IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No. 70,295

BRET CLARK,

Respondent,

vs.

THE FLORIDA BAR

Complainant.

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ON PETITION FOR REVIEW OF THE REPORT
OF THE REFREE IN A DISCIPLINARY MATTER

INITIAL BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE
AND OF THE FACTS

This is a petition for review of a report of the referee in a disciplinary proceeding brought against Respondent by the Florida Bar. In this brief Respondent Bret S. Clark, Esquire shall be referred to as "Clark" or "Respondent." The Florida Bar shall be referred to as the "Bar." References to the record shall be made to the excerpts thereof contained in the accompanying appendix prepared pursuant to Florida Rule of Appellate Procedure 9.220.

This section of the brief is divided into two parts. The first part sets forth the underlying facts upon which the Bar based the disciplinary proceedings commenced against Respondent. The second part of this section then describes those proceedings that eventually led to the report of the referee and the instant petition for review of that report.

I. THE FACTS

The Bar combined two seperate matters in the proceedings brought against Respondent. The first matter concerned an opinion filed by former Chief Justice Warren Burger in appeal proceedings brought by Clark to review an assessment of attorney's fees by the Fifth District Court of Appeal. A11-A14.

The second matter concerned a complaint filed by Clark naming a Judge of the Eleventh Circuit Court in and for Dade County, Florida, as a party defendant to the suit, pursuant to an order entered by the presiding United States District Court Judge in that action. A14-A17.

No testimony was offered by the Bar in the proceedings below in support of the allegations made in the complaint filed against Respondent, with the exception of the statements voluntarily provided by Respondent under oath in the informal proceeding had before the Referee. Respondent primarily relies upon the record of the proceedings at issue in each matter for which the Bar seeks to impose disciplinary sanctions against him to support the statement of the facts.

A. THE BURGER INCIDENT

Respondent was admitted as a member of the Florida Bar on January 20, 1984. A11, A18. Prior thereto, he received a traffic citation charging him with exceeding the speed limit, and was found guilty in a proceeding before the County Court in and for Lake County, Florida. Id. At the time Respondent was cited for this infraction, the Florida State Trooper issuing the citation stated that if Respondent chose to contest the infraction, the County Court would impose twice the amount of the original fine, as part of an established "double or nothing" sentencing policy of the court. A38.

The County Court assessed a fine of $100.00, exactly twice the original fine of $50.00. A38.

Respondent filed an appeal from this ruling to the appellate division of the Fifth Judicial Circuit in and for Lake County, Florida. All, A18. On September 4, 1984, nearly two years after the original ruling of the Lake County Court, the appellate division affirmed without explanation. A12, A18. Respondent, however, did not receive this order until January 14, 1985. Id.

On February 14, 1985, Respondent filed a Petition for Writ of Certiorari in the Fifth District Court of Appeal. Id. In the petition, he argued that the petition should be considered timely on the grounds that the clerk of the lower court had deviated from Florida statutes regarding notice in such cases, and that he had been deprived of due process. A37-A38.

The Fifth District Court of Appeal on March 12, 1985, entered an order directed to the State of Florida to show cause why the Petition for Writ of Certiorari should not be granted. A43. After a response to the Court's order by the State, but prior to the time within which Respondent was entitled to file a reply thereto, the District Court dismissed the petition for want of jurisdiction. A12, A18.

Respondent then filed a motion for rehearing of the Court's order, which was stricken as untimely by the court on the grounds

that the additional period of time provided in Florida Rule of Appellate Procedure 9.420(d) for responding to documents served by mail does not apply to orders of the court. A12-A13, A18-A19. Respondent then filed a motion requesting the Court to reconsider the order dismissing the petition on its own motion. Id.

In reply to that motion the State moved for an assessment of attorney's fees against Respondent under Florida Statute section 57.105 for having to review and respond to the motion. Id. The response of the State amounted to little more than a personal attack against Respondent, and argued that since the term of court had expired after the motion had been filed, and that the court did not issue a mandate anyway, the motion was frivolous. A45-A46.

The Court of Appeals denied Respondent's motion, and further ordered him to show cause within five days why the request for fees should not be granted. A47. The court then entered an order assessing $100.00 in attorney's fees. A13, A18. Thereafter, Respondent filed a timely motion for review of the order assessing attorney's fees, attacking the constitutionality of Florida Statute section 57.105. A13, A20.

On September 12, 1985, the Court of Appeals denied the motion for review of the fee award. A48. After confirming by correspondence with the Clerk that this Court lacked jurisdiction of that order, Respondent filed an appeal to the United States

Supreme Court on December 9, 1985. A14, A18.

Under Rule 16 of the Rules of the Supreme Court of the United States, the State was required to file a motion to affirm or to dismiss the appeal within thirty days. The State failed to do so. On February 28, 1986, the Supreme Court directed the State to file a response to the appeal pursuant to Rule 16. A49.

The State then filed a motion asking the Supreme Court to dismiss the appeal on the grounds that the Court of Appeals relied upon Florida Rule of Appellate Procedure 9.400(d) to assess fees against Respondent, not Florida Statute section 57.105, and thus the constitutionality of the later had not been passed upon. A53-A54.

In the alternative the State argued that the motion to review the award of fees should be construed as an untimely motion for rehearing, through which Respondent would not be entitled to raise the constitutionality of Florida Statute section 57.105, and thus could not raise the issue before the Supreme Court. A54-A57.

On April 28, 1986 the Supreme Court issued a memorandum decision in the case stating that the "appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." Clark v. Florida, 106 S.Ct. 1784 (1986).

Former Chief Justice Burger wrote a seperate opinion, which contained derogatory comments of a personal nature against Clark, including references to Respondent as a "small boy" given "a loaded pistol without instruction as to when and how it is to be used" and that Respondent "considers the judicial system a laboratory where small boys can play." 106 S.Ct. 1784- 1787. No other Justice joined in this opinion.

Shortly thereafter, the former Chief Justice resigned.

B. THE BARAD COMPLAINT

In March of 1983 a foreclosure action was filed against Rose Merle in the Eleventh Circuit Court in and for Dade County Florida, under a claimed mechanic's lien. A77. This complaint, and similar complaints filed against others, are allegedly filed for the purpose of depriving homeowners of their residences or to extort monies from these individuals as part of a scheme to defraud consumers contracting for home "improvement" services. A77-A83.

Mrs. Merle appeared several times before presiding Judge Frederick Barad in the foreclosure suit, until eventually retaining Respondent as her attorney, after Judge Barad threatened to hold her in contempt for questioning the propriety of his orders. A77.

Respondent removed the case into the United States District

Court for the Southern District of Florida, on the grounds, inter alia, that she was deprived of, and unable to enforce, her equal civil rights in the state court, because of alleged discrimination against her. A78.

The removed case was then remanded, in part, because Rose Merle, who is of Hispanic descent, had not alleged **race** discrimination, as opposed to nationality discrimination, in her petition. A78. Respondent obtained a stay of this remand pending appeal. A78.

Despite the stay order of the federal court, Judge Barad proceeded with an ex parte trial without notice and entered a partial final judgment against Mrs. Merle. A78, A81. This judgment was eventually reversed through the efforts of Respondent. Merle v. Florida State Constructors Service, Inc., 472 So.2d 558 (3rd DCA 1985).

During the course of these proceedings, Judge Barad exhibited great hostility towards Mrs. Merle, and in favor of the adverse party, and consistently ruled against her. A15, A19, A82. The Judge, however, refused to grant her Motion for Disqualification, based upon allegations of discriminatory treatment, ordering her to "take me up on it." A78. On November 27, 1985, Respondent obtained a writ of prohibition against Judge Barad. Merle v. Barad, 480 So.2d 1315 (3rd DCA 1985).

Prior to the issuance of the writ of prohibition against Judge Barad, the Judge continued to hold hearings and enter orders without jurisdiction and in violation of stay orders entered by the federal courts. A78. Respondent filed suit in the United States District Court for the Southern District of Florida regarding the foreclosure proceedings under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and under the civil rights laws of the United States. A15, A18, A70-A85.

On April 24, 1985, Respondent appeared before the District Court for a hearing on a motion seeking preliminary declaratory and injunctive relief against the parties seeking foreclosure in the state action. A14, A19. In response to a query of the presiding Judge, Respondent stated that Judge Barad was an active participant in a RICO violation. A15, A20.

The federal court ordered Mrs. Merle to amend the complaint to clarify the issues raised in the suit, and to include Judge Barad as a defendant to the action. A59-A69. Respondent prepared a Second Amended Complaint as directed, which contained specific factual allegations in support of the claims raised. A70-A86.

Included in the complaint filed by Respondent on behalf of Mrs. Merle and those persons similarly situated were allegations of retaliation by members of the state court against individuals and groups involved in the legal reform movement for political activities that were highly critical of the legal system.

A79-A8Ø. These activities included a "courtwatch" program, leafleting, and picketing outside the courthouse. Id.

On August 11, 1987, the federal court dismissed the suit filed against Judge Barad on the grounds of official immunity from suit. A87-A88.

II. COURSE OF THE PROCEEDINGS

In a letter dated May 13, 1986, the Bar requested Respondent's position regarding a newspaper account of the Burger incident attached to the letter. The Bar failed to identify any specific allegation of unethical conduct by Respondent.

On August 11, 1986 the Bar again wrote to Clark, requesting his response as to whether his statement that Judge Barad was an active participant in a RICO violation constitutes a violation of Disciplinary Rules 8-1Ø2 (13) and 1-1Ø2(A)(6). In reply Clark requested that the Bar reveal the source of the complaint. The Bar never responded to that request.

Neither allegation of unethical conduct was prompted by a complaint filed against Clark.

A grievance committee of the Eleventh Circuit Court in and for Dade County, Florida convened on the evening of October 2Ø, 1986 to consider both matters. No witnesses were subpoenaed to

testify by the Bar. The same day the committee found probable cause that Clark had violated the Code of Professional Responsibility.

Over five months later, the Bar filed a complaint in this Court in two counts for alleged professional misconduct. A11-A17. The first count alleged that Respondent knowingly advanced a claim or defense that is unwarranted under existing law by filing untimely or inappropriate pleadings, and allegedly for citing law that had been reversed. A11-14.

The second count alleged that Respondent knowingly made false accusations against a judge. A14-A17. Both counts also included the general allegation that Respondent engaged in conduct that adversely reflects on his fitness to practice law.

Clark filed an answer to the complaint admitting portions thereof and denying others, and denying that he had engaged in unethical conduct. A18-A20. The answer included as affirmative defenses (1) that the Bar failed to state a claim and had failed to meet its burden of proof; (2) that the prosecution of the complaint against him by the Bar violated the First Amendment; and (3) that the Bar was collaterally estopped. A21.

The discovery conducted by the Bar consisted solely of a request for admissions duplicating the allegations of the complaint, and Respondent's response thereto. A24-A29, A30-A36.

Judge John A. Miller of the Seventeenth Judicial Circuit in and for Broward County, Florida was appointed by the Court to act as referee on April 9, 1987. Judge Miller was directed to try the matter in Dade County, Florida and to submit his report within 180 days.

Eight months later, a brief hearing was convened by Judge Miller in his chambers at Fort Lauderdale, Florida. The Bar subpoeaned no witnesses to testify and introduced few documents in support of the allegations made in the complaint.

On January 9, 1988, Judge Miller issued a report. The findings of fact contained in the report were copied virtually verbatim from the complaint filed by the Bar. A1-A4, A11-A15. Judge Miller also copied the recommendations as to guilt from the proposed report prepared by the Bar for his signature. A6.

In imposing sanctions against Clark, Judge Miller likened his consideration of the proceedings brought by the Bar to football and hockey games observed by the Judge, concluding that Clark erred in "not knowing when to keep one's mouth shut." A9. To support this view Judge Miller attributed certain statements to Clark and made statements of fact not reflected in the record or otherwise. A6-A10.

Judge Miller also stated this Court held that "the First Amendment does not bar disciplining an attorney for accusations

against the judiciary" in response to issues raised during the proceedings. A7.

Judge Miller then found that Clark was not unfit to practice law, but that he was "unfit" by "virtue of having been found to have violated Disciplinary Rules (sic) 1-1Ø2(A)(6)." A1Ø.

The report recommends that Clark be publically reprimanded, although he had already been sufficiently reprimanded by former Chief Justice Burger. A9-A1Ø. The report also recommends that Clark bear one half of the costs of the proceedings. A1Ø.

Whereupon, the instant petition for review of the report was filed by the Respondent. No cross petition was filed by the Bar.

SUMMARY OF THE ARGUMENT

Respondent has divided the argument portion of this brief into two parts. The first part demonstrates that the Bar wholly failed to produce evidence sufficient to support a finding that Respondent violated any rule of professional ethics, and that the report itself contains insufficient factual findings to support the recommendations of the Referee that this Court impose sanctions against Respondent.

The second part of the argument section advances the position that, in the unlikely event that the Court finds that

Respondent has violated a rule of professional ethics, then under the facts of this case the rule in question is void as repugnant to the United States Constitution and must therefore be declared unconstitutional by this Court.

ARGUMENT

These proceedings present important issues concerning the proper relationship between attorneys and the judiciary. Like all government agencies, the courts are bound by the principles contained in the constitution, principles that restrict government officials, including judges, from imposing sanctions against any person, including an attorney, for the exercise by that attorney of rights protected by the First Amendment.

In the instant case the Bar asks this Court to impose such sanctions against the Respondent.

The rules of professional conduct, however, obviously do not contemplate that they be applied in a situation that would directly infringe upon the constitutional rights of attorneys, or that they would otherwise be applied in such a manner as to contradict the constitution that every attorney and judge is sworn to uphold.

Consequently, the primary contention of Respondent in these

proceedings is that the facts in this case simply do not support the recommendation that he be disciplined. Accordingly, the report of the Referee must be rejected and the matter dismissed.

I. THE FINDINGS CONTAINED IN THE REFEREE'S REPORT ARE NOT SUBSTANTIATED

As previously set forth in this brief, the proceedings leading to the report filed by the Referee were extremely brief and informal, conducted almost as a necessary formality to the inevitable conclusion eventually reached by the Referee. The report itself contains as findings of fact the allegations set forth in the complaint filed by the Bar copied almost verbatim, many of which were clearly erroneous.

By simply copying the complaint filed by the Bar, and the recommendations as to guilt prepared by the Bar for his signature, the Referee abdicated his responsibility to conduct a true hearing, calculated to determining the facts in issue for the purpose of reaching reasoned conclusions. The Referee imposed no burden of proof upon the Bar, simply taking as true facts and conclusions that a simple review of the record refutes.

The result is a report riddled with factual findings at variance with the truth, concluding with a nearly incoherent application of these facts, and others not evidenced in the

record, to the Referee's personal philosophy regarding the proper conduct of atheletes during sporting events.

But even given the erroneous factual determinations made by the Referee, the report fails to even set forth specific factual findings necessary to support the conclusion that Respondent violated any rule of professional conduct. In short, the Referee simply failed to establish any basis to discipline Respondent.

A. NO EVIDENCE SUPPORTS THE FINDINGS IN THE REPORT REGARDING THE BURGER INCIDENT

In the so-called Burger Incident, Clark is charged with the violation of Disciplinary Rule 7-102(A)(2), which provides in relevant part 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 good faith argument for an extension, modification, or reversal of existing law.

Ethical Consideration 7-4 explains this limit to the countervailing requirement that a lawyer zealously represent a client, by pointing out that a lawyer's conduct is permissible if the position taken is either supported by the law, or is supportable by a good faith extension, modification, or reversal of the law.

The comments to the new rule 4-3.1 further explain the purpose of this rule by noting that the law is not always clear

and is never static. An action becomes frivolous when the motive for taking the action on the part of the client is primarily to harrass or maliciously injure a person or if the lawyer is unable to support the action taken by a good faith argument for an extension, modification or reversal of exisiting law.

The findings contained in the report of the Referee in support of the contention that Clark advanced an unsupportable position state that Respondent breached the code of ethics by (1) not filing the petition for writ of certiorari within thirty days of the order affirming the ruling of the county court; (2) requesting the District Court of Appeal to reconsider its order of dismissal; (3) filing a motion to review the order assessing attorney's fees; and (4) filing an appeal to the United States Supreme Court.

No where in these findings does Judge Miller specifically conclude that Clark filed any of these documents knowing that the positions asserted were unfounded in the law, or, in fact, that these positions are not supported in the law. No legal arguments or citations of authority were presented by the Bar to refute the positions asserted in these documents, nor do any such reference to authority appear in the Referee's report.

To justify the conclusion that the positions asserted were not supportable in the law, thus calling for sanctions against Respondent, the Referee simply states that:

> Clearly, in the traffic matter, Mr. Clark just didn't make the rule book and regardless of how justified he thought his position was, he was never in the ballgame.

A review of the record reveals that the Referee, by copying the proposed report proferred by the Bar as his findings of fact and recommendations as to guilt, failed to establish the veracity of these proposed findings by simply reviewing the record before containing these erroneous findings in the report. Upon a review of the record this Court must conclude that these findings are unsubstantiated by the evidence, and therefore must be rejected.

1. THE PETITION FOR CERTIORARI

In the petition for certiorari filed in the Fifth District Court of Appeal Respondent himself recognized the jurisdictional issue posed by the fact that the petition was not filed within thirty days of the order of the lower Circuit Court, and provided legal arguments in support of his position that the court did have jurisdiction. After reviewing the petition, including these arguments, the court entered an order to show cause why the petition should not be granted.

Florida Rule of Appellate Procedure 9.100(f) provides in relevant part that upon the filing of such a petition, the court may issue an order to show cause if:

the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law, or that review of final agency action would not provide an adequate remedy * * *.

Clearly the entry of the order to show cause by the appellate court precludes the conclusion that Respondent presented a position in filing the petition that was unwarranted under existing law. Yet the Referee found fault with this position, without reference to legal authority in support of this criticism nor even addressing this point raised by Clark in the proceedings below.

2. THE REQUEST FOR RECONSIDERATION

As stated previously, the appellate court dismissed the petition, without allowing Clark an opportunity to file his reply to the answer of the State to the petition, pursuant to Florida Rule of Appellate Procedure 9.100(i). The court then struck Clark's Motion for Rehearing as untimely, computing the time for filing the motion as not including the extra days provided under the rules for service of documents by mail.

Respondent admittedly relied upon the following language of Florida Rules of Appellate Procedure 9.420(d) and 9.330(a), respectively:

> Whenever a party or clerk is required or permitted to do an act within some prescribed time after service of a document, and the document is served by mail, five days shall be added to the prescribed period.

> A motion for rehearing or for clarification of

decision may be filed within 15 days of an order or within such other time set by the court.

The explicit language of these rules do not reveal that courts have interpreted them to mean that the additional time provided to respond to documents served by mail does not apply to a motion for rehearing. Nevertheless, upon the striking of Clark's motion, he then requested that the Court reconsider the order of dismissal upon its own motion.

In support of this request Clark cited the case of Rogers v. State Farm Mutual Automobile Insurance Company, 390 So.2d 138 (5th DCA 1980), wherein the same court, after striking a motion for rehearing as untimely, determined to reconsider its decision upon its own motion.

This Court, treating a petition for writ of common law certiorari filed by State Farm as a request for issuance of a writ of mandamus, found that the appellate court lacked jurisdiction to recall the mandate issued pursuant to the order vacated by the lower court, because the recall of the mandate was made after the term of court had already expired. State Farm Mutual Automobile Insurance Company v. Judges of the Fifth District Court of Appeal, 405 So.2d 980 (Fla. 1981).

No where in the State Farm opinion did this Court disapprove the procedure employed by the lower court in reconsidering a judgment entered upon its own motion. Since by the State's own

admission the issue of whether the appellate court had the power to recall a mandate was irrelevant because no mandate had issued, Clark was certainly entitled to argue that the appellate court could reconsider the order dismissing the petition for writ of certiorari on its own motion.

Again, the Referee in his report failed to address this argument raised by Clark in response to the allegation that he was not entitled to request a reconsideration, or to rely upon a case that was disapproved by this Court on grounds not relating to the proposition for which that case was cited. The Referee merely states that Clark "should have at that point ceased his efforts" without providing authority or reasoning showing that these efforts were not supported in the law, or that they were made in bad faith.

3. THE MOTION TO REVIEW THE ORDER AWARDING ATTORNEY'S FEES

In paragraph 22 of the Referee's findings of fact, which is identical to the same paragraph in the Bar's complaint, the referee concludes that Clark filed an untimely motion with the District Court of Appeal to review the order assessing attorney's fees against him. As noted previously, a similar argument was made by the State before the United States Supreme Court.

The assessment of attorney's fees in the appellate courts is

regulated by Florida Rule of Appellate Procedure 9.400, part (c) of which provides that:

> Review of orders rendered pursuant to this rule shall be by motion filed in the court within 30 days of rendition.

By the Referee's own findings, the motion for review of the award of attorney's fees was filed on August 23, 1985, less than thirty days after the court's July 25, 1985 order. In fact, unlike the motion for rehearing, the motion for review of the fee award was denied by the appellate court on the merits, as opposed to having been struck as untimely.

Upon receipt of this order, Clark confirmed that this Court lacked jurisdiction to review the order, in anticipation of a subsequent appeal where he would be obliged to show that that order was entered by the highest court in which a decision could be had. The reason reference to this correspondence is contained in the report, other than the fact that the Referee simply copied it from the complaint filed by the Bar, is not readily apparent.

The finding by the Referee on this issue is yet another example of an erroneous fact contained in the report copied from allegations made by the Bar without factual or legal support. Both the Bar and the referee simply declined to consult the rules of procedure in making these false allegations, thus themselves committing the very acts for which they seek to discipline Clark.

4. THE APPEAL TO THE SUPREME COURT

The most egregious error committed by the Referee in his report is contained in paragraph 27 of the findings of fact, copied from the same paragraph of the Bar's complaint. In that finding Judge Miller claims 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".

In fact, the United States Supreme Court issued a memorandum decision disposing of this appeal that reads as follows:

> The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

As pointed out by Respondent below, the United States Supreme Court did not find the appeal "so utterly frivolous as to warrant any further discussion." That statement was made by former Chief Justice Burger in an opinion so unpersuasive that not a single Justice concurred with it.

Indeed, the ruling by the Supreme Court, as contrasted with the opinion filed by the former Chief Justice, is binding precedent upon this Court for the proposition that the appeal taken by Clark was not frivolous.

In a per curiam opinion, the Supreme Court explained the difference between the dismissal of an appeal for want of jurisdiction, as in the instant case, and the dismissal of an

appeal for want of a substantial federal question. Hopfman v. Connolly, 105 S.Ct. 2106 (1985). The Hopfmann case makes clear that the Supreme Court in dismissing Clark's appeal did not find that the position asserted in the appeal did not present a substantial federal question.

The order of the Supreme Court does indicate, however, that the Court as a whole rejected the opinion of former Chief Justice Burger, as none of the other Justices joined in that opinion.

In United States v. Kras, 93 S.Ct. 631, 637 (1973), the Court relied for its decision, in part, on dissents to the denial of certiorari by Justice Douglas in previous cases, and the failure of Justice Harlan to join in those dissents as an indication of the Court's "attitude" on the issue at hand. So too, in the instant case, the Supreme Court's rejection of the opinion filed by the former Chief Justice is indicative of the opinion's lack of merit, if not binding precedent on this Court.

In finding to the contrary that the seperate opinion of former Chief Justice Burger was in fact the opinion of the Supreme Court, the report of the Referee is clearly in error. In addition, like former Chief Justice Burger, neither the Bar nor Judge Miller supplied any authority or reasoning to refute the validity of the issues raised in Clark's appeal, nor did the Referee find that these issues lacked merit.

Although Respondent admittedly has not found a case with the identical facts involved in his appeal, the idea that a court of law may not unreasonably restrict a person's access to the courts is not novel. See, Boddie v. Connecticut, 401 U.S. 220 (1971). Similarly, the concept that attorney's fees may not be assessed against an attorney or a party without due process of law is not outrageous. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766-767 (1980).

Therefore, the fact that Respondent took this position is at least permissible under the ethics code as an argument for the extension of existing law. Certainly there has been no showing that Respondent knowingly took this position, or any other position, during the appeal that was unwarranted or that was taken in bad faith.

B. NO EVIDENCE SUPPORTS THE FINDINGS IN THE REPORT REGARDING THE BARAD COMPLAINT

The Bar has charged Respondent in the so-called Barad Complaint with violating Disciplinary Rule 8-102(B), which provides that:

> A lawyer shall not knowingly make a false accusation against a judge or other adjudicatory officer.

The Ethical Considerations underlying this rule as well as

the revised rule 4-8.2(a) make clear that attorneys are the primary source of information available to the public as to the integrity and fitness of judges and other officials. At the same time, attorneys are not authorized to purposefully make false accusations against these officials.

To support this allegation of misconduct the Bar and Referee state that Clark made allegations contained in a complaint and in a hearing before a United States District Court that Judge Barad had violated the RICO Act. Neither the Bar nor the Referee have sought to discipline Clark for the allegations also contained in the complaint that the Judge had violated the civil rights of Mrs. Merle, nor have they attempted to show that Judge Barad, in fact, did not violate Mrs. Merle's civil rights.

Indeed, no evidence was presented, and no factual finding was made in the report that Judge Barad did not violate the RICO Act, or that the specific facts relied upon to base the claim of liability were untrue, much less that Clark filed the complaint knowing that the allegations were untrue.

Despite this complete absence of evidentiary support or factual determinations the Referee simply states that:

> A lawyer can't hide behind a bad pleadings (sic) by saying "I did it that way because that is what my client told me."

The record, however, is barren of any evidentiary support

that Clark simply relied upon the representations of his client, or that Clark failed to investigate facts in the preparation of the complaint, filed pursuant to an order of a United States District Court Judge, by interviewing witnesses and by his own personal observations.

Nonetheless, the Referee, for example, chides Clark for relying upon the testimony of his client and others witnessing Judge Barad engaging in ex parte communications with opposing counsel prior to hearings on the foreclosure action, because the witnesses could not hear the content of those conversations. Presumably, the Referee by his report has indicated his approval of such inappropriate ex parte communications.

The Referee also characterizes Clark's actions as based upon the mere assumption that "'the judge must be in cahoots with the prevailing party because I lost.'" More surprisingly, Judge Miller states that there has been no showing in the proceedings below that any "wrongful orders" were reversed at the appellate level, when he could have easily verified the facts to the contrary by simply reading cases in the Southern Reporter referred to by the Respondent.

Again, as with the charges filed against Clark in the Burger Incident, the Referee simply took the allegations of the Bar as set forth in its complaint at face value, without regard to any evidentiary support for these allegations.

By contrast to these proceedings, in Iowa State Bar v. Horak, 292 N.W.2d. 129 (Iowa 1980), the Judge criticized by the offending attorney appeared at the hearing and denied any wrongdoing. In addition, the attorney did not contend that there was any factual basis for the allegations made against the Judge, and none was presented in the record.

Clearly the Bar must be required to come forward with some evidence to support the allegations that Clark knowingly made a false allegation that Judge Barad violated the RICO Act, and the Referee must base his recommendation for sanctions upon some finding of fact to that effect. Accordingly, the recommendations of the Referee as the the Barad matter must also be rejected.

C. NO EVIDENCE SUPPORTS THE FINDINGS IN THE REPORT REGARDING RESPONDENT'S FITNESS TO PRACTICE LAW

Finally, the Referee found that in both matters for which the Bar seeks sanctions Clark engaged in conduct adversely reflecting on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6).

The note to this rule states that a lawyer's responsibility in society is to act as a shield in defense of right and to ward off wrong. In essence, this rule requires that all attorneys maintain the highest degree of morality traditionally expected of

members of this profession.

Once again, no evidence was presented in the proceedings below, nor was any finding made that Respondent has acted maliciously, carelessly or with a disregard for professional ethics. No specific rationale was advanced by the Referee in support of the conclusion that Clark acted in such a manner as to reflect adversely on his fitness to practice law.

The Referee himself states in his report that he "does not find Mr. Clark to be unfit to practice law" although he then states that Clark is unfit because he had been found to have violated Disciplinary Rule 1-102(A)(6).

Since the record fails to support this conclusion, the Court must, as with the other charges made against Clark, reject the finding that Clark has violated this rule of conduct.

II. IMPOSITION OF SANCTIONS WOULD VIOLATE THE FIRST AMENDMENT

As more fully set forth in the preceding sections of this brief, the facts of this case do not support the conclusion that Clark has violated the Code of Professional Responsibility. If, however, this Court determines that under these facts Clark has violated the code and should be sanctioned, then those provisions

of the code relied upon are invalid as repugnant to the Constitution and laws of the United States.

In both allegations against Clark, the Bar clearly seeks sanctions based upon the content of words spoken or written by Clark. The Bar in the Burger Incident objects to arguments advanced by Clark during the course of appeal proceedings. Similarly, the Bar seeks sanctions for the mere statement made by Clark that a judge was liable under a federal statute.

Additionally, in both matters the Bar requests this Court to sanction Clark merely for filing papers or otherwise seeking relief in a court of law, because the Bar disagrees with the validity of Clark's assertion to a legal basis for the requested relief although, of course, the Bar provides no argument or citation to authority to refute those assertions. Such restrictions clearly violate the constitutional right to petition the government for redress of grievances.

In neither instance has the Bar shown that the sanctions it seeks to impose against Respondent for the exercise of these fundamental rights furthers a compelling state interest.

The report of the Referee attempts to deal with these issues somewhat, citing The Florida Bar v. Shimek, 284 So.2d 686 (Fla. 1973) for the proposition that the First Amendment does not bar disciplining an attorney for accusations against the judiciary.

Such a broad statement however does not comport with the law on this subject.

In Garrison v. Lousiana, 85 S.Ct. 209 (1964), modified in Curtis Publishing Co. v. Butts, 87 S.Ct. 1975 (1967), an attorney was convicted of making the following statement about the entire bench of a court sitting in New Orleans:

> The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investiagtions . . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges.

The Supreme Court reversed, finding that even if the statement was false, the Constitution requires a finding that the attorney knew the statement was false or made the statement with reckless disregard for its truth or falsity.

In the instant case no evidence was presented, nor did the Referee find that any of Clark's statements were false, much less that he knew they were false or made the statements with reckless disregard for the truth. The Referee's attempt to distinguish Garrison is wholly inadequate given the strict scrutiny to such an attempt by the State to restrain freedom of speech.

Finally, with regard to the allegation that the statements made by Respondent reflect adversely on his fitness to practice law, if applied to the instant proceedings, the rule is clearly overbroad as well as void for vagueness, in that it may be

applied to protected speech.

Accordingly, in the unlikely event that the Court concludes that Clark has violated the Code of Professional Responsibility, Respondent respectfully suggests that such rule is void as repugnant to the United States Constitution, and must therefore be declared unconstitutional.

CONCLUSION

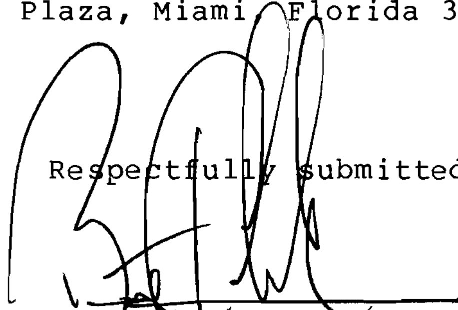
After a careful review of the evidence and record herein, the Court must come to the conclusion that Respondent has committed no violation of the rules of ethics. The Referee in his report based his findings of fact without regard to evidentiary support for those findings, which findings themselves fail to support the conclusions reached by the Referee.

In the unlikely event that the Court finds a violation of the code of ethics under the facts of this case, then any such specific provision is invalid as repugnant to the Constitution and laws of the United States. Accordingly, the Court must declare any such provision unconstitutional.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing was caused to be served by mail this 8th day of April, 1988, upon Ms. Randi Lazarus, Esquire, c/o Kevin Tyman, Esquire, Assistant Staff Counsel for The Florida Bar, The Florida Bar, 444 Brickell Avenue, 211 Rivergate Plaza, Miami, Florida 33131.

Respectfully submitted,



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