for the office of circuit judge based on the first three requirements listed above; rather, the fourth requirement is the only eligibility issue presented by the Governor’s request for an Advisory Opinion. Abramson is an elector of the state of Florida, resides in the territorial jurisdiction of the Fifteenth Judicial Circuit, and has not attained the age of seventy years.

18, 2008, this Court suspended Abramson from the practice of law for 91 days, which took effect on January 2, 2009. *See The Florida Bar v. Abramson*, No. SC07-713 (Fla. Jan. 8, 2009). Prior to that suspension, Abramson had neither resigned from the bar of Florida in the face of disciplinary charges nor been disbarred. Thus, in order to answer the Governor's request, this Court must determine if Abramson is eligible for the office of circuit judge, in light of his suspension from the practice of law for 91 days. This in turn requires a determination of whether Abramson is, and has been for the preceding five years, a member of the bar of Florida.

Rule 3-5.1(e), Rules Regulating The Florida Bar, governs suspensions for attorney misconduct, and states:

The respondent may be suspended from the practice of law for a definite period of time or an indefinite period thereafter to be determined by the conditions imposed by the judgment. ***During such suspension the respondent shall continue to be a member of The Florida Bar but without the privilege of practicing.*** A suspension of 90 days or less shall not require proof of rehabilitation or passage of the Florida bar examination and the respondent shall become eligible for all privileges of members of The Florida Bar upon the expiration of the period of suspension. A suspension of more than 90 days shall require proof of rehabilitation and may require passage of all or part of the Florida bar examination and the respondent shall not become eligible for all privileges of members of The Florida Bar until the court enters an order reinstating the respondent to membership in The Florida Bar. No suspension shall be ordered for a specific period of time in excess of 3 years.

(Emphasis added). Thus, according to the plain language of Rule 3-5.1(e), Abramson remains a member of The Florida Bar during his suspension. In contrast, a judgment of disbarment “terminates the respondent’s status as a member of the bar.” Rule 3-5.1(f), Rules Regulating The Florida Bar. Also, a respondent who resigns in the face of disciplinary charges also terminates the respondent’s status as a member of the bar. *See* Rule 3-5.1(j), Rules Regulating The Florida Bar.

Cases from this Court support the conclusion that a suspended member of The Florida Bar remains a member of The Florida Bar. In *The Florida Bar v. Ross*, 732 So. 2d 1037, 1040 (Fla. 1998), this Court, in reviewing Rule 3-5.1(e), held:

Thus, despite the fact that an attorney is suspended, he or she remains a member of The Florida Bar and, as such, is subject to the continuing disciplinary jurisdiction of this Court to the same extent as any other member of The Florida Bar. *See generally*, art. V, § 15, Fla. Const. (“The supreme court shall have exclusive jurisdiction to regulate . . . the discipline of the persons admitted [to the practice of law].”).

The same is *not* true of attorneys who have been disbarred or who have resigned in the face of disciplinary charges, as such attorneys are no longer “members” of The Florida Bar. *See* R. Regulating Fla. Bar 3-5.1(f) (“A judgment of disbarment terminates the respondent’s status as a member of the bar.”); R. Regulating Fla. Bar 3-5.1(j) (“If accepted by the Supreme Court of Florida, a disciplinary resignation terminates the respondent’s status as a member of the bar.”).

(Emphasis in original). Similarly, in *The Florida Bar v. Solomon*, 589 So. 2d 286, 287 (Fla. 1991), this Court held, “[a]lthough under suspension, Solomon is still a

member of The Florida Bar. R. Regulating Fla. Bar. 3-5.1(e). As such, he is subject to ‘the standards of ethical and professional conduct prescribed by this Court.’ *Id.* at 3-5.1.”

“Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision’s explicit language.” *Fla. Soc’y of Opthamology v. Fla. Optometric Ass’n*, 489 So. 2d 1118, 1119 (Fla. 1986). *See also Benjamin v. Tandem Healthcare, Inc.*, 2008 WL 5333646, at \*2 (Fla. Dec. 23, 2008) (“In interpreting a constitutional amendment, we begin with the amendment’s plain language.”). “If the constitutional language is clear, unambiguous, and addresses the matter at issue, it must be enforced as written, and courts do not turn to rules of constitutional construction.” *Ford v. Browning*, 992 So. 2d 132, 136 (Fla. 2008) (citing *Fla. Soc’y of Opthamology*, 489 So. 2d at 1119).

Despite his suspension, Abramson remains a member of The Florida Bar. Article V, Section 8, Florida Constitution states that “[n]o person is eligible for the office of circuit judge unless the person is, and has been for the preceding five years, a member of the bar of Florida.” The Florida Constitution requires that, for eligibility purposes, a circuit judge be a member of the Florida Bar. There are no additional qualifiers to the bar membership requirement.

By contrast, Article V, Section 8 also states that “[u]nless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less *if the person is a member in good standing of the bar of Florida.*” The language requiring that county judges in counties having a population of 40,000 or less be, or have been members of the bar of Florida and unless otherwise provided by general law, “a member in good standing of the bar of Florida,” was approved at the general election of November 1984. The text of the amendment provided as follows:

## ARTICLE V

### JUDICIARY

SECTION 8. Eligibility. – No person shall be eligible for office of justice or judge of any court unless he is an elector of the state and resides in the territorial jurisdiction of his court. No justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, on-half of which he has served. No person is eligible for the office of justice of the supreme court or judge of a district court of appeal unless he is, and has been for the preceding ten years, a member of the bar of Florida. No person is eligible for the office of circuit judge unless he is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, no person is eligible for the office of a county court judge unless he is, and has been for the preceding five years, must be a member of the bar of Florida. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less if he is a member in good standing of the bar of Florida.

H.J.R 37 (1984), approved at the general election November 1984.

The ballot summary provided as follows:

## CONSTITUTIONAL AMENDMENT

### ARTICLE V, SECTION 8

ELIGIBILITY TO BE COUNTY COURT JUDGE. – Proposing an amendment to the State Constitution, effective July 1, 1985, to require that unless otherwise provided by general law, no person shall be eligible for the office county court judge unless he is, and has been for the preceding five years, a member of the bar of Florida. Unless otherwise provided by general law, a person shall be eligible for election or appointment to the office of county court judge in a county having a population of 40,000 or less if he is a member in good standing of the bar of Florida.

H.J.R 37 (1984);

The Florida Constitution does not state that, as a requirement for eligibility for the office of circuit court judge, that a person be a “member in good standing” of the bar of Florida. Instead, the Florida Constitution’s eligibility requirement for circuit judge is that a person is, and has been for the preceding five years, a member of the bar of Florida.

Although the qualification language of Article V, Section 8 has been subject to little interpretation, the plain meaning of the provision is clear: there is no requirement with respect to the office of circuit judge that the person assuming that office be a “member in good standing of the bar of Florida” at that time. This Court has “consistently held that in order to determine intent we must give effect to

the plain meaning of the words actually used in the Constitution . . . .” *Coastal Florida Police Benevolent Association, Inc. v. Williams*, 838 So. 2d 543, 548 (Fla. 2003). The 1984 amendment to Article V, Section 8” must be given effect according to its plain meaning and what the people understand it to mean at the time they adopted it.” *In Re Advisory Opinion to the Governor*, 223 So. 2d 35, 39 (Fla. 1969); *see also In Re Advisory Opinion to the Governor*, 156 Fla. 48, 22 So. 2d 398, 399 (Fla. 1945).

In *Ervin v. Collins*, 85 So. 2d 852, 855 (Fla. 1956), this Court dealt with a challenge to Governor Collins’ qualifications for election. Upon the death of the previous Governor (Dan McCarty), Collins was installed as Governor pursuant to then-Article IV, Section 19, Florida Constitution, which prescribed the succession procedures in case of the death of the Governor. *See id.* at 859. There was no qualification in that constitutional provision for eligibility or ineligibility for reelection after that initial term expired. *See id.* at 856. Collins’ eligibility was challenged under then-Article IX, Section 2, Florida Constitution, which stated in relevant part, “[t]he Governor shall be elected by the qualified electors . . . shall not be eligible for re-election to said office the next succeeding term . . . .” *Id.* at 855. This Court ruled that the qualifying language of Section 2 did not apply to a Governor installed by Section 10. The Court stated:

We are called on to construe the terms the people, and we are to effectuate from the people, and we are to effectuate their purpose from

the words employed in the document. We are not permitted to color it by the addition of words or the engrafting of our views as to how it should have been written. . . . [I]t must be presumed that those who drafted the Constitution had a clear conception of the principles they intended to express, that they knew the English language and that they knew how to use it, that they gave careful consideration to the practical application of the Constitution and arranged its provisions in the order that would most accurately express their intention.

\* \* \*

It is pertinent to point out that the makers of the Constitution imposed ineligibility for reelection only on those elected under Section 2, Article IV, and did not impose such a restriction on those who succeeded to the office for the unexpired term as provided in Section 19, Article IV. The makers of the Constitution not having seen fit to impose ineligibility for reelection to the office of Governor on those succeeding to the office for the causes of Section 19, Article IV, there is not authority for this court to impose such a restriction.

*Id.* In a similar vein, the makers of the Article V, Section 8, did not require that a circuit judge be a “member in good standing” of The Florida Bar, and under principles of constitutional construction, as discussed in *Ervin*, this Court should not read in such a requirement.

According to the clear and unambiguous language of the Florida Constitution, Abramson is eligible for the office of circuit judge, because he is, and has been for the preceding five years, a member of The Florida Bar. Abramson respectfully requests that this Court advise the Governor that he is eligible for the office of circuit judge.



## **II. THE GOVERNOR HAS A MINISTERIAL DUTY TO COMMISSION ABRAMSON AS CIRCUIT JUDGE.**

Article IV, Section 1(a), Florida Constitution, states, in pertinent part, “[t]he governor *shall* take care that the laws be faithfully executed, *commission all officers of the state and counties*, and transact all necessary business with the officers of government.” (Emphasis added). The issuance of a commission has been described as “ministerial in nature[.]” *State ex rel. Bisbee v. Drew*, 17 Fla. 67 (Fla. 1879). In *State ex rel. Davis v. Giblin*, 98 Fla. 802, 804, 124 So. 375, 376 (Fla. 1929), this Court stated:

Even when under the law an appointment or election to office is not complete until the officer has been commissioned, the issue of the commission is in many circumstances regarded as a ministerial act which may be enforced by mandamus.

*See also Slaughter v. Dickinson*, 226 So. 2d 97, 98 (Fla. 1969) (agreeing with the above-cited pronouncement in *State ex rel. Davis* and holding that “in the adoption of the Constitution of this State, the people never intended that any public official could thwart the will of the public expressed at an election by failure to do any ministerial act.”).

Abramson meets the requirements of eligibility for the office of circuit judge. The electors of the Fifteenth Judicial Circuit elected him to that office on August 26, 2008, and the Elections Canvassing Commission certified him the winner on September 29, 2008. The Governor has a ministerial duty to

commission Abramson as circuit judge pursuant to Article IV, Section 1(a), Florida Constitution.

### **CONCLUSION**

Based on the foregoing, Abramson respectfully urges this Court to advise the Governor that he has the authority under Article IV, Section 1(a), Florida Constitution, to commission Abramson as a circuit judge, in and for the Fifteenth Judicial Circuit.

Respectfully submitted,

**MESSER, CAPARELLO & SELF, P.A.**

P.O. Box 15579

Tallahassee, FL 32317

Telephone: (850) 222-0720

Facsimile: (850) 224-4359

By: /s/ Mark Herron

MARK HERRON, ESQ.

Florida Bar No.: 199737

ROBERT J. TELFER III, ESQ.

Florida Bar No.: 0128694

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 20th day of January, 2009 to:

Hon. Charles J. Crist, Jr.  
Office of the Governor  
The Capitol  
Tallahassee, FL 32399

Hon. Kathleen J. Kroll  
Chief Judge  
Fifteenth Judicial Circuit  
Palm Beach County Courthouse  
205 North Dixie Highway  
West Palm Beach, FL 33401

:/s/ Mark Herron

MARK HERRON

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

:/s/ Mark Herron

MARK HERRON