IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
vs.
JEROME L. TEPPS,
Respondent.

CASE NO. 76,468

ATTORNEY TEPPS' REPLY BRIEF

LEWIS A. FISHMAN, P.A.
Counsel for Appellant
100 South Pine Island Road
Suite 112
Plantation, Florida 33324
(305) 475-8400

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES: Page

PRELIMINARY STATEMENT

Attorney JEROME L. TEPPS relies on the Statement of the Case and Facts contained in his Initial Brief.

ARGUMENT

POINT ONE

THE SETTLEMENT OF THE CIVIL LAWSUIT BETWEEN RESPONDENT AND THE SEC WAS NOT A FINAL ADJUDICATION OF GUILT OF MISCONDUCT IN A DISCIPLINARY PROCEEDING AS REQUIRED BY RULE 3-4.6, RULES REGULATING THE FLORIDA BAR. THEREFORE, THE REFEREE ERRED IN GRANTING THE MOTION TO LIMIT ISSUES.

The Referee below erroneously granted the Florida Bar's motion to limit issues to discipline since Rule 3-4.6 is inapplicable in this case. That rule states that:

> "A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct, justifying disciplinary actions, shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule."

In the instant case it was error to grant the motion to limit issues because the settlement of the civil lawsuit between the SEC and Mr. Tepps was not a final adjudication of guilt of misconduct and the SEC is not a "court or other authorized disciplinary agency" within the meaning of the rule. The SEC brought a civil lawsuit against Mr. Tepps alleging fraud. That lawsuit was settled by Mr. Tepps consenting to be enjoined from any violation of the Securities Act, without admitting or denying the allegations of the

complaint. As a result, and still without admitting misconduct, Mr. Tepps agreed to a suspension of his right to appear before the SEC for a period of no more than five years.

It is this civil settlement which the Florida Bar contends should be the equivalent of a plea of nolo contendere or an Alford plea in a criminal case, for purposes of bar discipline. The Florida Bar is wrong. A plea of nolo contendere or an Alford plea submits a defendant in a criminal case to the court's power to impose punishment. In a nolo contendere plea, the defendant admits the facts in an information or indictment for the purposes of the pending prosecution, thereby giving the court the power to punish him. Vinson v. State, 345 So.2d 711 (Fla. 1977). In an Alford plea, the defendant proclaims his innocence of the crime charged, but submits to the court's power to punish because he feels his interests are better served by doing so. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). In both instances, there is a criminal charge pending and a court finding that there is an adequate basis for the plea and for the imposition of a criminal penalty.

In the instant case, however, there was never any criminal charge against Mr. Tepps, much less any plea to a criminal charge that could subject him to the imposition of punishment. No court has made any finding that there is any adequate basis for a plea or for the imposition of a criminal penalty. In short, the Bar's reliance on The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984) is misplaced because Mr. Tepps was never charged with a

crime, never pleaded to a crime and has never been subjected to a criminal penalty or been found guilty of misconduct. The SEC's action against Mr. Tepps and others was entirely civil in nature, and a civil judgment, especially one based not on proof, but on an offer of settlement without admission of misconduct, is simply, and completely, different from a criminal conviction.

The mere fact that the SEC has an internal regulation that presumes that a suspension is the result of the misconduct that the SEC alleges in its civil complaint cannot be considered to be a final adjudication of guilt of misconduct. It is no more than a presumption of misconduct and is certainly not a finding by a court or disciplinary agency that misconduct occurred. To hold that a presumption of guilt of misconduct can support a disbarment- or even lesser bar punishment- would be to run afoul of the due process protections guaranteed by the Rules Regulating The Florida Bar and by this Court's holding in The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965).

Furthermore, due process prevents a finding that the SEC is a "court or other authorized disciplinary agency" within the meaning of Rule 3-4.6 since the agency presumes wrongdoing from settlements of civil actions that are made specifically without admitting wrongdoing. This presumption of wrongdoing denies due process of law. Under Florida rules a presumption of wrongdoing would be insufficient to sustain discipline. Rather, Florida requires that there be a finding of misconduct. Since the SEC does not provide the full panoply of due process protections that are provided under

the Rules Regulating the Florida Bar, this Court ought not to hold that the SEC is a disciplinary agency.

The mere fact that the SEC has a regulation that corresponds to Rule 3-4.6 does not establish, as the Bar contends, that it is a disciplinary agency contemplated by 3-4.6. That is a decision that only this Court can make, with due regard for the fact that the SEC is a federal administrative agency - not an integrated bar association or a court whose focus is on the due process rights, privileges and responsibilities of the lawyers licensed by it and subject to its discipline.

Even if this Court finds that in appropriate cases the SEC might be an authorized disciplinary agency, it is clear that in this case there has been no final adjudication of guilt of misconduct that can be considered conclusive proof of misconduct. The SEC's internal regulations have transformed Mr. Tepps' civil settlement, which included no admission of fraud or other wrongdoing, into misconduct subject to Bar discipline, through the magic of presumption. Under Wilkes, that presumption is far from conclusive proof of misconduct. To sustain discipline, particularly the most extreme sanction of disbarment, for misconduct in the nature of fraud, it is incumbent on The Florida Bar to establish conclusively that the misconduct occurred. Here, where there has been no evidentiary hearing, no admission, and no court finding or final adjudication, the Bar has failed to meet its burden. It would be unprecedented for an attorney to be disbarred under these circumstances.

Therefore, Mr. Tepps is entitled to a full evidentiary hearing at which The Florida Bar will be put to its proof, rather than relying on a mere presumption of wrongdoing. See, generally, as to the necessity for taking evidence, Azar v. Richardson Greenshields Securities Inc., 528 So.2d 1266 (Fla. 2d DCA 1988); Finocchi v. Nies, 452 So.2d 88 (Fla. 2d DCA 1984).

POINT TWO

DISBARMENT IS AN EXCESSIVE AND UNJUSTIFIED PUNISHMENT ON THE FACTS OF THIS CASE.

Respondent relies on his Initial Brief on this point except to note that every case relied on by The Florida Bar to support its claim that disbarment is the appropriate discipline in this case arose from a criminal conviction. Mr. Tepps was never charged with or convicted of any crime. In the absence of conclusive proof that he engaged in criminal acts or fraud, disbarment is excessive and unwarranted discipline.

CONCLUSION

WHEREFORE, this Court should not confirm the report of the Referee and should remand the matter for a full hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 11th day of October, 1991 to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and Kevin P. Tynan, Bar Counsel, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309.

LEWIS A. FISHMAN, P.A.
Counsel for Respondent
100 South Pine Island Road
Suite 112
Plantation, Florida 33324
Telephone: (305) 475-8400

By _____
LEWIS A. FISHMAN, ESQUIRE
Florida Bar No. 261467