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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ROBERT STEPHEN RYDER,

Respondent.
_________________________/

Case No. 72,216
[TFB No. 88-31,064(05A)]

INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be known as the Bar.

The Report of Referee will be referred to as R.

The transcript for the final hearing held on July 21, 1988, shall be known as T.

Bar exhibits will be referred to as B-Ex.

STATEMENT OF THE CASE

Respondent was indicted by the Federal Grand Jury on May 13, 1987, on four felony counts of perjury in connection with his sworn testimony before the Federal Grand Jury and at the trial of United States v. James Joseph Erp, et al., Case No. 83-8-Cr-DC-16, in the United States District Court, Middle District of Florida, Ocala division. (R pp. 3-4; B-Ex 1) Respondent's testimony allegedly violated 18 U.S.C. Section 1623. (B-Ex 1) On December 3, 1987, respondent was found guilty by a jury of the first three counts of the indictment. (R p. 4; B-Ex 2) On January 18, 1988, he was sentenced to a term of eighteen months with six months to be served in prison with the remainder of the sentence of imprisonment suspended. He was also placed on probation for a period of twelve months with a special condition that he contribute five hours of community service per week. (R p.4)

The Florida Bar filed its notice of felony conviction on February 22, 1988. Respondent filed a petition to terminate or modify the proposed suspension and for appointment of a referee on March 2, 1988, to which the Bar filed its response on March 15, 1988, and its complaint on April 6, 1988. The Supreme Court of Florida denied the respondent's petition by order dated April 28, 1988, and automatically suspended him pursuant to Rule

3-7.2(e) of the Rules of Discipline effective May 31, 1988. The final hearing was held on July 21, 1988. The referee's report was signed on September 7, 1988. He recommended the respondent be found guilty of all the rules charged and that he be disbarred from the practice of law but specifically declined to make any recommendation as to the period of time the respondent must wait prior to applying for readmission. He further recommended the respondent pay the costs of the proceeding.

The rules charged are as follows:

Integration Rules 11.02(3)(a) for conduct contrary to honesty, justice or good morals and 11.02(3)(b) for engaging in conduct constituting a felony; and Disciplinary Rules 1-102(A)(3) for engaging in illegal conduct involving moral turpitude; 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation; 1-102(A)(5) for engaging in conduct prejudicial to the administration of justice; and 1-102(A)(6) for engaging in conduct that reflects adversely on his fitness to practice law.

The Board of Governors reviewed the referee's findings and recommendations at their September, 1988, meeting and voted to approve the referee's findings of fact and recommendations as to guilt but to seek review to determine the length of the

respondent's disbarment. In the opinion of the Board a five year period of disbarment pursuant to Rule 3-5.1(f) of the Rules of Discipline is the appropriate level of discipline given the rules in effect at the time the respondent was criminally tried, the Bar case opened, and the seriousness of his offense. The Board further agreed the respondent should be required to pay the costs of this proceeding now totalling $1,709.60. The Bar filed its petition for review on October 5, 1988.

STATEMENT OF THE FACTS

In December, 1979, the respondent was contacted by James Joseph Erp to handle a real estate transaction in Sumter County, Florida. (T p. 80) The respondent had done a considerable amount of legal work for the Erp family over a period of several years and allegedly Mr. Erp was interested in referring a friend, Paul Richards, to the respondent. (T pp. 80 and 92) Mr. Richards intended to purchase an airport. (T p. 80) The respondent closed the real estate deal. (T p.80) Thereafter Mr. Erp was convicted in federal court on various drug smuggling, racketeering and income tax evasion charges and sentenced to thirty years. (T p. 81)

The respondent testified under oath before the Federal Grand Jury on March 10, 1983, and May 12, 1983, and during the trial in the case of United States v. James Joseph Erp, et al., Case No. 83-8-Cr-DC-16, in the United States District Court, Middle District of Florida, Ocala division, on August 22, 1983. (R pp. 3-4) Respondent testified on all three occasions that he did not realize Mr. Erp had a financial interest in the purchase of the property until after the closing or that he was involved in the purchase through Mr. Richards. (T p. 82, R p. 4)

Mr. Erp later entered into an agreement with the government to testify against the respondent and another attorney. (T p.82)

Thereafter, the respondent was indicted by the Federal Grand Jury on four counts of perjury in connection with his testimony before the grand jury and the trial court. (R p.4) At the trial, Mr. Erp testified that he had informed the respondent of his interest in the airport prior to the closing. (T p. 82) On December 3, 1987, the respondent was convicted by the Federal District Court on three counts, two involving his testimony before the grand jury, and one count involving his testimony before the trial court. He was found innocent on one count. (R p. 4) He received three concurrent sentences of eighteen months with a special condition that he be confined in a jail-type institution for a period of six months to be followed be a period of twelve months probation during which he was required to contribute five hours of community service per week. (R p. 4)

SUMMARY OF THE ARGUMENT

The Florida Bar agrees with the referee's findings of fact, but seeks review of the recommended discipline. The referee in this case recommended disbarment but specifically refrained from making a recommendation as to the length of the period of time the respondent must wait prior to making the an application for readmission. The Bar believes that Rule of Discipline 3-5.1(f) rather than former Integration Rule 11.10(5) should be the governing rule in this matter. The Bar also argues that the respondent's misconduct warrants this longer term of disbarment even under the old rules which permitted disbarment periods in excess of three years.

Respondent's misconduct occurred in 1983 prior to the effective date of January 1, 1987, for the new Rules Regulating The Florida Bar. His trial, conviction and the Bar case all occurred after the change. The Florida Bar filed its complaint on April 6, 1988. Therefore, the rules governing the procedure in this case are the new rules.

The Bar submits that the period of time the respondent must wait prior to applying for readmission is procedural rather than substantive in nature and therefore Rule 3-5.1(f) of the Rules of Discipline should apply rather than former Integration Rule 11.10(5). The new Rules did not alter the definition of

disbarment but rather altered the length of time an attorney must wait prior to making his application for readmission. Even under the old rules it was possible for an attorney to be disbarred more than three years since that was merely the minimum waiting period for applying for readmission and several attorneys were disbarred for much longer periods.

Even if the rule change were to be deemed substantive rather than procedural in nature, the respondent's misconduct would warrant a five year disbarment. Notwithstanding given the mitigating evidence offered by the respondent at the final hearing, the seriousness of his misconduct simply does not justify a lesser discipline. The referee properly considered all the evidence before him and clearly stated in his report that the mitigating factors were insufficient to "justify reduction of the recommended penalty of disbarment." (R p.6) The only questions are the length of time and whether the new rule governs in such cases.

ARGUMENT

A FIVE YEAR PERIOD OF DISBARMENT EITHER MADE PURSUANT TO RULE 3-5.1(f) OR DUE TO THE SERIOUSNESS OF THE RESPONDENT'S MISCONDUCT RATHER THAN A THREE YEAR PERIOD OF DISBARMENT IS THE APPROPRIATE LEVEL OF DISCIPLINE IN THIS CASE.

The Bar submits that a three year period of disbarment would not be consistent with the current level of discipline prescribed by Rule 3-5.1(f) of the Rules of Discipline. The Bar submits the present rule should govern as the conviction occurred in December, 1987, the Notice of Felony Conviction was filed in February, 1988, and the complaint in April, 1988, all after the rule change. Furthermore, even if this court should find the old rule would apply, the serious nature of the respondent's commission of and conviction for perjury warrants a five year period of disbarment.

The main issue in this matter is whether or not the new procedural Rules of Discipline apply to all Bar cases opened on or after January 1, 1987, where the underlying misconduct occurred prior to that time. The Bar submits the new rules do apply. Here, they were in effect prior to the commencement of any formal disciplinary proceedings. Although the actual misconduct occurred in 1983, the respondent was not convicted until December, 1987.

The Bar concedes that were this a criminal proceeding then the use of Rule 3-5.1(f) might very well result in an ex post facto application. However, because Bar proceedings are quasi-judicial and administrative rather than criminal in nature, the ex post facto doctrine does not apply. These are civil proceedings. The constitutional prohibition against ex post facto legislation generally applies only to criminal matters. Harisiades v. Shaughnessy, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952); Board of Commissioners of Everglades Drainage District v. Forbes Pioneer Boat Line, 80 Fla. 252, 86 So. 199, (Fla. 1920), reversed on other grounds, 258 U.S. 388, 42 S.Ct. 325, 66 L.Ed. 647 (1922).

In Florida, the constitutional prohibition against ex post facto laws does not apply to judicial disciplinary proceedings. See In Re: Inquiry Concerning a Judge, Etc., 357 So.2d 172, 180, 181 (Fla. 1978). However, in that case due process considerations caused this court to apply the rule prospectively as the improper actions committed by the judge were not grounds for removal at the time they were committed. This differs from the present case in that the wording of former Integration Rule 11.10(5) put all attorneys on notice that the three year period of disbarment was merely a minimum and that longer term disbarments were possible. In addition, the United States Eighth Circuit of Appeals determined that the prohibition against ex

post facto rules did not apply in disbarment proceedings against an attorney in Iowa, *Matter of Randall*, 640 F.2d 898 (8th Cir. 1981), Cert. denied, two cases, 454 U.S. 880, 102 S.Ct. 361, 70 L.Ed. 189 (1981).

In the civil arena retrospective legislation or procedural statutes that are retrospective in nature usually do not offend the *ex post facto* doctrine and may be applied to pending cases. *Village of El Portal v. City of Miami Shores*, 362 So.2d 275 (Fla. 1978). However, there is a caveat. When the retrospective act impairs a vested right, imposes a new obligation or duty, imposes an additional penalty, or its consequences are unduly harsh, it may be held invalid if it violates the due process clause of the United States Constitution. *McCord v. Smith*, 43 So.2d 704 (Fla. 1949).

Due process in the non-criminal area has been defined as affording a party reasonable notice and an opportunity to be heard. *Sheffey v. Futch*, 250 So.2d 907 (Fla. 4th DCA 1971). The Bar submits that the application of Rule 3-5.1(f) to the present situation would not violate the respondent's due process rights.

Respondent was convicted in federal court of committing perjury on three occasions in 1983 during a grand jury investigation and the ensuing trial of his former client, James

Joseph Erp. (R p. 4) At the time the offenses occurred, former Integration Rule 11.10(5) provided for a minimum three year period of disbarment. However, this was merely a minimum period a disbarred attorney was required to wait before he could apply for readmission to the Bar. The referee could, at his discretion, recommend a longer time period which this court could impose as the judgment. This change in the rule occurred in 1979. See Petition of Supreme Court Special Committee, Etc., 373 So.2d 1, 28 (Fla. 1979). Furthermore, case law supporting disbarments in excess of three years existed at the time respondent's misconduct actually occurred. See The Florida Bar v. Lee, 409 So.2d 1027 (Fla. 1982), where an attorney's existing period of disbarment was extended from three to four years due to a subsequent finding of guilt on another offense. The Florida Bar v. Cooper, 429 So.2d 1 (Fla. 1983) was decided shortly after the respondent committed perjury for the first time before the federal grand jury in March, 1988, but before his testimony in May, 1983, and August, 1983. Other cases since 1983 imposing longer term disbarments under the old rules include The Florida Bar v. Nagel, 440 So.2d 1287 (Fla. 1983); The Florida Bar v. Altman, 465 So.2d 514 (Fla. 1985); The Florida Bar v. Davis, 474 So.2d 1165 (Fla. 1985); and The Florida Bar v. Pierce, 498 So.2d 431 (Fla. 1986).

Respondent either was aware or should have been aware of the provisions of the rule. Former Integration Rule 11.01(1) and current Rule of Discipline 3-4.1 charge every member The Florida Bar with knowledge of the rules. Therefore, the respondent was on notice that an attorney found guilty of serious misconduct could be disbarred for more than three years.

In Harisiades v. Shaughnessy, supra, a deportation case, the United States Supreme Court considered both the due process and ex post facto problems in relation to retrospective legislation. Three immigrants were deported for their past membership in communist organizations even though they had terminated their memberships prior to the enactment of the Alien Registration Act of 1940. For the first time the Act specifically made an immigrant's previous membership in any subversive organization grounds for deportation. The United States Supreme Court found the act did not violate either the due process clause or the ex post facto doctrine even though it inflicted severe hardships on the parties. The court found that the immigrants should have been aware that their conduct could result in deportation as congress had admonished aliens in the past that membership in organizations advocating the overthrow of the United States government could result in their deportation. Likewise, the respondent should have been aware prior to the rule change that any attorney could be disbarred for more than three years.

The Bar further argues that the rule change was procedural in nature rather than substantive. Black's Law Dictionary defines substantive law as that which "creates, defines, and regulates rights, as opposed to 'adjective or remedial law,' which prescribes method of enforcing the rights or obtaining redress for their invasion." Black's Law Dictionary, 5th Edition, at 1281 (1979). Procedure is defined as "the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right, and which, by means of the proceeding, the court is to administer; the machinery, as distinguished from its product." Black's Law Dictionary, 5th Edition, at 1083 (1979).

Clearly, the rule change did not alter the definition of disbarment. It altered a procedure. The act of applying for readmission to the Bar after disbarment is the "machinery" which activates the "product" of disbarment. The length of time a disbarred attorney must wait prior to making his application is part of the "machinery."

Bar disciplinary proceedings are remedial in nature and are designed to protect the public and the integrity of the legal system rather than to punish the lawyer. DeBock v. State, 512 So.2d 164 (Fla. 1987). Therefore, the rule of statutory construction that should apply is that which provides that where

there are changes in statutory law, remedial or procedural changes may be immediately applied to pending cases as opposed to prospective application only. Heilmann v. State, 310 So.2d 376 (Fla. 2nd DCA 1975). Of course, in this case we are concerned with the Rules of Discipline of the Rules Regulating The Florida Bar promulgated by the Court to govern the Bar.

It appears the issue may have recently been settled by The Florida Bar v. Greenberg, 13 F.L.W. 625 (Fla. Oct. 20, 1988). The attorney was adjudicated guilty of committing criminal acts in June, 1985, and suspended from the practice of law by the Bar in July, 1985. The Bar's complaint and the hearing before the referee, however, occurred after the new rules became effective on January 1, 1987. This court found that since the case was pending subsequent to January 1, 1987, the new rules applied. As a result, the attorney was ordered disbarred nunc pro tunc to the date of his suspension for a five year period rather than a three year period. However, this case does not become final until November 4, 1988, when the time for filing a motion for rehearing expires as provided by Fla. R. App. P. 9.330(a).

In this case, only the misconduct occurred prior to the rule change. The criminal conviction and all Bar proceedings, including the respondent's felony conviction suspension, were

commenced after January 1, 1987. Clearly, the reasoning in Greenberg, supra, should apply here.

In addition, several other cases recently decided by this court have resulted in disbarments under the current rules where the misconduct occurred prior to January, 1987. For instance, in The Florida Bar v. Padgett, 529 So.2d 1099 (Fla. 1988), an attorney was disbarred after his conviction of grand theft of guardianship funds and his misappropriation of estate assets. Although the court's opinion did not specifically state the length of time the attorney must wait prior to applying for readmission to the Bar, it upheld the referee's findings and recommendations. A review of the referee's report indicates that he recommended the attorney be disbarred for a period of five years. (See Appendix) All of the misconduct occurred prior to January 1, 1987.

In The Florida Bar v. Gussow, 519 So.2d 603 (Fla. 1988), an attorney was disbarred pursuant to Rule 3-5.1(f) even though he was found guilty of violating one or more provisions of the Integration Rule and the Code of Professional Responsibility.

Similarly, an attorney was ordered disbarred with no application for readmission to be tendered within five years in The Florida Bar v. Bryan, 506 So.2d 395 (Fla. 1987). Some of the

charges arose out of the attorney's felony conviction for which he was suspended. Rule 3-5.1(f) was impliedly used since the opinion cited Rule 3-7.9 regarding the minimum waiting period for application for readmission.

The same issue also has been addressed with regard to reinstatements. In _The Florida Bar_, 425 So.2d 531 (Fla. 1982), an attorney who had been disbarred in 1957 applied for readmission in 1981. At the hearing it was determined that his readmission to the Bar should be conditioned upon his passing The Florida Bar examination. The disbarred attorney argued that this condition should not be required of him as the rule in effect when he was disbarred made no provision regarding reinstatement although that procedural route was available when disbarment was not termed permanent. The petitioner argued that the requirement violated both the federal and state constitutional prohibitions against _ex_ _post_ _facto_ laws. However, this court disagreed and found that reinstatement proceedings were governed by the rules in effect at the time of application for reinstatement unless the disbarment order or the rules in effect when the petitioner was disbarred provided otherwise. The issue was not whether the current rules were being applied retroactively, but whether the 1957 rules permitted passage of the Bar exam as a prerequisite to reinstatement. As the petitioner's original disbarment order did

not address the taking of the exam, this court found the prerequisite was not foreclosed.

The Bar submits the same reasoning should be applied to the present case. Former Integration Rule 11.10(5) did not foreclose the recommendation of a five year disbarment. Furthermore, the respondent has no vested right in the rules governing the length of disbarment. The Florida Bar, supra. Any argument otherwise would in effect suggest that the respondent might not have committed perjury had he known at the time that the term of disbarment would be five rather than three years.

Even if the present rules were not to apply, the serious nature of the respondent's misconduct clearly warrants a more severe discipline than either a three year disbarment or a lesser discipline overall. The commission of a felony is a serious offense and the commission perjury by an officer of the court sworn to uphold truth and justice is one of the worst offenses an attorney can commit. It serves to undermine "both the effectiveness of the legal system and the public trust of the judicial process. It is comparable to the seriousness of the charge of attempted bribery of a judge..." The Florida Bar v. Thompson, 271 So.2d 758, 760 (Fla. 1972). In Thompson, supra, the accused attorney was not found guilty of the charge of perjury, but he was found guilty of issuing worthless checks,

avoiding payment of a bill, practicing law while suspended for nonpayment of dues, swearing to a false birthdate, signing another's name to an affidavit, and failing to carry out a contract of employment. The attorney was suspended for a period of two years, although the court clearly would have ordered him disbarred had the charge of perjury been proved by the clear and convincing evidence.

The referee in this case wrote in recommending discipline:

> The crime of perjury involves an intentional interference with the very system and process we at the Bar are sworn to serve and uphold. Such an offense must be sternly and positively denounced in every instance, but when committed by a member of the Bar the crime is greater, and the punishment must be greater. We must avoid in every instance the impression that "we protect our own" when dealing with such instrinsic threats to our courts and our system of justice. (R p.6)

In The Florida Bar v. Leon, 510 So.2d 873 (Fla. 1987), the accused was adjudicated guilty in state court on two counts of perjury after his removal from judicial office. The referee recommended a three year suspension which this court specifically found to be insufficient given the nature of the attorney's actions. He was ordered disbarred. See also, The Florida Bar v. Onett, 504 So.2d 388 (Fla. 1987), where an attorney was disbarred after he was convicted in federal district court on six felony charges, two of which were for perjury.

The Bar is aware of the evidence the respondent offered in mitigation at the final hearing on July 21, 1988. A review of the referee's report indicates that he considered it in making his recommendation. (R p. 6) Considerable testimony was offered as to the respondent's reputation and character. However, the referee felt it was simply insufficient to warrant the recommendation of a lesser discipline. (R p. 6) Not only has the respondent practiced law since 1970, he has done so as an assistant county prosecutor, county prosecutor, assistant state attorney, chief assistant state attorney and county attorney for Marion County. (T pp. 66-67) It stands to reason that with such an extensive background in criminal law the respondent must have fully appreciated the consequences of knowingly committing perjury. In further aggravation, he steadfastly refuses to admit to his wrongdoing. (T p. 83)

It is the purpose of discipline to protect the public, punish the breach of ethics, encourage reform, and deter other members of the Bar who might be tempted to engage in similar misconduct. The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984), this court noted an additional aspect of discipline, that of protecting the favorable image of the legal profession by imposing visible and effective discipline when serious breaches

of ethics occur. The referee noted the perception aspect in his recommendation as to discipline. (R p.6)

The local media reported the respondent's conviction for perjury. This has tarnished not only his reputation, but that of the legal professional as well. An attorney has a responsibility to conduct himself in a manner that is consistent with the high standards of the profession regardless of whether or not he is acting in his professional capacity. The Florida Bar v. Bennett, 276 So.2d 481, 482 (Fla. 1973). The Bar submits that nothing less than a five year disbarment will do to reinforce this principle in the legal community for this attorney who simply did not accept the burdens associated with the privilege of being a member of The Florida Bar.

In conclusion, while it is manifestly apparent to the Bar that a five year disbarment is the appropriate level of discipline in the case given both the seriousness of the offense and the terms of Rule 3-5.1(f), it also appears the issue may have been settled by The Florida Bar v. Greenberg, supra, providing a timely motion for rehearing is not filed in that case. A five year disbarment is not only warranted but is mandated by the current rule which is applicable. Respondent should be disbarred for that period and ordered to pay the costs of these proceedings now totalling $1,709.60.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to affirm the referee's findings of fact, recommendations of guilt, and discipline of disbarment and further order a minimum five year period of disbarment and payment of costs of these proceedings which currently total $1,709.60.

Respectfully submitted,

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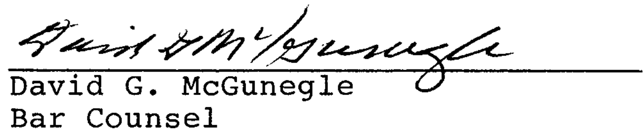
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original and seven (7) copies of the foregoing Brief and accompanying appendix by U.S. Mail to the Clerk of the Supreme Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing by certified mail, return receipt requested no. P 938 916 445 to counsel for respondent, John A. Weiss, Post Office Box 1167, Tallahassee, Florida, 32302; and a copy by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 1st day of November, 1988.



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