No._____

In The
Supreme Court of the United States

_____

ANDREW W. SHALABY,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
Respondents.

_____

On Petition for Writ Certiorari to the United States Court of Appeals for the Seventh Circuit

_____

PETITION FOR WRIT OF CERTIORARI

Andrew W. Shalaby, pro per
Supreme Court Bar No. 262436
7525 Leviston Avenue
El Cerrito, CA 94530
Tel. 510-551-8500,
email: andrew@eastbaylaw.com

QUESTIONS PRESENTED FOR REVIEW

This petition involves the disbarment and denial admission of an attorney to the bar of a Federal Court in Chicago, Illinois for allegedly impugning the integrity of a judge in violation of American Bar Association [ABA] Model Rule of Professional Conduct 8.2(a), a provision which states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualification or integrity of a judge.

1. Can a Federal Court deny an attorney admission to the bar of the court, as a punishment for the alleged violation of ABA Model Rule of Professional Conduct 8.2(a), for expressing an opinion that a particular judge was required to disqualify himself based on the fact that before becoming a judge, he worked for the law firm representing a party to a proceeding before him, if the attorney erred as to the date of the judge's employment with the firm?

2. Does 28 U.S.C. § 455(b)(2) require recusal of a judge who was a former member of a law firm and, who, after leaving the firm, maintained a co-counsel relationship with the firm at the same time that the firm represented a party in the matter in controversy?

3. Should *Richardson-Merrell Inc. v. Koller,* 472 U.S. 424 (1985) be overturned so that an order revoking an

attorney's pro hac vice ("PHV") admission may be immediately appealable, instead of appealable as an interlocutory order at the end of the case, in light of the fact that the revocation causes immediate and substantial injury to the attorney, his client, and the public, as illustrated in the facts of this case?

PARTIES TO THE PROCEEDING

1. ANDREW W. SHALABY, Petitioner;

2. United States District Court for the Northern District of Illinois, by way its Executive Committee

RELATED PROCEEDINGS

Bailey v. Bernzomatic[1], No. 16-cv-7548, U.S. District Court for the Northern District of Illinois (aka *Bailey v. Worthington Cylinder Corporation*, App. 2a), order entered February 1, 2019. This proceeding is related because the District Court's Executive Committee's order states that it is based on an order revoking the PHV admission of the petitioner-attorney issued in *Bailey*. (App. 4a, 6a.)

[1] Bernzomatic is division of Worthington Cylinder Corporation, a subsidiary of Worthington Industries. Worthington purchased Bernzomatic from Newell Rubbermaid (aka Newell Operating Company or Newell Brands) on July 1, 2011.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Andrew W. Shalaby respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The August 20, 2019 order of the United States Court of Appeals for the Seventh Circuit, affirming the United States District Court's order of June 13, 2019 denying Attorney Andrew W. Shalaby admission to the general bar of the Court as a sanction, is unpublished and reported at 775 Fed.Appx. 249 and is reprinted in the Appendix to this Petition ("App.") at App. 1a-5a.

The June 13, 2019 order of the Executive Committee of the United States District Court for the Northern District of Illinois, denying Attorney Andrew W. Shalaby's application for admission to the general bar of the Court, is reprinted at App. 6a-8a.

The February 1, 2019 order of the United States District Court for the Northern District of Illinois, issued in *Bailey v. Bernzomatic et al.,* 16-cv-7548, revoking the pro hac vice admission of Attorney Andrew W. Shalaby, is reprinted at App. 9a-86a.

The September 3, 2019 order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's petition for en banc rehearing is reprinted at App. 87a.

JURISDICTION

The United States Supreme Court has jurisdiction over a final order from the United States Court of Appeals pursuant to 28 U.S.C. § 1254(1). The order of the United States Court of Appeals for the Seventh Circuit was entered on August 20, 2019. (App. 1a.) The order denying Petitioner's petition for en banc rehearing was issued September 3, 2019. (App. 87a.) This petition is timely filed within 90 days of the date of entry of the order as required by Supreme Court Rule 13.1.

The Seventh Circuit Court of Appeals has jurisdiction over orders imposing filing restrictions and denying bar membership as judicial decisions, as explained on its order at App. 4a. *In re Chapman*, 328 F.3d 903, 904 (7th Cir. 2003); *In re Palmisano*, 70 F.3d 483, 484-85 (7th Cir. 1995).

The United States District Court for the Northern District of Illinois has jurisdiction with regard to an applicant's application for admission to the general bar of the Court pursuant to Northern District of Illinois Local Rule 83.10.

STATUTORY PROVISIONS INVOLVED

- United States Constitution, amendment I:

  > Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- 28 U.S.C. section 455

  > (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
  >
  > (b) He shall also disqualify himself in the following circumstances:
  >
  > [...]
  >
  > (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it[;]

STATEMENT OF THE CASE

The Federal Court in Illinois permits an attorney to appear pro hac vice, or in the alternative, be admitted to the general bar of the Court and represent parties without restriction. The appeal underlying this petition is from the June 13, 2019 order of the U.S. District Court for the Northern District of Illinois, issued by its Executive Committee, denying Attorney Shalaby's application for admission to the general bar of the Court as a punishment arising out of protected free speech. (App. 1a-5a.)

The Seventh Circuit Court of Appeals addressed the question of whether a court may deny an attorney admission as a punishment based on protected free speech, that free speech being the assertion of a belief that based on the employment history of a Magistrate Judge (Hon. Iain D. Johnston), recusal was mandatory under 28 U.S.C. § 455(b)(2). (App. 2a-3a.) Attorney Shalaby erred as to the date of the termination of Mr. Johnston's employment from the law firm that represented the entity "Bernzomatic" in an earlier proceeding, and was harshly punished for that error by denial of admission. (App. 2a-4a.) This was the second harsh punishment, because four months earlier Attorney Shalaby's PHV admission was revoked on the same grounds by Judge Philip G. Reinhard in *Bailey v. Bernzomatic*, No. 16-cv-7548, U.S. District Court for the Northern District of Illinois. (App. 85a.)

The First Amendment abridgement here is particularly troubling because the error made by Mr.

Shalaby with regard to Magistrate Judge Johnston's date of termination of his employment with the firm in question was not material. It was not material because under the correct facts, Magistrate Judge Johnston was likely still required to recuse himself as a matter of law based on his continued co-counseling relationship with the firm in question. Judge Reinhard revoked Mr. Shalaby's PHV admission, at least in part, because the court was not able to find any authority addressing this fact pattern (App. 37a):

> In its research, the court found no case in which the language of Section 455(b)(2) was construed to apply to a judge who was a former member of a law firm and, who, after withdrawing from that firm, had appeared as co-counsel with a member of that firm in an unrelated matter at the same time that a different member of that firm was serving as a lawyer in the matter in controversy.

Therefore, the second question presented for review is whether 28 U.S.C. § 455(b)(2) calls for the recusal of a judge who was a former member of a law firm and, who, after leaving the firm, maintained a co-counsel relationship with the firm at the same time that it represented a party in the matter in controversy.

Finally, the Executive Committee did not make its own findings, but instead, adopted the findings on Judge Reinhard's order, even though that order was not yet final, and is still not final because it cannot be

appealed until the conclusion of the *Bailey* case. The Executive Committee discloses its adoption of findings from Judge Reinhard's order as follows (App. 6a):

> The Committee found that Ms. [sic] Shalaby had violated American Bar Association Model Rule of Professional Conduct Rule 8.2(a), which states: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." The Committee further found that Mr. Shalaby did not meet the character and fitness requirements to join the General Bar. Local Rule 83.10(a). Those findings were based on the order issued in *Bailey v. Benzomatic et al.,* 16 C 7548. R. 402 at 14-16.

Because the Executive Committee discloses that its "findings were based on the order issued in *Bailey v. Benzomatic* et al., 16 C 7548. R. 402 at 14-16," it was necessary that Judge Reinhard's order revoking Mr. Shalaby's PHV admission in the *Bailey* case become final before it could be relied-upon by the Executive Committee. *Browning, Ektelon Div. v. Williams*, 348 Ill. App. 3d 830, 833, 807 N.E.2d 984, 986 (2004) explains:

> An appeal is a continuation of the proceedings (134 Ill.2d R. 301) and, until

> either the time to appeal has expired or, where an appeal is being pursued, until the court of review has rendered a decision, the circuit court's judgment is not a final adjudication.

However, the order was not final because in *Richardson-Merrell Inc. v. Koller,* 472 U.S. 424 (1985) the Supreme Court held that such an order is interlocutory and could not be appealed until at the conclusion of the case. In fact Mr. Bailey had appealed the order revoking Mr. Shalaby's PHV admission, but that appeal was dismissed by the Seventh Circuit Court of Appeals as unripe, as it explained in *Bailey v. Worthington Cylinder Corp*., No. 19-1240, 2019 WL 3763951, at 1 (7th Cir. June 18, 2019):

> IT IS ORDERED that this appeal is dismissed. Plaintiff Kurtis Bailey filed a notice of appeal from an order that revoked attorney Andrew Shalaby's pro hac vice status, precluding attorney Shalaby (an attorney licensed in California) from representing plaintiff Bailey in this case. But an order granting or denying a motion to disqualify counsel in a civil case is not immediately appealable under the collateral order doctrine. See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985). Plaintiff Kurtis Bailey must wait until the case is at an end to seek review of this order.

The Executive Committee relied on an order which could very well be reversed at the conclusion of the *Bailey* case, and this has caused a significant chain reaction of harms. Therefore, the third question presented for review is whether, in light of the harms observed in this case, *Richardson-Merrell Inc.* should be overturned.

This petition does not extend to the question of whether the petitioner failed to disclose an earlier order issued in another case imposing sanctions against him, an order which was reversed on appeal, because that issue was decided in the petitioner's favor. The Seventh Circuit Court of Appeals recites the facts related to that matter on its order (App. 2a):

> Opposing counsel moved to revoke Shalaby's pro hac vice admission on the basis that Shalaby's application failed to disclose that he had been disciplined by the United States Bankruptcy Court for the Northern District of California.[2] See

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[2] Bernzomatic's motion to revoke Mr. Shalaby's PHV admission was document 310 in *Bailey*. On it, Bernzomatic misrepresented to Magistrate Judge Johnston that a portion of the sanction issued in *Nakhuda* had not been reversed on appeal. Judge Reinhard corrected these facts. He first pointed out on his order to show cause referenced at app. 10a (doc. 382 in *Bailey*) that an order issued pursuant to 11 U.S.C. § 329 determining the reasonable amount of compensation to an attorney in a bankruptcy is not a "sanction" (*Bailey* doc. 382 p.8). Judge Reinhard continued to

> *In re Nakhuda*, No. 14-41156-RLE, 2015 WL 1943450 (Bankr. N.D. Cal. 2015) aff'd in part, 544 B.R. 886 (B.A.P. 9th Cir. 2016), aff'd, 703 F. App'x 621 (9th Cir. 2017).[3]

The Seventh Circuit Court of Appeals also made a mistake of fact by stating that Mr. Shalaby made false statements in his bar applications (App. 4a):

> Shalaby's argument that his discipline violates his free-speech rights fares no better. The First Amendment did not give him a constitutional right to make false statements in his bar applications.[4]

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correct Bernzomatic's misrepresentations on his order at app. 13a, by pointing out that the sanction imposed on Mr. Shalaby in *Nakhuda*, directing him to complete 24 hours of continuing education, was also "implicitly reversed." (App. 13a.)

[3] Nakhuda was a case in which Mr. Shalaby was sanctioned, but the sanctions were reversed on appeal in a published decision, leaving only a provision suspending his ECF privileges until he completed training.

[4] Mr. Shalaby filed two applications for admission to the general bar, as disclosed by the Executive Committee on p. 6a-7a. The first application was denied on March 11, 2019 (App. 6a.) The second application was submitted April 1, 2019, inadvertently overlooked by the Court, then placed back on calendar for the Executive Committee's June 6, 2019 session (App. 7a). It was denied on June 13, 2019 (App. 8a). The June 13, 2019 order was appealed to the Seventh Circuit Court of Appeals. (App. 1a.)

The Executive Committee's order does not allege that Mr. Shalaby made false statements in his bar applications. (App. 6a-8a.) Moreover, to the extent that the Bernzomatic defendants raised the issue with respect to Mr. Shalaby's PHV application on their motion to revoke Mr. Shalaby's PHV admission, Magistrate Judge Johnston denied that motion as well (App. 76a.):

> But, again, the matters before the court are Attorney Shalaby's actions occurring after the order [333] on defendants' motion to revoke his PHV admission. The motion filed by defendants has been decided. That decision was not to revoke his PHV admission.

On Magistrate Judge Johnston's order denying Bernzomatic's motion to revoke Mr. Shalaby's PHV admission, the Court explained that the revocation of an attorney's PHV status is perhaps one of the harshest sanctions a court could fashion, citing to *In re Rimsat, Ltd.*, 229 B.R. 914, 922 (Bankr. N.D. Ind. 1998), aff'd, 230 B.R. 362 (N.D. Ind. 1999), aff'd, 212 F.3d 1039 (7th Cir. 2000):

> Revocation of an attorney's pro hac vice status is a harsh sanction, perhaps one of the harshest the court could fashion.

An order punishing an attorney in relation to free speech strongly violates the First Amendment, yet Judge Reinhard revoked Mr. Shalaby's PHV admission

because of Mr. Shalaby's error as to the date of Mr. Johnston's termination of employment from the subject law firm, a communication which occurred after Magistrate Judge entered his order denying Bernzomatic's motion to revoke Mr. Shalaby's PHV (App. 76a):

> [t]he matters before the court are Attorney Shalaby's actions occurring after the order [333] on defendants' motion to revoke his PHV admission.

The Seventh Circuit Court of Appeals makes clear that Mr. Shalaby was punished for making the error as to Mr. Johnston's date of termination of his employment on its order (App. 2a-3a):

> The district judge issued a show-cause order demanding that Shalaby explain why his admission should not be revoked on the basis of his misrepresentations and because of false statements he had made about the magistrate judge presiding over the case. (Shalaby repeatedly stated that the magistrate judge had a conflict and should have recused himself under 28 U.S.C. § 455(b)(2), even though the magistrate judge explained that Shalaby was working from incorrect information about the dates of his employment with a defense law firm in the Bailey case.)

The Seventh Circuit Court of Appeals also acknowledged that the level of detail of Judge Reinhard's order revoking Mr. Shalaby's admission was "unusual" (App. 3a):

> The district judge explained in an unusually detailed order why he found Shalaby's defense of his behavior unpersuasive and revoked Shalaby's pro hac vice admission.

This unusual level of detail was necessary because Mr. Shalaby's argument for disqualification was not just based on Magistrate Judge Johnston's appearance of the inability to be impartial due to his employment history with the law firm that previously represented Berzomatic, or his continued co-counsel relationship after he left the firm. Mr. Shalaby argued that when those facts are combined with the fact that Magistrate Judge Johnston took the seemingly unprecedented step of hiring his own expert on the *Bailey* products liability action, ordering the parties to pay that expert $15,909.01, then firing the expert without explanation, and without that expert having ever produced any work product whatsoever, leaving Mr. Bailey out of pocket thousands of dollars, the appearance of impropriety is so serious that disqualification should be required. Judge Reinhard discloses this matter on his order (App. 56a):

> Magistrate Judge Johnston did not refer to his order directing payment as a 'sanction' but in effect the order operated

> as a sanction, because the Court imposed this involuntary payment of $7,954.05 for an expert the Court hired, then fired, without benefit to any party. Plaintiff and Mr. Shalaby are sharing costs in this action, and thus far Mr. Shalaby has paid far more than 50% of all costs associated with this case. This includes the $15,909.01 bill of Mr. Khan."

To better understand the context of these communications, a brief background into the *Bailey* matter is presented. The *Bailey* action arises in relation to a defective handheld torch commonly sold at most home improvement and general retail stores.[5] The Federal Pacer registry contains a large number of Bernzomatic torch defect cases spanning most of the years since the Pacer system was implemented in 1988. Yet, to the best of Petitioner's knowledge, no case has ever gone to trial, with exception of one case that terminated prematurely as a sanction: *Englebrick v. Worthington Industries Inc.*, *et al.*, No. 08-cv-01296, U.S. District Court for the Central District of California. In that case the Court stated its finding regarding the defect of the Bernzomatic torch:

> Indeed, Plaintiffs presented substantial

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[5] The torch consists of a fuel cylinder, and a torch attachment that screws onto the top of the cylinder. The cylinders contain either propane, propylene, or "MAPP" gas. Worthington is the sole manufacturer of these products in the United States.

> evidence at trial showing that there was, in fact, a defect in the cylinder."[6]

It was most unfortunate that the *Englebrick* case terminated prematurely, because eight months earlier the same product, a Bernzomatic gas cylinder, exploded and killed one Mr. Tran in New York.[7]

As a most unfortunate consequence of the failure of any of the many cases posted on the Pacer system to advance to trial over the many years, many people have been severely injured with horrific burn injuries, and one Ms. Astrid Marmont, the mother of three young children, was killed on September 15, 2013. *Marmont v. Bernzomatic, et al.*, No. 16-cv-00848, U.S. District Court for the Central District of California. That case did not go to trial, but instead, settled recently for millions of dollars, while the defective Bernzomatic torch products continued and still continue to injure users. Mr. Bailey is one of the many injury victims, suffering his severe burn injuries on May 20, 2014, eight months after the death of Ms. Marmont. Then followed the severe burn injuries suffered by Mr. Peralta in *Peralta v. Bernzomatic*, No. 17-cv-3195, U.S. District Court, Arizona, and several

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[6] This finding is on document 638 p.3:24-25 in *Englebrick*.

[7] On February 26, 2008 Mr. Tran died after suffering severe burn injuries caused by a defective Bernzomatic torch. *Tran v. Worthington*, No. 4777/2010, Kings County Supreme Court, Civil Div., NY. The *Tran* Court records disclose that the case settled for $3,750,000.

others (fn. 8).

Mr. Shalaby was so concerned that others would suffer severe injury or death by way of the defective Bernzomatic products that he filed a very early motion for partial summary judgment to establish the defect of the Bernzomatic torch products. He filed the motion on October 30, 2017 (document 193 in the *Bailey* case docket), long before his PHV was revoked. However, Magistrate Judge Johnston suggested that the defendants file a "Rule 56(d) declaration," then upon its filing, continued the motion for partial summary judgment, ultimately staying it indefinitely once Bernzomatic filed its motion to revoke Mr. Shalaby's PHV admission on March 26, 2018 (filed as document 310 in *Bailey*). The stay has now spanned well over a staggering 19 months to date, and during these months there were at least two additional severe injuries caused by the Bernzomatic torches.[8]

Most unfortunate for the Bernzomatic torch

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[8] The injury victims contacted Mr. Shalaby and reported the injuries. Ironically, one of these severe injuries, which included extensive property damage, was in the same venue as *Bailey*. On May 11, 2018 one Mr. Cepuran suffered severe injury when his Bernzomatic torch exploded. The documents in relation to his matter are in the *Bailey* docket at doc. 477. A second Bernzomatic defective torch injury was also reported to Mr. Shalaby on August 1, 2019. Ironically, this injury occurred in Arizona, where Worthington filed yet another motion to revoke Mr. Shalaby's PHV admission in *Peralta v. Bernzomatic*, No. 17-cv-3195, U.S. District Court, Arizona, causing that case to come to a standstill since March 29, 2019.

injury victims that were injured during the delays and stays caused by the Court's proceedings to revoke Mr. Shalaby's PHV admission, the *Bailey* Court made clear that it was aware that other injuries were very likely to occur while the PHV revocation proceedings were pending and the action was stayed (App. 73a-74a):

> Mr. Shalaby finally brings to the Court's attention that the death of Mr. Tran, death of Ms. Marmont, burn injuries of Mr. Shadbolt in Canada, and many other severe burn injuries and possible deaths occurring after the year 2007, were almost certain to be avoided, had the Court in San Diego focused its attention on the details of the product defects before it, instead of taking seriously and taking as true the 'false facts' and contrived evidence of the defendants and their counsels targeting Mr. Shalaby personally, while these are now the same counsels in this action doing the same thing once again because of the reward of success a decade ago in the earlier action. The motivation of the defense counsels in moving to remove Mr. Shalaby as counsel is therefore the most important consideration.

Judge Reinhard was therefore aware that Mr. Shalaby was particularly troubled by Magistrate Judge Johnston's history of employment with the law firm that represented Bernzomatic years earlier, and Judge

Johnston's concomitant retention of his own expert at the expense of Mr. Bailey. The communications for which Mr. Shalaby's PHV admission was revoked, and for which his admission to the general bar of the Court was denied, were spoken in this context, and are therefore privileged First Amendment activities which are protected by Illinois' absolute litigation privilege:

> In essence, the absolute litigation privilege affords immunity to attorneys (and other participants in the judicial process) from tort liability arising out of statements made in connection with litigation. See *Imbler v. Pachtman*, 424 U.S. 409, 439, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (White, J., concurring) (describing common-law privilege). The privilege as it has developed in Illinois is quite broad. *Steffes v. Stepan Co.*, 144 F.3d 1070, 1074 (7th Cir. 1998)

The Revocation of Mr. Shalaby's PHV admission based on his free speech activities, followed by the Executive Committee's denial of his application for admission to the Court's general bar on the same grounds, have therefore caused harm not only to Mr. Shalaby, Mr. Bailey, and Mr. Peralta, but to the public as well, because the motion for partial summary judgment Mr. Shalaby filed in the *Bailey* matter was put on hold since October 17, 2019, the *Bailey* and *Peralta* cases remain frozen at this time, and during these many months other persons have suffered severe burn injuries as the result of the defective Bernzomatic

torch products.

REASONS FOR GRANTING THE PETITION

The denial of Mr. Shalaby's application for admission to the general bar of the Court for stating an error of fact is a serious abridgement of First Amendment rights. In this instance the Executive Committee's denial of admission of the petitioner to the Court's general bar made it impossible for him to timely adjudicate the products liability case so as to prevent injuries to others, even though the *Bailey* Court has in its dockets the completed expert report identifying the defects of the products by way of Bernzomatic's own evidence, which means the defects are not even reasonably capable of dispute. The report, which was submitted many months ago to the Consumer Product Safety Commission, simply sits as an idle document (number 450-1) in the *Bailey* docket, and idle document (number 164-2) in the *Peralta* docket.[9] Yet the petitioner is helpless to adjudicate the defects because he has been denied admission to the general bar by the Executive Committee based on the non-appealable interlocutory order revoking his PHV admission over a mere mistake as to the date of the termination of employment of Mr. Johnston from the subject firm, even though the communication is free speech

[9] The detailed Bernzomatic product defect report is posted at: https://drive.google.com/file/d/1_fClA3pQiYwXQrMnMCO_MOwb_zHPAG26/view?usp=sharing

protected by the First Amendment and by Illinois' absolute litigation privilege.

1. Disbarment Based on Free Speech

Attorneys are the Court's liaison to the people, best suited to identify improper judicial acts when they occur. The Supreme Court articulates well the importance of such free speech in *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 896, 93 L. Ed. 1131 (1949):

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky v. New Hampshire*, supra, 315 U.S. at pages 571 - 572, 62 S.Ct. at page 769, 86 L.Ed. 1031, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance,

or unrest.

The Supreme Court should therefore grant this petition to remedy the serious abridgement of First Amendment rights caused by the Executive Committee's punishment of the petitioner over speech which is protected by the First Amendment and by the absolute litigation privilege which now exists in Illinois and most or all of the other states.

2. Mandatory Recusal Under 28 U.S.C. § 455(a)

This appears to be the first case raising the question of whether a judge who worked for the law firm that is now representing one of the parties to a proceeding before him must recuse himself, even if he left the firm before it substituted into the action in question, if when in private practice he maintained a co-counsel relationship with the firm in question. The law is clearly explained in *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980):

> Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the

> circumstances, would harbor doubts about the judge's impartiality.

However, while the law is clear, the Seventh Circuit Court of Appeals did not address the issue on its order. (App. 1a-5a.) This leaves the fact pattern undecided and without any precedent to guide the courts in the future. The Supreme Court should therefore grant this petition so that it can issue a decision providing guidance to the lower Courts on whether the co-counsel relationship of an attorney with a firm he used to work with that represented a party to the case in controversy should disqualify himself under 28 U.S.C. § 455(a) and (b)(2).

3. Overturning Richardson-Merrell Inc.

This case presents a strong fact pattern that brings to light the harms caused by the holding in *Richardson-Merrell Inc.* stating that an order revoking an attorney's PHV admission may not be appealed until the conclusion of the case in which his admission was revoked. One harm is that the attorney will be denied admission to the bars of other courts, as was done here. Another harm is that the attorney must report the PHV disbarment to other courts, including the United States Supreme Court under Supreme Court Rule 8, and is therefore subjected to additional punishment and disbarment from these other Courts. Another harm is that the represented party's case is halted for months, as evidenced in the *Bailey* and *Peralta* actions. Another harm is that the disbarment can stop the timely progression of an action involving

products that cause injury to people, leading to actual physical injuries to others, as witnessed here, where during the stays of the *Bailey* and *Peralta* actions, other persons suffered severe physical injuries by the products, despite the fact that the petitioner-attorney filed a very early motion for summary judgment to adjudicate the defects of the products.

The Seventh Circuit Court of Appeals affirmed the Executive Committee's order denying Petitioner admission to the general bar based on the order issued in *Bailey* revoking the petitioner's PHV admission, even though that order was not capable of appellate review until the end of the case, due to the Supreme Court's holding in *Richardson-Merrell, Inc.* The Supreme Court should therefore grant this petition so that it can overturn *Richardson-Merrell Inc.* and prevent the appreciable harms observed in this matter.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

Andrew W. Shalaby
7525 Leviston Avenue
El Cerrito, CA 94530
Tel. 510-551-8500
andrew@eastbaylaw.com
Petitioner pro per