IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BRET S. CLARK,

Respondent.

Supreme Court Case
No. 70,295

On Petition for Review of the Referee's Report in a Disciplinary Proceeding.

ANSWER BRIEF OF COMPLAINANT

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as "The Bar" or "The Florida Bar". Bret S. Clark, Respondent, will be referred to as "Mr. Clark" or "the Respondent".

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, Bret S. Clark, in his Initial Brief set forth what he considered to be the facts of the case. The Complainant, The Florida Bar, takes exception to a large part of his statement of facts. The record does not reflect the existence of some of these facts and other portions are argumentative.[1] Therefore, The Florida Bar would adopt the Referee's summary of facts contained in the Report of Referee as its statement of the facts. Those findings have been included below for the Court's convenience.

> "**FINDING OF FACTS:** I find the following facts to be true and correct:
>
> COUNT I
>
> 1. That Respondent, Bret S. Clark, on or about January 20, 1984, was admitted to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.
>
> 2. That on or about August 12, 1982 prior to Respondent's admittance to The Florida Bar, Respondent received a speeding ticket to which he pled not guilty.
>
> 3. That on or about October 11, 1982 Respondent was found guilty of such speeding ticket by the Lake County Court, Lake County, Florida and fined $100.00.

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[1] see page 14 for an example of an argumentative remark. Respondent suggests that a hearing was conducted "as a necessary formality to the inevitable conclusion reached by the Referee." This statement infers one of two explanations. Either the Referee was biased or that the Referee and Bar had some "arrangement". Such a remark is typical of Respondent's ability to accuse without any basis in fact. Further, such type of behavior is precisely the type of behavior which caused Respondent to be disciplined in the first place.

4. That on or about November 22, 1982 Lake County Court stayed imposition of payment of such fine pending appeal of the Circuit Court, Fifth Judicial Circuit, in and for Lake County, Florida.

5. That on or about January 20, 1984, Respondent was admitted as a member of The Florida Bar and at all times hereinafter mentioned was a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

6. That on or about September 4, 1984 the Circuit Court, Fifth Judicial Circuit, in and for Lake County, Florida sitting in its appellate capacity, affirmed the Lake County Court decision, without opinion.

7. That on or about February 14, 1985 Respondent filed a petition for writ of certiorari with the Fifth District Court of Appeal of Florida to review such September 4, 1984 order of the Circuit Court.

8. That pursuant to Florida Rules of Appellate Procedure 9.100(c), such petition for writ of certiorari should have been filed within 30 days of the order sought to be reviewed, or by October 4, 1984 in the instant case.

9. That Respondent argued such petition was timely under an exception to the rule where denial of appellate review would be fundamentally unfair.

10. That Respondent contended such denial of appellate review would be fundamentally unfair since Respondent had not received notice of the Fifth Judicial Circuit's order of affirmance until January 14, 1985.

11. That Respondent's failure to receive such notice was due to his

change of address and failure to inform the Court of such change.

12. That on or about April 15, 1985 the Fifth District Court of Appeal dismissed Respondent's petition for writ of certiorari due to lack of jurisdiction.

13. That on or about April 30, 1985 Respondent filed a motion for rehearing with the Fifth District Court of Appeal of Florida.

14. That on or about May 28, 1985 the Fifth District Court of Appeal denied such motion as untimely.

15. That Respondent had erroneously assumed that all documents served by mail have an additional five days added to the time period whereas such procedure is not applicable to the filing of notices of appeal or motions for rehearing.

16. That on or about July 8, 1985 Respondent filed a motion to recall mandate and a suggestion for reconsideration with the Fifth District Court of Appeal.

17. That such motion was attacked by the State as being frivolous and a sham pleading since the Court had no power to recall mandate and that no mandate had even issued.

18. That the State moved for attorneys fees under the provisions which provides for such fees where a losing party's position lacks any "justiciable issue" of law or fact.

19. That in support of Respondent's contention that his efforts were not frivolous, Respondent relied on a 1980 case that had been reversed by The Florida Supreme Court in 1981.

20. That on or about July 12, 1985 the

Fifth District Court of Appeal denied Respondent's motion for recall of mandate.

21. That on or about July 25, 1985 the Fifth District Court of Appeal granted the State's Motion for Attorney's Fees in the amount of $100.00.

22. That on or about August 23, 1985 Respondent filed an untimely motion with the Fifth District Court of Appeal to review such order granting attorney's fees.

23. That Respondent argued, for the first time, that such sanctions were in retaliation for Respondent's correspondence to the Fifth District Court of Appeal where Respondent complained of his denial of appellate review as violating his First Amendment right to petition for redress of grievances and that such fee sanction was repugnant to the Constitution.

24. That on or about September 12, 1985 the Fifth District Court of Appeal summarily denied Respondent's Motion to Review such fee award.

25. That on or about November 14, 1985 the Florida Supreme Court, answering an inquiry made by Respondent, informed Respondent that it lacked jurisdiction to review orders granting fee awards.

26. That on or about December 9, 1985 Respondent appealed the Fifth District Court of Appeal's final order awarding fees to the United States Supreme Court, arguing that such fee award was in violation of the First Amendment since such fee statute was based upon a vague concept of what constituted a justiciable issue.

27. That on or about April 28, 1986 the United States Supreme Court denied such appeal as being "so utterly frivolous as to not warrant any further discussion".

COUNT II

28. That on or about April 25, 1985 Respondent appeared before the Honorable Judge Spellman as plaintiff's attorney in a preliminary injunction hearing, in the case of Rose Merle v. Florida State Constructors Services, Inc., Case No. 85-0974-Civ-EPS, in the U.S. District Court, Southern District of Florida.

29. That at such hearing, Respondent alleged that Judge Barad, a Circuit Judge of the Eleventh Judicial Circuit of Florida was an active participant in a RICO conspiracy with defendants.

30. That Respondent based such allegations on the premise that Judge Barad and the defendants in the case being tried had entered into a conspiracy which resulted in obstruction of justice and the inability of Respondent's client to get a fair hearing before such Judge.

31. That on or about April 21, 1986 Respondent filed a Second Amended Complaint-Class Action against the Honorable Frederick N. Barad and the entire Eleventh Circuit Court of Dade County, Florida among other defendants.

32. That in such complaint, Respondent alleged that Judge Barad and other judges of the Eleventh Circuit Court were corruptly influenced in the due administration of justice in the state courts by the private defendants, thus engaging in a pattern of racketeering activity in violation of the RICO statute.

33. That Respondent based such allegations of racketeering activity on Judge Barad's rulings against Respondent's client and ex parte communications had between Judge Barad and opposing counsel.

Lastly, The Florida Bar wants to note that the Referee found that these facts warranted a finding that the Respondent had violated Disciplinary Rules 1-102(A)(6)*, 7-102(A)(2) and 8-102(B) and that a public reprimand was warranted.

*Although the Report of Referee and Complaint show this as Disciplinary Rule 1-106(A)(6), it is obvious that the Complaint and Referee Report were referring to Disciplinary Rule 1-102(A)(6), as the description after the cited rule states, "conduct that adversely reflects on attorney's fitness to practice law." Also there is no Disciplinary Rule 1-106(A)(6).

SUMMARY OF ARGUMENT

The Respondent attempts to have this Honorable Court conduct a trial de novo of this disciplinary matter. This Court has held on numerous occasions that the findings of a Referee in a disciplinary matter are presumed correct and not to be reversed unless these findings are proven to be clearly erroneous or lacking in evidentiary support. Therefore, an appeal to this Court should not be used to conduct a trial de novo of factual findings.

The Respondent has failed to show that the Referee's findings, in reference to the appeal of his traffic ticket to the United States Supreme Court and in reference to certain unsubstantiated derogatory remarks about members of the judiciary, are clearly erroneous or lacking in evidentiary support.

The Respondent argues that he cannot be disciplined in this instance as to do so would violate his First Amendment Right to Freedom of Speech. This argument is clearly without merit as this Honorable Court and others have held that an attorney may be disciplined for making unsubstantiated or untruthful remarks about members of the judiciary, notwithstanding the First Amendment.

In light of the foregoing the findings of the Referee must be upheld and the Respondent should be publicly reprimanded for his unethical acts.

POINT ON APPEAL

WHETHER THE REFEREE'S FINDINGS MUST BE UPHELD SINCE THEY ARE NOT CLEARLY ERRONEOUS NOR ARE THEY LACKING IN EVIDENTIARY SUPPORT?

ARGUMENT

I

THE REFEREE'S FINDINGS ARE NOT CLEARLY ERRONEOUS NOR ARE THEY LACKING IN EVIDENTIARY SUPPORT AND THEREFORE, THESE FINDINGS MUST BE UPHELD

This Honorable Court has held that a Referee's findings of fact in an attorney disciplinary proceeding are presumed correct. The Florida Bar v. Neely, 502 So.2d 1237, 1238 (Fla. 1987). Additionally, this Court has decided that these findings will be upheld unless it can be shown that the findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Golden, 502 So.2d 891, 892 (Fla. 1987); The Florida Bar v. Hooper, 507 So.2d 1078, 1979 (Fla. 1987). An application of these standards to the case sub judice, clearly indicates that the Respondent has failed to meet his burden and therefore his appeal should be denied.

In essence, the Respondent would like this Honorable Court to reevaluate the facts of this case and find that the Respondent did not breach the Code of Professional Responsibility. However, for this Court to reevaluate the facts of this case would be giving the Respondent a trial de novo. This Court has stated that the Supreme Court of Florida will not conduct a trial de novo of a disciplinary matter. The Florida Bar v. Hooper, 509 So.2d 289, 290 (Fla. 1987).

The Respondent attempts to find fault with the Report of Referee, simply because his findings of fact are identical to the Complaint that was filed by the Complainant. The Respondent claims that this action by the Referee was an abdication of the

Referee's responsibilities. However, what the Respondent fails to realize is that the Referee found that the Bar had met its burden of proof and that the Bar had established the allegations contained in the Complaint. Thus, the Referee adopted the allegations contained in the Complaint, as the statement of facts proved at the Final Hearing of this matter.

A. THE RECORD REFLECTS THAT THE RESPONDENT VIOLATED DISCIPLINARY RULE 1-102(A)(6) AND DISCIPLINARY RULE 7-102(A) (2) OF THE CODE OF PROFESSIONAL RESPONSIBILITY REGARDING THE APPEAL OF HIS TRAFFIC TICKET.

Disciplinary Rule 7-102(A) (2) of the Code of Professional Responsibility dictates that a lawyer shall not:

> Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by a good faith argument for an extension, modification, or reversal of existing law.

It is the Respondent's contention that he did not violate this Disciplinary Rule and that the record reflects that every step he undertook regarding his appeal of his traffic ticket to the United States Supreme Court, was a good faith argument for an extension, modification, or reversal of existing law. At this juncture it is important to distinguish between the merits of the Respondent's ticket case and the Rules of Appellate Procedure which the Respondent refused to follow in fighting this traffic ticket. It is this failure to follow the simple Rules of Appellate Procedure that resulted in a stinging opinion by Chief Justice Warren Burger[2] and not the actual merits

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[2]The Respondent is correct that the opinion by Chief Justice Burger was not joined by other members of the Court. It is also important to note that the Chief Justice's resignation from the Supreme Court had nothing to do with this opinion or Bret Clark.

of why the Respondent should not have paid one hundred dollars ($100.00) for his traffic ticket.

It is the Bar's position that this failure to meet procedural deadlines resulted in the filing of frivolous pleadings. This position is supported by Chief Justice Burger in his blistering opinion which noted that the Respondent had:

> ... demonstrated a contempt for the Florida Courts and the system of justice by repeatedly ignoring filing deadlines and by raising patently frivolous claims.
>
> Clark v. Florida, 106 S.Ct 1784 (1986).

The Referee was also of the opinion that the Respondent's acts were untimely and frivolous. The Referee explained that Clark:

> . . . petitioned for certiorari to the Fifth District Court of Appeals five months subsequent to the date of the order. The Rules of Appellate Procedure unequivocally provides that the petition be filed within 30 days. Although Respondent changed his address and failed to advise the court of same, he persisted undeterred. Respondent then filed a Motion for Rehearing outside of the time limits prescribed, mistakenly believing he had extra time for mailing. Although Mr. Clark claims this mistake to be common among other attorneys he should have at that point ceased his efforts. He had failed to comply with mandatory rules which all attorneys and litigants are bound by. The Fifth District Court of Appeals recognized the foregoing and consequently awarded the Attorney General's office attorney's fees. I believe that such an action was extraordinary and certainly in the same vein as former Chief Justice Burger's act.
>
> Report of Referee p5.

These comments by the Referee on the Respondent's inability to follow procedural rules are substantiated in Chief Justice Burger's opinion where the Chief Justice carefully set forth the lower Court procedures. This opinion was entered into evidence

by the Bar. Thus, the Referee had ample evidentiary support for Clark's failure to meet these deadlines and the extraordinary actions taken not only by Chief Justice Burger but also by the Fifth District Court of Appeal.

Disciplinary Rule 1-102 (A) (6) requires that an attorney shall not engage in conduct that adversely reflects on an attorney's fitness to practice law. It is the Bar's position that by failing to follow the simple procedural rules and by his advancement of unmeritorious pleadings, the Respondent has engaged in conduct that adversely reflects on his fitness to practice law.

Of note is Chief Justice Burger's comment that had Clark committed this type of activity prior to being admitted to The Florida Bar the Board of Bar Examiners "would plainly have been entitled to conclude that he was unfit to be a member of the Bar". Clark v. Florida, at 1787 (Chief Justice Burger concurring).

The Respondent in his brief attempts to show this Court why he did certain things during his unsuccessful appeal of his traffic citation. Each argument, that the Respondent has raised regarding the steps that he took to fight this ticket, has already been rejected, not only by the Fifth District Court of Appeals but also by the Supreme Court of the United States. Clark v. Florida. Therefore, this Honorable Court should once again accept the argument that the Respondent's actions in this instance were frivolous and in violation of Disciplinary Rule

1-102(A)(6) and Rule 7-102(A)(2) of the Code of Professional Responsibility.

B. THE RECORD REFLECTS THAT THE RESPONDENT HAS VIOLATED DISCIPLINARY RULE 1-102(A)(6) AND DISCIPLINARY RULE 8-102(B) OF THE CODE OF PROFESSIONAL RESPONSIBILITY REGARDING HIS UNSUBSTANTIATED DEROGATORY REMARKS INVOLVING MEMBERS OF THE FLORIDA JUDICIARY.

Disciplinary Rule 8-102(B) requires that a lawyer shall not knowingly make false accusations against a member of the judiciary. As explained above, Disciplinary Rule 1-102(A)(6) states that a lawyer shall not engage in conduct that adversely reflects on his fitness to practice law.

The Report of Referee as to Count II of the Bar's complaint is enlightening as to the charges leveled against the Respondent and as to why the Respondent should be found to have violated the Code of Professional Responsibility. The Referee explained as to Count II that:

> The Respondent is charged with knowingly accusing Judge Barad and the other Judges of the Eleventh Judicial Circuit of participating in a RICO conspiracy, where such allegations were without basis. Respondent complains that it is his ethical duty to advise the public of judicial impropriety and The Florida Bar is in essence preventing him from doing so. I cannot agree with Respondent. For instance, Mr. Clark based his accusation that Judge Barad engaged in ex parte communications with the defendant's attorney, since his client witnessed the two in conversation. He admits that she did not have any knowledge of the content of the conversation. Further, that Judge Barad engaged in mail fraud since the defendants presented pleadings containing false information which were ruled on by the court and placed in mail receptacles. I do not believe the mail fraud statute contemplates such an interpretation which

> stretches the limits of credibility. Mr. Clark also asserts Judge Barad's involvement in the conspiracy since he ruled against his client on matters which were without question. Surely, adverse rulings can be attributed to mistakes of law and consequently remedied by the appellate court, as they were in this case. The list of accusations continued without any provable support from Mr. Clark.

The record reflects that The Florida Bar submitted into evidence a certified copy of the Second Amended Complaint that contained the unfounded allegations against Judge Barad and the entire Eleventh Circuit Court. The Respondent also admitted at the hearing that he did indeed draft and file this Second Amended Complaint. Thus, the Referee had ample evidence to show that certain derogatory allegations were made against the judiciary.

The only question remaining then is did the Referee have support in the record for his finding that these allegations were unsubstantiated. The Respondent admitted during the final hearing of this matter that part of the allegations in said complaint relied upon a certain ex-parte conversation between Judge Barad and the oposing counsel. The Respondent admitted that he had no knowledge of the content of that conversation but that he relied on his clients' representations of the content even though she did not overhear the conversation.

It is The Florida Bar's contention that the Respondent had no substantiation whatsoever for his allegations against Judge Barad and the commission of RICO violations. The Referee relied upon this lack of substantiation to find that the Respondent violated Disciplinary Rule 8-102(B) and by violating Disciplinary

Rule 8-102(B) to have exercised a course of conduct that adversely reflected on his fitness to practice law in violation of Disciplinary Rule 1-102 (A) (6).

II

THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IS NOT VIOLATED BY DISCIPLINING AN ATTORNEY FOR UNSUBSTANTIATED DEROGATORY REMARKS OR BY DISCIPLINING AN ATTORNEY FOR FILING FRIVOLOUS PLEADINGS.

The Respondent contends that to discipline him for the acts which caused this instant action would be a violation of his First Amendment Right to freedom of speech. This is simply not the case.

This Honorable Court was faced with this precise issue on at least one prior occasion. The Florida Bar v. Shimek, 284 So.2d 686 (Fla. 1973). In Shimek this Court held that the First Amendment does not prevent the disciplining of an attorney for accusations against the judiciary of the State of Florida. Id at 689. In light of this position this Court has not been reluctant to publicly reprimand attorneys who make false accusations against the judiciary. The Florida Bar v. Weinberger, 397 So.2d 661, 662 (Fla. 1981); Cerf v. State, 458 So.2d 1071, 1074 (Fla. 1984).

In Cerf this Court noted that:

> "It is one thing to allow an attorney his truthful criticisms against our judicial system. However, it is quite another to allow an attorney a poetic license to falsely slander a circuit judge with untrue accusations . . ."
>
> Id at 1074.

In the same vein the Louisiana Supreme Court once explained

that:

> It is not the genuineness of an attorney's belief in the truth of his allegations, but the reasonableness of that belief and the good faith of the attorney in asserting it that determines whether or not one has "knowingly" made false accusations against a judge within the meaning of DR 8-102(B). Consequently, where it is shown that an attorney knew, or in good faith should have known, of the falsity of his accusations, that attorney's unsubstantiated, subjective belief in the truth of those accusations, however genuine, will not excuse his violation of DR-8-102(B).
>
> Louisiana State Bar Association v. Karst, 428 So.2d 406, 409 (La. 1983)

The Respondent relies upon Garrison v. Louisiana, 379 U.S. 64 (1964), for the proposition that an attorney cannot be disciplined for derogatory remarks about the judiciary. However, Garrison stands for the proposition that an attorney cannot be disciplined for truthful statements. Id. The remarks about Judge Barad and the entire 11th Judicial Circuit being involved in a RICO conspiracy and/or mail fraud can hardly be characterized as truthful and the Respondent's reliance on Garrison is therefore misplaced.

The Respondent during the final hearing of this matter stated that he had "no objection to the recommendation for a public reprimand if the Court finds that I violated these ethics rules". Therefore, the Respondent's argument that it is a violation of the First Amendment to discipline him is not consistent with his prior position in this case. Furthermore, an argument could be raised that the Respondent waived this constitutional contention by his prior admission.

In any event it is clear that this Honorable Court would not violate the precepts of the First Amendment by disciplining the Respondent for his unethical acts.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee correctly imposed a public reprimand, and would urge this court to affirm same.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Complainant on Petition for Review was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Bret S. Clark, at his Record Bar Address, P.O. Box 53-1131, Miami Shores, Florida 33153-1131 on this 29th day of April, 1988.

RANDI KLAYMAN LAZARUS
Co-Bar Counsel