

No. _____

In the Supreme Court of the United States

THOMAS M. UTTERBACK,
Petitioner,

v.

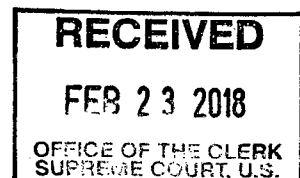
TRUSTMARK NATIONAL BANK
and HAND ARENDALL, LLC,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Thomas M. Utterback
641 Norfolk Drive
Kirkwood, MO 63122
(850) 582-8525
tomback47@yahoo.com

Pro Se Petitioner



QUESTION PRESENTED

When a plaintiff has alleged a credible tort claim against an attorney based on the attorneys' misconduct, should the federal trial and appellate courts, where possible, exercise judicial discretion to insure adjudication on the merits? If so, do trial and appellate courts abuse their discretion by failing to transfer to a trial court of more competent jurisdiction when that would more likely allow a trial on the merits?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND RULE PROVISIONS AND INHERENT AUTHORITY	1
STATEMENT OF THE CASE AND FACTS	2
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	10
APPENDIX	
Appendix A Opinion and Judgment in the United States Court of Appeals for the Fifth Circuit (November 22, 2017)	App. 1
Appendix B Order Granting Dismissal and Final Judgment in the United States District Court for the Southern District of Mississippi, Northern Division (March 30, 2017)	App. 10
Appendix C Sup. Ct. R. 8 §2	App. 39
Fla. Const., Art. V, Sec. [15] ...	App. 39

TABLE OF AUTHORITIES

CASES

<i>Abdool v. Bondi</i> , 141 So.3d 529 (Fla. 2014)	2
<i>Ex parte Burr</i> , 22 U.S. (9 Wheat.) 529 (1824)	2
<i>In re Disbarment of Utterback</i> , 525 U.S. 803, 119 S. Ct. 288 (1998)	1
<i>Fla. Bar v. Martocci</i> , 791 So.2d 1074 (Fla. 2001)	9
<i>Sacher v. United States</i> , 343 U.S. 1, 72 S. Ct. 451 (1952)	7
<i>United States v. Dinitz</i> , 424 U.S. 600, 96 S. Ct. 1075 (1976)	7
<i>United States v. Taylor</i> , 487 U.S. 326, 108 S. Ct. 2413 (1988)	10
<i>Utterback v. Trustmark Nat'l Bank</i> , No. 17-60249, 2017 U.S. App. LEXIS 23687 (5th Cir. Nov. 22, 2017)	1
<i>Young v. Allstate Ins. Co.</i> , 119 Haw. 403, 198 P.3d 666 (2008)	9

CONSTITUTION

Florida Const., Art. V, Sec. [15]	2
---	---

STATUTES AND RULES

28 U.S.C. § 1254(1)	1
Sup. Ct. R. 8 §2	1

OTHER AUTHORITIES

<u>Sanctions Available for Attorney Misconduct: A Glimpse at the "Other" Remedies</u> , Tracy Axelberg, Montana Law Review, Vol. 47, Issue 1, Article 4 (Winter 1986)	8
---	---

PETITION FOR A WRIT OF CERTIORARI

Thomas M. Utterback, a disbarred, former member of this Court's Bar (see, *In re Disbarment of Utterback*, 525 U.S. 803, 119 S. Ct. 288 (1998), *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court final judgment denying Utterback's motion to transfer his case to the United States District Court for the Northern District of Florida as moot.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App., *infra*, 1-9) is reported at *Utterback v. Trustmark Nat'l Bank*, No. 17-60249, 2017 U.S. App. LEXIS 23687 (5th Cir. Nov. 22, 2017). The opinion of the United States District Court for the Northern District of Mississippi is set out at App., *infra*, 10-38.

JURISDICTION

The court of appeals entered its judgment on November 22, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND RULE PROVISIONS AND INHERENT AUTHORITY

USCS Supreme Ct R 8 §2 (App., *infra*, 39) confirms this Court's authority to take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court. The power to

maintain the respectability of the bar and preserve its harmony with the bench is inherent. *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824).

Florida, Art. V, Sec. [15] of the Florida Constitution (App., *infra*, 39) merely recognizes the inherent authority of the Florida Courts to discipline members of the Bar practicing before them. *Abdool v. Bondi*, 141 So.3d 529, 548 (Fla. 2014).

STATEMENT OF THE CASE AND FACTS

This Petition presents an issue not previously addressed by this or any other federal court: given the inherent authority of the Courts to regulate attorneys and insure the integrity of the court, when a plaintiff reasonably alleges tortious injury as a direct result of attorney misconduct, does the duty and burden of the courts to regulate attorneys impose upon the courts a duty to insure that allegations of unethical conduct be decided on the merits where legally possible?

Here, the Hand Arendall law firm in Mobile, Alabama repeatedly attacked Utterback as an ex-con and disbarred attorney in several matters of civil litigation that were not concerned with Utterback personally and in which Utterback had no involvement in the underlying case. Yet, Hand Arendall consistently accused Utterback of practicing law without a license even though he was the manager for CCB, LLC, a Florida limited liability company that had borrowed money from Hand Arendall's bank client well prior to Utterback's being hired to manage CCB's affairs.

The string of related cases began when BankTrust (Trustmark's predecessor) filed the primary "state case," Case No. 2009 CA 001573 in the Circuit Court of

Walton County, Florida, in the fall of 2009. Thereafter, in June 2010, CCB sued BankTrust (the Hand Arendall client) in the United States District Court for the Northern District of Florida (Case No. 3:10-CV-228 – the “federal case”), alleging fraud, fraud in the inducement, breach of fiduciary duty, and other related legal theories.

Then, in the spring of 2012, CCB’s owners filed Case No. 3:12-cv-394 in the United States District Court, Northern District of Florida, Pensacola Division alleging wrongful garnishment. CCB, LLC, the entity which Utterback managed, was not a party to the wrongful garnishment complaint. Yet, Hand Arendall personally attacked Utterback in this case as well. A summary of Hand Arendall’s unrelenting war on Utterback includes:

1. An unlicensed practice of law complaint against Utterback filed on February 17, 2011, with the Florida Bar UPL Committee.

2. In Case No. 3:12-cv-394 in the United States District Court, Northern District of Florida, Pensacola Division, on December 21, 2012, Hand Arendall wrote in a memorandum of law that “BankTrust believes that Mr. Utterback has continued to work as an unlicensed lawyer in this case by preparing pleadings, conducting legal research, and advising plaintiffs and their counsel as to legal strategy, for compensation.”

3. In Case No. 2009 CA 001573 in the Circuit Court of Walton County, Florida, on November 22, 2011, Hand Arendall filed a motion to compel identifying Utterback to the trial judge as a “disbarred Missouri attorney who may or may not – be providing

defendants with legal advice regarding this matter. If defendants are relying on the advice of a disbarred attorney in pursuing their claims, BankTrust – and the Court – is entitled to know.”

4. In Case No. 2009 CA 001573 in the Circuit Court of Walton County, Florida, on March 19, 2012, Hand Arendall’s response questioned Utterback’s job as CCB manager and reminded the trial court that Utterback was convicted of federal felony charges in 1998 and expressed BankTrust’s “fear that Mr. Utterback is continuing to practice law....” and that Defendants’ counsel would have to be disqualified if they facilitated Utterback’s alleged malfeasance. Hand Arendall never sought to disqualify any of CCB’s, Barniv’s, or Witkind’s attorneys.

5. In Case No. 2009 CA 001573 in the Circuit Court of Walton County, Florida, on March 23, 2012, Hand Arendall moved to dismiss and repeated the allegations that Utterback was practicing law without a license.

6. In Case No. 2009 CA 001573 in the Circuit Court of Walton County, Florida, on March 28, 2012, Hand Arendall filed BankTrust’s response in opposition to CCB’s motion to reconsider wherein Walker again stated that “BankTrust believes that he [Utterback] has been engaged in the unlicensed practice of law in this case.....”.

7. In Case No. 1D12-1774, in Florida’s First District Court of Appeal, on May 24, 2012, Hand Arendall responded to CCB’s Petition for a Writ of Certiorari by writing that, “BankTrust believes that Mr. Utterback’s activities in ‘managing’ the litigation may well have involved the unlicensed practice of law and, if so, such

conduct will or may preclude Petitioners' current counsel from continuing to represent them in this case;" that Utterback "is or has been engaged in the unlicensed practice of law..."; and that Utterback "has in fact been engaged in the unlicensed practice of law."

8. On February 7, 2013, the Florida Bar's First Circuit Unlicensed Practice of Law Committee "A" closed their file on the Hand Arendall/BankTrust complaint by accepting a 'cease and desist' affidavit in which Utterback affirmed his compliance with Florida law. The Florida Bar Committee never held a hearing, never supplied Utterback with any of their investigative results, never allowed Utterback to confront his accusers, and never did anything more with Utterback than exchange letters.

9. In Case No. 1D13-0154, in Florida's First District Court of Appeal, on February 20, 2013, after Hand Arendall's UPL complaint against Utterback had been dismissed, Hand Arendall filed a motion for appellate attorneys' fees in part because the Appellants took "counsel from an individual [Utterback] not licensed to practice law in Florida or anywhere else." Hand Arendall went on to describe Utterback's 1998 guilty plea to money laundering and that Utterback's "third and most recent application for reinstatement was rejected by the State Bar of Missouri in 2009."

10. On March 11, 2013, in that same appellate case, Hand Arendall filed a response to CCB's motion to strike wherein he stated that "Petitioners' arguments regarding Mr. Utterback are unintelligible, but Respondent BankTrust believes they are arguing that this Court should not consider Mr. Utterback's unlicensed involvement in this case because that is not

an issue raised in *their* Petition.” Then, Hand Arendall went on to allege that Petitioners “have voluntary taken counsel from a man not licensed to practice law in the State of Florida – or anywhere else.”

At no time did Hand Arendall file a motion to disqualify Utterback from his status as manager of CCB, LLC in the state and appellate proceedings. At no time did any trial or appellate judges grant Hand Arendall or its client any relief based on Hand Arendall’s continuous stream of attacks.

On March 6, 2015, Utterback sued Hand Arendall and its bank client Trustmark (successor to the defunct BankTrust) in Case No. 15 CV 00163 in the United States District Court for the Southern District of Mississippi. On March 30, 2017, the district court granted Hand Arendall’s and Trustmark’s motions to dismiss Utterback’s complaint, but failed to address Utterback motion to transfer, motion to defer ruling, and his motion to abate entry of judgment so that Utterback could amend his complaint as a result of a major change in Florida law. App. 34-35.

In Case No. 17-60249, on November 22, 2017, the United States Court of Appeals for the Fifth Circuit affirmed the district court finding, in essence, that the district court did not abuse its discretion in failing to consider Utterback’s motion to transfer to the United States District Court for the Northern District of Florida. App. 2.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeals decided that the district court did not abuse its discretion by failing to consider Utterback's motion to transfer to a more appropriate venue – a venue where Utterback was much more likely to clear the procedural hurdles imposed by application of Mississippi law and allow Utterback's claims to be decided on the merits.

Utterback contends that how judicial discretion is exercised in a case involving attorney misconduct is an important question of federal law that has not been, but should be, settled by this Court.

Utterback contends that the inherent authority of the courts to regulate attorney conduct should compel the federal courts to insure that where attorney misconduct is well-pled that the courts exercise judicial discretion to insure a trial on the merits where possible.

If Utterback's claims against Hand Arendall are ordinary torts, Utterback would not have filed this Petition. However, Utterback argues that the interests of society in the preservation of courtroom control by trial judges should not be frustrated through unchecked improprieties by zealous attorneys. *Sacher v. United States*, 343 U.S. 1, 8, 72 S. Ct. 451, 454-55 (1952). In *United States v. Dinitz*, 424 U.S. 600, 612, 96 S. Ct. 1075, 1082 (1976), this court confirmed the duty of the district court to protect the integrity of the court and to stop professional misconduct.

Here, the several state and federal courts rebuffed Hand Arendall's efforts to discredit Utterback as the manager of a plaintiff limited liability company.

However, those Courts did not have the jurisdiction to hear or decide Utterback's tort claims seeking money damages. Utterback argues that while the actions of the UPL Committee and courts may have been in his favor, those actions will do little to curb Hand Arendall in repeating their attacks on some other plaintiff in the future if Hand Arendall (and its then client) decides they want to punish the complainant outside the courtroom.

As has been pointed out by many commentators, attempting to effectively sanction attorney misconduct is not without its shortcomings. Here, Hand Arendall attempted over and over to get trial and appellate courts and the Florida UPL committee to sanction Utterback. Hand Arendall failed. Yet, Utterback suffered damage to his reputation and his career because the wrongful attacks did not stay in the courtrooms nor were they confined to the pages of pleadings, motions, and memoranda.

It is not often that the little guy or gal has sufficient sophistication to pursue a remedy against Big Law. The deck is stacked in favor of the well-monied and well-connected. Given that, those persons bullied by Big Law have little incentive to pursue remedies given the time involved, the many quirks of the legal processes, and the reluctance of the courts to impose sanctions against misbehaving attorneys. Thus, the type of unethical conduct that Utterback complains of remains essentially unchallenged by legal communities. See, Sanctions Available for Attorney Misconduct: A Glimpse at the "Other" Remedies, Tracy Axelberg, Montana Law Review, Vol. 47, Issue 1, Article 4 (Winter 1986) at page 92.

In *Fla. Bar v. Martocci*, 791 So.2d 1074 (Fla. 2001), the Florida Supreme Court sanctioned Attorney Martocci for an over-zealous representation that devolved into harassment and intimidation. Reported attorney discipline cases from across the country reflect the sentiments in *Martocci*, but none of these cases address a court's role in helping to insure money compensation for victims of attorney abuse.

The failure of the district court to even consider whether it should exercise its discretion to transfer Utterback's case to a more correct venue is part and parcel of the failure of the legal system to enforce Rules of Conduct and provide meaningful sanctions. Should this Court hold that federal courts more closely scrutinize tort claims that emanate from attorney misconduct, this Court can make the scales of justice modestly more even.

If this Court grants Utterback's Petition, he will not argue that the district court should have tried Utterback's case for him, but Utterback will argue that the district court did have discretion to transfer the case to Florida's Northern District. However, absent a ruling by this Court that compels federal appellate and district courts to exercise judicial discretion to insure that a well-plead "attorney conduct" tort case be decided on the merits where possible, there is nothing to guide district or appellate courts as to their duties to take greater steps to provide meaningful remedies for attorney misconduct.

The dissent in *Young v. Allstate Ins. Co.*, 119 Haw. 403, 435, 198 P.3d 666, 698 (2008) provides a particularly cogent discussion of the tort of "malicious defense" and candidly admits that injuries such as

Utterback's are not often redressable through court procedural rules or the inherent powers of the courts.

In *United States v. Taylor*, 487 U.S. 326, 343-44, 108 S. Ct. 2413, 2423 (1988), this Court dealt with misconduct on the part of a defendant in contributing to a violation of the Speedy Trial Act. In doing so, this Court confirmed a trial court's great discretion in making decisions concerning trial schedules and responding to abuse and delay. Yet, this Court found that the trial court abused its discretion when it failed to consider all the factors relevant to the choice of a remedy under the Speedy Trial Act.

Here, the district court did not consider Utterback's motion to transfer (and his supporting motions to defer ruling and to abate judgment pending a decision by the Florida Supreme Court) at all.

CONCLUSION

If the Court grants his Petition, Utterback will argue that the interests of the Rule of Law mandate that federal trial courts should exercise their discretion in favor of adjudication on the merits where a plaintiff has reasonably pled injury emanating from attorney misconduct. For the reasons set forth above, this Court should grant a writ of certiorari.

11

Respectfully submitted,

Thomas M. Utterback
641 Norfolk Drive
Kirkwood, MO 63122
(850) 582-8525
tomback47@yahoo.com

Pro Se Petitioner