097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

v.

SEYMOUR FRIEDMAN,

Respondent.

_____/

Supreme Court Case
No. 82,536

The Florida Bar File
No. 93-00,503-02

AMENDED ANSWER BRIEF

ALISA SMITH #794805
Bar Counsel
The Florida Bar
5900 N. Andrews Ave., Suite 835
Ft. Lauderdale, FL 33309
(305) 772-2245

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

DISCIPLINARY RULES

INTEGRATION RULES

RULES REGULATING THE FLORIDA BAR

NEW YORK RULES

STANDARDS

PRELIMINARY STATEMENT

Appellant, Seymour Friedman, will be referred to as Respondent or Mr. Friedman throughout this Brief. The appellee, The Florida Bar, will be referred to as such or as the Bar.

References to the Report of Referee shall be by the symbol "RR" followed by the appropriate page number.

References to the final hearing before the Referee on February 14, 1994, shall be by the symbol "T" followed by the appropriate page number.

References to the Respondent's Brief shall be by the symbol "RB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Florida Bar submits the following statement in addition to the rendition of information provided by Respondent.

A. Procedural Facts:

The Bar filed its complaint and a request for admissions in this matter on October 12, 1993. On or about November 24, 1993, respondent filed a response to the Bar's request for admissions, an answer and a memorandum of law with attachments. In or about December 20, 1993, the Florida Supreme Court, upon stipulation between respondent and the Bar, transferred this case from Tallahassee to be heard in Broward County. On December 20, 1993, the Honorable Judge W. Herbert Moriarty was assigned as referee to preside over the above referenced case. A final hearing was held on February 14, 1994 in which Ms. Alisa M. Smith, Esq., attorney for the Bar and Mr. Seymour Friedman, pro se, appeared in person. The referee issued his report and recommendations on March 21, 1994.

B. Substantive Facts:

The report of referee sets forth the findings of facts which are supported by the pleadings and record. There was no testimony and only a partial trial transcript from the prior disciplinary hearing in New York offered or considered as evidence. Therefore, the only factual evidence relevant to these proceedings is derived from the Report of Referee (RR-1-4) as follows:

1. Respondent was a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida. (RR-1)

2. Respondent was disbarred from the practice of law in New York by the Supreme Court of the State of New York, appellate Division: Second Judicial Department on August 23, 1993. (RR-2)

3. The New York, Appellate Division: Second Judicial Department filed a five (5) count complaint in a petition dated February 28, 1991 against the Respondent. (RR-2)

4. The Supreme Court of the State of New York, Appellate division: Second Judicial Department in its order dated August 23, 1993, made the following factual findings:

A. Charge One (1) that respondent was retained by Mary Lou Ramm, in or about May 1985, to prosecute her claim for personal injuries sustained in an automobile accident. Respondent met with Ms. ramm in or about 1987, prior to a pretrial deposition she was scheduled to vive. During this matter, Respondent instructed Ms. Ramm to give testimony at her deposition which Respondent knew to be false. (RR-2)

B. Charge Two (2) that from approximately January, 1984 through July, 1986, Respondent was entrusted as fiduciary with funds belonging to clients. Respondent improperly commingled those funds with funds of his own. (RR-2)

C. Charge Three (3) that from approximately July 1986 through February 1988, respondent was entrusted as fiduciary with funds belonging to clients. Respondent improperly commingled those funds with funds of his own. (RR-2)

D. Charge Four (4) that from approximately December, 1984, respondent as attorney and fiduciary for Margaret Gootnick, was entrusted with the sum of $650.00, the settlement proceeds of a claim instituted on Ms. Gootnick's behalf. After depositing the proceeds into his Chemical Bank Escrow Account ,Respondent drew upon the account with a check payable to Mary Gootnick, in the sum of $308.50. This

represented the payment of funds to which Ms. Gootnick was entitled. The bank dishonored that check upon presentation due to insufficient funds in the Respondent's escrow account. (RR-2)

E. Charge five (5) that respondent engaged in a pattern of professional misconduct by issuing checks drawn upon his escrow accounts which failed to clear those accounts when presented for payment. (RR-3)

5. Respondent conceded factually to charges two, three, four and five at the special referee hearing. (RR-3)

6. Respondent contested the "conclusory paragraphs" of charges two, three, four and five, i.e., the alleged violations of the disciplinary rules were denied at the special referee hearing. (R-33)

7. Respondent denied the allegations set forth in charge one. (RR-3)

8. The Supreme Court of the State of New York Appellate Division: Second Judicial Department found the respondent violated the following disciplinary rules as correlated to the specific charges:

A. Charge One: Code of Professional Responsibility DR 1-102(A)(1), 1-102(A)(3), 1-102(A)(4), 1-102(A)(5) and 1-102(A)(7) 122 NYCRR 1200.3 (a)(1), 1200.3 (a)(3), 1200.3 (a)(5),and 1200.3(a)(7) and Code of Professional Responsibility DR 7-102(A)(4), 7-102(A)(6) and 7-102(A)(7) (22 NYCRR 1200.33 (a)(4), 1200.33 (a)(6), and 1200.33 (a)(7). (RR-3)

B. Charge Two: DR 9-102(A) (22 NYCRR 1200.46(a) and 22 NYCRR 691.12(a). (RR-3)

C. Charge Three: DR 9-102(A) (22 NYCRR 1200.46(a) and 22 NYCRR 691.12(a). (RR-3)

D. Charge Four: Code of Professional Responsibility DR 1-102(A)(1) and 1-102(A)(7), (22 NYCRR 1200.3(a)(1) and 1200.3 (a)(7). (RR-3)

E. Charge Five: DR 1-102(A)(1), 1-102(A)(4), and 1-102(A)(7); NYCRR 1200.3 (a)(1), 1200.3 (a)(4), 1200.3 (a)(7), DR 9-102 (22 NYCRR 1200.46) and 22 NYCRR 691.12. (RR-3)

9. On December 10, 1993 the Supreme Court of the State of New York Appellate Division: Second Judicial Department vacated the respondent's disbarment and instead suspended respondent from the practice of law in New York for a period of five (5) years for the foregoing violations. (RR-4)

10. Respondent's New York disbarment was vacated due to the respondent's remorse for failing to keep accurate escrow records, the absence of self-dealing and the character and reputation evidence presented on his behalf. (RR-4)

11. In the instant proceeding, the respondent failed to establish that the New York disciplinary proceedings were deficient or lacking in due process. (RR-4)

12. Respondent failed to show either an infirmity of proof that the New York judgment should not be followed or some other reason not to accept the consequences of that judgment and no transcript of the New York proceedings was filed with this court. (RR-4)

The referee found that respondent violated Rules 4-8.4(a) and 4-8.4(c). Respondent has not contested his violation of the rules regarding Count II but is litigating the findings as it relates to Count I and the

application of Rule 3-4.6 of the Rules Regulating The Florida Bar as to Count I. (T - 28).

SUMMARY OF THE ARGUMENT

The Florida Bar contends that the referee's findings and recommendations submitted to this court should be upheld. Those findings are supported by the evidence and respondent has failed to demonstrate the report is erroneous, unlawful or unjustified. Respondent's sole assertion before the referee was that R. Regulating Fla. Bar 3-4.6 should not apply because the disciplinary proceeding in New York was unconstitutional. The referee rejected this unsupported assertion and noted that respondent failed to show either an infirmity of proof of such a nature that the New York judgment should not be followed or some other reason not to accept the consequences of that judgment. Since respondent failed to establish that the foreign judgment was deficient, the referee properly applied Rule 3-4.6 and accepted New York's finding of misconduct as conclusive proof of guilt in the Florida disciplinary proceeding.

The paramount question presented to this Court for resolution concerns the application of Rule 3-4.6 in instances where the standard of proof in the foreign jurisdiction is less exacting than that required in Florida disciplinary cases. The Florida Bar posits that the sole inquiry to be made is whether the foreign judgment is reliable, not whether the standard of proof in the foreign jurisdiction differs from the standard applied in Florida.

There are several justifications and rationales for Rule 3-4.6. Foremost is the elimination of the necessity to retry the issue of guilt; to make unnecessary the production in Florida of testimony and evidence from a distant jurisdiction on the issue of guilt; and to fully protect the public.

The analysis suggested by The Florida Bar preserves the intent of Rule 3-4.6 whereas the approach advanced by respondent would require this Court

to evaluate the standard of proof utilized in foreign jurisdictions; determine whether that burden is less exacting than Florida's burden; treat foreign judgments differently based upon the standard of required proof; and ultimately to provide trials de novo in all cases wherein the standard of proof was less exacting than the clear and convincing standard required in Florida disciplinary cases, regardless of the reliability of the foreign judgment. Respondent's approach would subvert the intent and purpose of Rule 3-4.6 and create unnecessary controversy in many cases involving foreign judgments of misconduct. Further, The Florida Bar's suggested analysis fully protects respondent's rights in that respondents would have the opportunity to establish that the foreign judgment is so unreliable or deficient as to create an unjust result and therefore mandate a trial de novo on the facts.

Finally, it is important to note that the respondents have opportunity to fully litigate the disciplinary aspect of the process in all cases; therefore, they have the opportunity to explain their conduct and offer any mitigating factors. In the case at bar, respondent had the opportunity to demonstrate that the application of Rule 3-4.6 was not suitable, as well as to argue appropriate discipline to be imposed. Since respondent failed to show that the foreign judgment relied upon by the bar was either unreliable or deficient, although presented the opportunity to do so, Rule 3-4.6 should be applied to this case rather than have its clear meaning twisted in a manner never envisioned when this Court adopted the rule.

Regarding the issue of discipline, The Florida Bar asserts that the referee's recommendation is one that protects the public and is supported by the evidence. Therefore, it should be upheld.

I. ARGUMENT CONCERNING REFEREE'S REJECTION OF RESPONDENT'S ARGUMENT THAT THE DISCIPLINARY PROCEEDINGS IN NEW YORK VIOLATED HIS DUE PROCESS RIGHTS

The referee was provided numerous documents, affidavits and a memorandum of law by respondent to be considered along with the other pleadings relevant to this matter. Further, respondent was given the opportunity to argue, as he did, the deficiency of the underlying discipline imposed by New York and relied on by The Florida Bar to show conclusively that the Rules Regulating The Florida Bar have been violated by respondent. The referee read through the complaint, answer, memorandum with attachments and all other materials provided by the Bar and respondent prior to the February 14, 1994 final hearing. (T -3). Respondent's sole argument is that the underlying discipline imposed by New York is deficient because the standard of proof utilized by New York in disciplinary proceedings is not as exacting as the clear and convincing standard implemented in Florida's disciplinary process. See respondent's memorandum of law with attachments and (T-16-26). The referee rejected respondent's argument and found that "[i]n the instant proceeding, respondent failed to establish that the New York disciplinary proceedings were deficient or lacking in due process." (RR-4). The referee went on to state that the "[r]espondent failed to show either an infirmity of proof that the New York judgment should not be followed or some other reason not to accept the consequences of that judgment and no transcript of the New York proceedings was filed with this court." (RR-4-5).

In The Florida Bar v. Wilkes, 179 So. 2d 193, 198 (Fla. 1965), which concerned a lawyer that was disbarred in New York, the court determined, in

applying a rule similar to Rule 3-4.6 of the Rules Regulating The Florida Bar, that "right and justice require that when the accused attorney shows that the proceeding in the foreign state was so deficient or lacking in notice or opportunity to be heard, that there was such a paucity of proof, or that there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof of guilt of the misconduct involved, Florida can elect not to be bound thereby." The Court went on to emphasize in Wilkes that "the burden of showing why a foreign judgment should not operate as conclusive proof of guilt in a Florida disciplinary proceeding is on the accused attorney." Id. Respondent has failed to meet the Wilkes burden. Further, the referee's findings of fact or lack thereof is supported by the pleadings and record and therefore should be presumed correct. The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990). According to a myriad of case law, the findings of a referee will be upheld unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990). Further, the burden is upon the party seeking review to demonstrate that the referee's report is erroneous, unlawful or unjustified. Id. Respondent's exclusive assertion that his due process rights were violated by the standard of proof applied in the New York disciplinary process is not supported by the record of facts nor law. In fact, respondent concedes that New York has consistently upheld this standard as constitutional. (RB -9). See also Matter of Cappocia, 15 N.Y. 2nd 549; 466 N.Y.S. 2nd 269 (1983). Respondent states in his brief that "[i]t is noteworthy that the referee did not, as he stated, hear any witnesses, examine any evidence or read the New York transcripts but based his ruling solely on Rule 3-4.6 (RB-7)". It was respondent's burden to provide the proof to establish the deficiency of the

underlying proceeding. Therefore, Respondent may not attack the referee's findings which were based upon review of the available argument, pleadings and memorandum of law, and not solely on an analysis of Rule 3-4.6. Respondent's failure to provide the necessary witnesses, evidence and trial transcripts to support his argument should not inure to his benefit. Since respondent has not established that the referee's findings are clearly erroneous nor has he shown the underlying disciplinary finding to be deficient, respondent has failed to meet his burden of proof and the referee's findings should be upheld.

II. ARGUMENT CONCERNING THE CONSTITUTIONALITY OF NEW YORK'S STANDARD OF PROOF IN THE DISCIPLINARY PROCESS

Although the Bar's position regarding this issue overlaps with the previous argument, it is important to address, since respondent continuously asserts the unconstitutionality of the standard of proof in New York. First, the Bar contends that this issue is not properly before the Florida Supreme Court, per se. The Florida Supreme Court cannot rule that a sister state's burden of proof is unconstitutional and if it did rule in such a matter, this decision would have no impact upon the New York process. See Wilkes, 179 So. 2d at 198 wherein the court stated that "going behind the judgment of the sister state did not constitute a collateral attack on that judgment, for it cannot affect its result in the sister state." On the other hand, the importance of the constitutionality of the underlying disciplinary finding is the "effect which the [the court] will give that judgment in this state." Id. Therefore, The Florida Bar will presume that the respondent is relying on this latter argument when he states that the New York standard is unconstitutional.

The Florida Bar contends that the standard of proof utilized in the disciplinary process in New York, i.e., the preponderance standard, is not a violation of due process; therefore, constitutional. In a recent case before the Second District Court of Appeal in Florida, this argument regarding the unconstitutionality of the preponderance standard of proof in a license revocation proceeding in a foreign jurisdiction was rejected. Rife v. Dept. of Professional Reg'n, 19 Fla. L. Wkly D1097 (2 DCA 1994). In Rife, the Second District Court of Appeal found that several states employ a preponderance standard in [license revocation] cases and held that "[a]lthough there is a growing trend toward use of the more rigorous standard, it is apparent that such standard is not essential to satisfy due process under the U.S. Constitution." Id. The Florida Bar's contention is further supported by respondent's attachment of the Survey of National Organization of Bar Counsel on standards of proof which establishes that six states, including New York, have retained the preponderance standard. Finally, New York has upheld, against constitutional attack, its preponderance standard of proof. In re Cappocia 15 N.Y. 2nd 549 (NYC App. 1983). The Florida Bar agrees with the determination in Rife that the preponderance standard, utilized in six other foreign jurisdictions, is consistent with the due process provision of the U.S. Constitution.

Respondent relies on a series of federal court cases which label the disciplinary process "Quasi-Criminal" and have held that under certain circumstances the higher burden of clear and convincing evidence is more appropriate than that of the preponderance of the evidence standard. First, the Florida Supreme Court has rejected the label of "quasi-criminal" to the bar disciplinary process. In Rule 3-7.6(e)(1) of the Rules Regulating The

Florida Bar, the disciplinary process is defined as not civil or criminal but a quasi judicial administrative proceeding. Further, the Florida Supreme Court has expressly rejected the contention that bar proceedings were penal in nature. DeBock v. State, 512 So. 2d 164 (Fla. 1987). In DeBock, the Florida Supreme Court held that bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts. The function of the disciplinary process is to determine fitness to practice law, not to penalize. Based upon Florida's rejection that bar proceedings are penal in nature or quasi criminal, respondent's reliance on the federal court cases is misplaced and his argument meritless. In the alternative, the primary cases cited by respondent to support his contention that the more exacting or higher standard of proof is mandated thereby dismantling the New York disciplinary finding, are easily distinguished. First, Addington v. Texas, 441 U.S. 418 (1979) concerns the standard of proof in civil proceedings brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. Any analogy between the privilege to practice law and the bar disciplinary proceeding to the involuntary commitment proceeding espoused in Addington is misguided at best.

Next, respondent relies upon Matthews v. Elderidge 424 U.S. 319 (1974) and Santosky v. Kramer, 455 U.S. 745 (1982). Respondent submits that these cases which concern the loss of livelihood (RB at p.11) are analogous to the practice of law as a liberty interest which would require the higher burden of proof thereby nullifying his underlying discipline which is based upon the lower standard. The Florida Supreme Court has consistently stated that "a license to practice law confers no vested right to the holder thereof, but is a conditional privilege which is revocable for cause." Rule

3-1.1 Rules Regulating The Florida Bar and cited in DeBock at p. 168. Further, the Florida Supreme Court went on to state in DeBock "that attorneys can be held to different standards than other regulated professions." The rationale for this holding is "the unique role of attorneys as officers of the court [which] mandates that attorneys be held to the highest of ethical standards. This difference has been recognized by centuries of jurisprudential thought and is manifested in article V, section 15 of our constitution." DeBock at p. 168. Although the Florida Supreme Court has imposed the higher burden of proof to bar disciplinary matters, this does not axiomatically mandate that lower standards are unconstitutional. The practice of law is a conditional privilege not a liberty interest.

III. ARGUMENT CONCERNING THE APPLICATION OF RULE 3-4.6 IN CASES IN WHICH ANOTHER JURISDICTION ADJUDICATES MISCONDUCT UTILIZING A LESS EXACTING STANDARD OF PROOF

It appears that the paramount ruling to be made by this court concerns the application of Rule 3-4.6 in the case at bar. This determination was one in which the referee obviously struggled and overtly enunciated his ambivalence in his report. The referee stated that "there is an apparent inconsistency in applying Rule 3-4.6 and Florida's standard of proof in disciplinary matters in circumstances where the standard in the foreign jurisdiction differs from that of Florida. More specifically, it is unclear whether Florida, in [disciplinary] proceedings where the standard is clear and convincing evidence, should accept a final adjudication of guilt from a court in another state when that finding is premised on a preponderance of the evidence standard." (RR-5-6)

Although it appears that this is an issue of first impression, there is support for the proposition that Rule 3-4.6 is applicable as long as the underlying adjudication of misconduct is reliable. In 1965, this Court rendered an opinion in Wilkes, 179 So. 2d at 193 wherein the application of rule 11.02(6) of the Integration Rule, 31 F.S.A. was determined. Rule 11.02(6) reads as follows:

> Discipline by foreign jurisdiction. A final adjudication by a court or other authorized agency of another state in a disciplinary proceeding that an attorney licensed to practice in that state is guilty of misconduct justifying disciplinary action should be considered as conclusive proof of such misconduct in a disciplinary proceeding in this state.

The Rule applicable today at 3-4.6 of the Rules Regulating The Florida Bar is virtually identical with grammatical not substantive changes. Rule 3-4.6 states the following:

> 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 action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

The Florida Bar believes the Wilkes holding and rationale are applicable to Rule 3-4.6 because the substance of the provision is identical. The referee pronounces an "apparent inconsistency" in applying this Rule to a final adjudication in a disciplinary proceeding when the standard of proof in the underlying proceeding is based upon a less exacting standard. The Florida Bar does not agree that there is an inconsistency. In Wilkes, this court explained the rationale for and effect of the rule concerning discipline by a

foreign jurisdiction. The Florida Supreme Court explained in Wilkes the following:

> [4] By adopting Rule 11.02(6) we took a reasonable position between the two extremes .... By the plainest language the rule makes such a foreign judgment of guilt conclusive proof of such misconduct in a disciplinary proceeding in this state. Proof of guilt of the acts of misconduct adjudicated in the sister state is accomplished by simply proving the entry of the foreign judgment. This eliminates any necessity to retry the bare issue of guilt and makes unnecessary the production in Florida of testimony and evidence on this issue. The rule nether [sic] prescribes nor proscribes professional behavior. It relates solely to the question of proof of guilt.

This court rejected the extreme view of application of the principles of full faith and credit and comity as well as the position that Florida would not recognize a judgment from another jurisdiction. The court established this rule which relates solely to the question of proof of guilt. Wilkes, 179 So.2d at p.197. "The Rule does not require Florida to follow the foreign judgment as to discipline imposed thereby." Id. The reason for the interpretation of the Rule is to fully protect the public interest; to ensure the respondent due process of law and a mature consideration of his fitness to practice law; and it will preserve the integrity of the court's exclusive jurisdiction and obligation in disciplinary matters. Id. Based upon this rationale, the Wilkes court concluded that under

> ... Rule 11.02(6), the introduction in evidence of a properly authenticated judgment of discipline entered by a competent agency of a sister state shall operate as conclusive proof of guilt of the acts of misconduct adjudicated in that judgment, but that the discipline to be awarded for such acts by this state shall be determined by this court and its agencies in the same manner as in all other disciplinary proceedings.

Wilkes also takes into consideration that an accused attorney can properly raise the issue as to whether the proceedings in the sister state were so deficient as to make the foreign judgment unreliable as an automatic adjudication of guilt. Wilkes, 179 So.2d at p.198. Because Wilkes provides this safeguard and the respondent at bar has failed to meet this burden, there is no inconsistency in the application of this Rule to the New York judgment. To disavow the well reasoned decision of Wilkes wherein the court took the middle ground between two extreme positions would create a situation in which any jurisdiction with a standard of proof different from or lower than Florida would force The Florida Bar to produce evidence and testimony concerning guilt of respondent only in those selected jurisdictions, thereby treating foreign jurisdiction adjudications differently. The Rule now provides that all foreign jurisdiction findings are treated alike, i.e., lawyers disciplined for misconduct in a foreign jurisdiction may not practice law with impunity in Florida and are provided an opportunity to litigate the appropriate discipline to be imposed in Florida. This latter application is a fair disposition of these matters.

Finally, respondent's analogies and hypotheticals, which appear in his initial brief, concerning outrageous examples of the application if this rule to situations in which a member of the bar could be found axiomatically in violation of our Rules based upon a patently unfair, bizarre or absurd standard of proof or rule have no merit in light of the constraints imposed by Wilkes. Respondent's examples are inapplicable because under Wilkes an evaluation into the reliability, deficiency and infirmity of those scenarios would result in a finding that the accused attorney's due process rights were violated thereby obviating the application of Rule 3-4.6. Since the case at bar

has not been undermined by a valid due process attack and the New York judgment has been found to be reliable, Rule 3-4.6 is applicable and the referee's finding that respondent violated the Rules Regulating The Florida Bar based upon the foreign judgment should be upheld.

IV. ARGUMENT REGARDING THE NECESSITY FOR REMAND ON DISCIPLINE

Although the transcript from respondent's New York disciplinary proceeding was not admitted as evidence to be considered by the referee in making a determination as to the appropriate discipline, The Florida Bar contends that under the circumstances of this case, the omission of the transcript does not warrant remanding this case for further disposition. The basis for the bar's contention is that the referee was provided with copies of the detailed findings of the New York proceedings, i.e., the decision and order on motion dated December 10, 1993 which vacated the imposition of disbarment; the opinion and order dated August 23, 1993 imposing disbarment; the particularized 21 page special referee findings; respondent's extensive memorandum of law with attachments; and respondent's argument concerning his innocence regarding the fact that the key witness lied and the favorable disciplinary finding in California. (See pleadings and T-13-15 and 26-29) It is significant to point out that respondent did attach to his memorandum of law a portion of the transcript from the New York proceeding. The referee specifically requested that bar counsel and respondent speak to discipline regarding Count II, i.e., the escrow account violations. (T-31). Respondent had an opportunity to address the appropriate discipline as well as mitigating and aggravating circumstances. (T-35-36; 38-42; 44). The Florida Bar also provided several cases concerning the appropriate discipline

for subornation of perjury as it related to Count I. Those cases are The Florida Bar v. Rightmyer, 616 So. 2d 953 (Fla. 1993) and Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960). Respondent had the opportunity to contradict and rebut the application of this law at the hearing as well as to argue the appropriate discipline based upon the underlying misconduct. (T-46-48). Because the referee was provided with the details concerning the New York case including respondent's defense and argument concerning the error of the judgment, the evidence was sufficient to justify a determination . The Florida Bar v. Abrams, 402 So. 2d 1150 (Fla. 1981).

Further, the discipline recommended by the referee is sufficient to protect the public. The Florida Bar relies on the seriousness of the misconduct and the principle that one prohibited from practicing in a foreign jurisdiction should likewise be prohibited from practicing in the State of Florida. In re Sanders, 580 So. 2d 594 (Fla. 1991). The Florida Bar is aware that the Sanders case involves disbarment and that Florida is not bound by the disposition of a sanction in a foreign jurisdiction, The Florida Bar agrees with Justice Ehrlich's special concurring opinion in The Florida Bar v. Sickmen, 523 So. 2d 154 (Fla. 1988) and its reliance thereon in The Florida Bar in re: Sanders (supra) wherein the pronouncement that [the Florida Supreme Court] should not allow the practice of law in Florida of one disbarred in his home state. Subsequently, in that same year, in the Florida Board of Bar Examiners Re: R.L.V.H., 587 So. 2d 462, 463 (Fla. 1991), the Florida Supreme Court held relying on the special concurring opinion in Sickmen, and the majority opinion in Sanders that the court "will not allow the petitioner to practice law in Florida so long as he is disbarred in the State of Ohio." Consistent with these rulings, the Court held in The Florida Bar v.

Eberhart, 631 So. 2d 1098 (Fla. 1993) that an attorney who resigns from the bar of a foreign jurisdiction without leave to reapply and thereby stops four separate disciplinary actions against him in that state should be disbarred from the practice of law for the misconduct. Subsequent to Florida's imposition of a suspension, thee of law in Florida. Recently this Court decided another case involving the reinstatement of an attorney to the practice of law yet disbarred in a foreign jurisdiction. The Florida Bar re: Susser, 19 Fla. L. Wkly S375 (July 7, 1994). In Susser, the respondent had been suspended from the practice of law in Florida prior to the foreign jurisdiction imposing a sanction foreign jurisdiction disbarred Susser. During his reinstatement hearing in Florida, the referee found that Susser complied with the requirements imposed by the previous order of suspension and concluded that the foreign jurisdiction ruling was harsh and recommended that Susser be reinstated. In relying on Sickmen, this Court in Susser held that it would be unfair now to impose discipline to a higher degree based solely on a disbarment by Susser's home state that was premised upon the same conduct.

The case at bar is more like Sanders than Sickmen, in that, respondent comes to this Court with a suspension from the practice of law in New York for a period of five years and a suspension from the practice of law in California for a period of one year based upon the underlying misconduct. The Florida Bar agrees with the referee's recommended discipline of a suspension from the practice of law in the State of Florida for an indefinite period of time and that respondent may petition for reinstatement upon his readmission to the New York Bar (RR-6). In coming to this conclusion, the referee reviewed the evidence presented; gave due consideration of the respondent's fitness to practice law; and considered Standard 6.12 of the Florida Standards for

Imposing Lawyer Sanctions which states:

> 6.12 - Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action. (RR-6)

Based upon the foregoing, the Referee's recommended discipline should be adopted by this court.

CONCLUSION

Based upon the foregoing facts and argument, The Florida Bar respectfully requests that this Honorable Court accept the recommendation of the referee and impose the sanction of an indefinite suspension and permit the respondent to petition for reinstatement upon his readmission to practice law in New York.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Answer Brief have been sent by Certified Mail #Z 082 653 948, return receipt requested, to Seymour Friedman, Respondent, 11015 71st Road, Forest Hills, NY 11375 and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 1st day of September, 1994.

ALISA SMITH #794805
Bar Counsel
The Florida Bar
5900 N. Andrews Ave., Suite 835
Ft. Lauderdale, FL 33309
(305) 772-2245