IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case No. 70,295

BRET CLARK,

Respondent,

vs.

THE FLORIDA BAR

Complainant.

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

REPLY BRIEF OF RESPONDENT

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ARGUMENT

In this petition for review of a report by the Referee in a disciplinary matter, Respondent presents a two part argument in support of his request that the Court reject the findings and recommendations contained in the report and dismiss the complaint brought against him by the Florida Bar. The first part provides a detailed analysis of why the findings of fact are unsupported by the evidence, and why these findings are insufficient to support the recommendations of the Referee that this Court impose sanctions against Respondent.

The second part of Respondent's argument is that, in the unlikely event Respondent is found to have violated a rule of professional ethics under the facts in this case, then the rule in question is void as repugnant to the United States Constitution, and must therefore be declared unconstitutional by this Court.

In answer to these arguments, the Bar, after first taking exception to the statement of facts contained in the Initial Brief, characterizes Respondent's petition as a request that this Court conduct a "trial de novo" of the allegations made against him, and then in conclusory fashion argues that the allegations are supported in the record.

The Bar then argues that the First Amendment does not preclude

disciplinary measures imposed upon an attorney for criticism of the judiciary, and, in the alternative, that respondent has somehow waived his First Amendment rights.

Respondent addresses each of these arguments in turn.

I. THE STATEMENT OF THE FACTS

At page one of the Answer Brief, the Bar takes exception to "a large part" of the statement of the facts contained in the Initial Brief by making the sweeping statement that the "record does not reflect the existence of some of these facts and other portions are argumentative." The sole example offered by the Bar to support this contention alleges that on page 14 of Respondent's Initial Brief:

> 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 is 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. Answer Brief at 1, n. 1.

An examination of page 14 of the Initial Brief, however, reveals that the quoted excerpt bitterly attacked by the Bar as "argumentative" appears under the argument portion of Respondent's brief and is clearly identified as such.

Surely if Respondent were to make a similar false and irresponsible assertion as that made by counsel for the Bar in a

brief filed before this Court, distorting excerpts of quoted material taken out of context, an inference would be drawn that he has, indeed, failed to make proper reference to supporting evidence or authority in making statements or filing papers that find their way into the public record.

To the contrary, the statement of facts appearing in the Initial Brief is amply supported by references to the record in these proceedings. Respondent at page 2 of his brief even takes care to point out that the references are primarily to documents making up the record in the two cases for which the Bar seeks to impose sanctions, since the Bar failed to subpoena a single witness to support the allegations made against him.

By contrast, a review of the Answer Brief filed by counsel for the Bar reveals that not a single reference to the record is made anywhere in support of statements contained therein or otherwise, including quoted material. The Bar, by filing a brief unsubstaniated by record references and at variance with the Florida Rules of Appellate Procedure, has itself engaged in the type of conduct which it accuses Respondent of committing.

In addition, instead of relating the events that transpired below, as is normally expected of appellate practioners, the Bar, instead of setting forth a proper statement of the facts, again merely reprints the findings of fact of the Referee as its statement of the facts, which in turn was copied almost verbatim

from the Complaint filed by the Bar.

The fact that the Bar is either unable or unwilling to refer to specific evidence to support these findings in its brief serves to reinforce the conclusion, made by Respondent in his Initial Brief, that the Bar has failed to present sufficient evidence to support the findings of fact contained in the report, and that the Referee, did, indeed, abdicate his responsibilities to conduct a full and fair hearing of this matter.

II. THE FINDINGS OF THE REPORT ARE CLEARLY ERRONEOUS

The principle argument of the Bar appears to be that this Court is without power to "reevaluate" the findings of fact made by the Referee, Answer brief at 9, or to disturb the conclusions made by the Referee that were presumably based upon those findings. In doing so, the Bar likens Respondent's petition for review as a request for a "trial de novo."

Yet the Bar does concede, however, that findings of a referee that are clearly erroneous, or lacking in evidentiary support, may be rejected by this Court. Answer brief at 9, citing The Florida Bar v. Golden, 502 So.2d 891, 892 (Fla. 1987); The Florida Bar v. Hooper, 507 So.2d 1078, 1079 (Fla. 1987). This is precisely the issue raised by Respondent in these review proceedings, a point which the Bar steadfastly refuses to even attempt to refute in its brief.

A close examination of the record reveals that the Referee, in simply copying the allegations made by the Bar without evidentiary support, abdicated his responsibility to conduct a true hearing, despite the Bar's assertion, unsupported in the report itself or the record, that the Referee, in copying the Bar's allegations almost verbatim, "found that the Bar had met its burden of proof." Answer Brief at 10.

The truth of the matter is that there is no evidence to support the findings of the report, findings that themselves do not support the conclusion that Respondent breached the rules of professional conduct.

A. THE BURGER INCIDENT

In attempting to justify the findings of the Referee regarding the so-called Burger Incident, the Bar declines to provide a shred of analysis or legal authority to refute the detailed argument advanced by Respondent as to the propriety of each step of the proceedings taken in that case.

In place of reasoned analysis, the Bar simply relies upon the "blistering opinion" of former Chief Justice Burger, which was found so utterly unpersuasive by the other Justices of the United States Supreme Court, that not a single member of the Court joined in his extremely degoratory and unseemly opinion.

Although the Bar in its brief does admit that this opinion was

not joined by the other members of the U.S. Supreme Court, Answer Brief at 10, n.2, the Bar, while castigating Respondent for supposedly being unable to follow appellate procedures, still cannot distinguish between the opinion rendered by the former Chief Justice and the opinion of the Court.

Thus, at page 12 of its Answer brief, the Bar makes the false statement that "[e]ach argument, that the Respondent has raised regarding the steps that he took * * * has already been rejected, not only by the Fifth District Court of Appeals but also by the Supreme Court of the United States."

As already pointed out by Respondent in his Initial Brief, the United States Supreme Court ruled that his appeal be dismissed, and treating the papers upon which he sought appeal as a petition for certiorari, that certioari be denied. Yet, the finding of the Referee, copied from the Bar's Complaint and reprinted again at page 4 of the Answer Brief, falsely states:

> 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."

Not only is this "finding of fact" clearly false as to what the Supreme Court, as opposed to retired Chief Justice Burger, ruled in this case, the Bar, by failing in its brief to even address Respondent's argument that the legal effect of the ruling in that case is to preclude a finding as a matter of law that the appeal was frivolous, apparently concedes the issue.

In addition, rather than attempting to provide any legal authority whatsoever in response to that provided by Respondent in support of his actions, or to show upon what authority, reasoning or evidence the Referee relied in finding these efforts improper, counsel for the Bar merely makes the conclusory statement that:

> 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. * * * Thus, the Referee had ample evidentiary support * * *. Answer Brief at 11-12.

A close scrutiny of the opinion filed by former Chief Justice Burger, however, as compared with the record of the proceedings in that case introduced into evidence by Respondent, reveals that the opinion describes the proceedings in a light most favorable to the State, even adopting reasoning advanced by the government that is clearly contrary to Florida law.

For example, the opinion states that attorney's fees were assessed against Respondent "pursuant to Florida Rule of Appellate Procedure 9.400(b)", as opposed to Florida Statute section 57.105, an argument advanced by the State. See, Clark v. Florida, 106 S.Ct. 1784, 1785-1786, Initial Brief at 5. The committee notes to the 1977 revisions to the rule, however, makes clear that a party seeking fees must rely upon substantive law, not the rule itself.

Also, in criticizing Respondent for citing a case that had been

reversed, the former Chief Justice, like both the Bar and the Referee below, apparently did not even bother to read the decisions at issue to determine the proposition for which they were relied upon by the Respondent, a proposition that was not disapproved when this Court vacated the judgment of the lower court. See, Initial Brief at 19-20.

But most importantly, no where in the opinion filed by former Chief Justice Burger, the Referee's report, or in any paper filed by the Bar, including its Answer Brief, does a single citation of authority or even legal analysis appear in response to the legal issue presented by Respondent in the appeal to the United States Supreme Court.

B. THE BARAD COMPLAINT

To support disciplinary measures against Respondent for the mere filing of a complaint in a civil action naming a judge as a defendant pursuant to an order entered by the United States District Court for the Southern District of Florida, the Bar, again without a single, solitary reference to any evidence whatsoever, simply makes the conclusory statement that:

> 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. Answer Brief at 14.

As pointed out in Respondent's Initial Brief, at page 26-27, the Bar failed to come forward with any evidence to prove that

the statements made by Respondent were untrue. The Bar even failed to present testimony from Judge Barad himself denying that he had violated the RICO Act, or had committed the facts set forth in the complaint filed by Respondent, facts that in many instances are a matter of public record.

In place of argument in response to this glaring evidentiary shortcoming, the Bar merely quotes the report filed by the Referee at length, concluding that Respondent admitted that "part of the allegations in said complaint relied (sic) upon a certain ex-parte conversation between Judge Barad and the opposing counsel." Answer Brief at 14.

Counsel for the Bar then claims, falsely, that Respondent relied upon his client's recital of the content of this conversation, which she obviously could not have done since she did not hear the conversation. As with the other assertions made by counsel for the Bar in its Answer Brief, no record reference is made to support this mischaracterization of the facts.

The record in this disciplinary proceeding does, however, lead to the inescapable conclusion that the Referee imposed no burden of proof upon the Bar to substantiate its allegations contained in the complaint filed against Respondent.

The only difference Respondent has been able to discern between the findings of fact and the Complaint is that in preparing the findings for the Referee's signature the Bar inexplicably

ommitted that portion of paragraph 34 of the Complaint referring to Judge Barad's "demeanor" and his "exhibition of hostility towards Respondent's client." Compare, A15 with Answer Brief at 5, paragraph "33."

But perhaps the most telling weakness of the Bar in this matter is that in preparing the findings of fact for the Referee to sign, counsel for the Bar did not even bother to include a specific finding that the statements made by Respondent were false, much less that Respondent knew they were false or made the statements with reckless disregard for the truth. No where in the Answer Brief does counsel for the Bar attempt to refute this crucial issue raised in Respondent's Initial Brief.

C. RESPONDENT'S FITNESS TO PRACTICE LAW

Respondent's brief also argues that the Bar failed to provide any evidence to support the conclusion that his conduct reflects adversely on his fitness to practice law, and that the report contains no finding that Respondent acted maliciously, carelessly, or with a disregrad for professional ethics. Initial Brief at 27-28.

Respondent also points out the inherent contradiction of the report in that although the Referee found Respondent not to be unfit, he was deemed unfit because he was found to have violated Disciplinary Rule 1-102(A)(6).

No argument is made by the Bar in its Answer Brief in reply to these points raised by Respondent. Accordingly, Respondent presumes that it concedes the issue.

III. THE IMPOSITION OF SANCTIONS WOULD VIOLATE THE FIRST AMENDMENT

Finally, the Bar attempts to refute Respondent's argument that, in the unlikely event the Court finds he has violated a rule of ethics under the facts of this case, then that rule is clearly repugnant to the United States Constitution and must be declared unconstitutional by this Court.

Counsel for the Bar argues that this Court may, and has in the past, disciplined attorneys for making critical statements of the judiciary, and, presumably, may now discipline Respondent for the mere statement that a judge was liable under a federal statute. The Bar, by failing to respond to Respondent's additional argument that the imposition of sanctions would also violate the right to petition the government for redress of grievances, and that the pleadings filed in the Burger Incident are protected speech, apparently concedes these issues.

The Bar does not argue that the sanctions further a compelling state interest, and declines to refute Respondent's contention that it must show he knew the statements were untrue when they were made or that they were made with reckless disregard for the truth or falsity of these statements. See, Initial Brief at

29-30. Counsel for the Bar also fails to even address Respondent's overbreadth and void for vagueness arguments. Initial Brief at 30-31.

In reply the Bar simply states, without evidentiary support, or even a specific finding by the Referee, that the statements made are untrue, and therefore Respondent can lawfully be sanctioned. Answer Brief at 15-16. Such a response is clearly inadequate and irresponsible. By making these sweeping statements, counsel for the Bar, in effect, would have this Court rule upon on an important issue of constitutional law irrespective of clear legal precedent to the contrary.

As urged by Respondent, the Court should be more circumspect about venturing down such a path. Preferably, the Court should avoid passing upon the constitutionality of a law by construing the law narrowly. In the instant case, Respondent has suggested such an approach.

No finding was made herein, nor was any burden imposed to show that Respondent made statements he knew to be false, or that he made statements with reckless disregard for the truth or falsity of these statements. Indeed, there was no evdience presented nor any finding made that these statements were, in fact, false. Thus, as argued by Respondent, the Court should find that he has not violated the rules of ethics.

A contrary holding, as noted by the American Bar Association

Commission on Evaluation of Professional Standards (the so-called "Kutak Commission") in its May 30, 1981, Proposed Final Draft of the Model Rules of Professional Conduct, would run contrary to the First Amendment to the United States Constitution.

The notes accompanying Model Rule 8.2 set forth the constitutional infirmities of the prior rule, under which the Bar now seeks to sanction Respondent, which the Kutak Commission sought to rectify by conforming the language of the new rule with the standard announced by the U.S. Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964).

Thus, clearly the imposition of sanctions under the facts of this case would violate the First Amendment. Which is perhaps why the Bar makes a final attempt to avoid this conclusion by making the falacious argument that Respondent has somwhow waived his constitutional rights in these proceedings.

In drawing this startling conclusion, the Bar attributes a statement to Respondent, again without any record reference, wherein the Respondent does not object to the Bar's recommended form of disclipline, reprimand, as opposed to suspension. Counsel for the Bar also declines to provide legal authority to support this position.

The record makes clear that Respondent asserted the First Amendment arguments advanced herein at the earliest possible opportunity, and has consistently asserted these claims

throughout every stage of the proceedings in this matter. The assertion made by the Bar that these claims have been waived is obviously without merit.

CONCLUSION

In these proceedings, the Bar has accused Respondent of failing to abide by the rules of appellate procedure, of making unmeritorious arguments, and of making statements unsubstantiated by a proper reference to evidentiary support. Yet the Bar's own Answer Brief runs contrary to basic tenets of appellate practice, advances positions clearly unwarranted under exisiting law, and is completely lacking in evidentiary support.

The crudely drafted brief of the Bar fails to refute any of the arguments and analysis provided in the Initial Brief filed herein, and ill befits a practioner before this Court. What's more, this wholly inadequate effort on the part of the Florida Bar is reflected in the results of the proceedings had below.

Accordingly, this Court must reject the report of the Referee in its entirety, and dismiss the complaint filed herein against the Respondent.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Respondent was caused to be served by mail this 7th day of June, 1988, upon Randi Clayman Lazarus, Esquire, Bar Counsel, The Florida Bar, Suite 211 - Rivergate Plaza, 444 Brickell Avenue, Miami, Florida, 33131.

Respectfully submitted,

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