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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT PAUL JORDAN, II

Respondent.
_____/

Supreme Court
Case No. 86,271

On Petition for
Review of
the Referee's Report
in a Disciplinary
Proceeding.

REPLY BRIEF OF RESPONDENT

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INTRODUCTION

In this brief, Robert Paul Jordan is referred to as either "Respondent" or "Jordan"; The Florida Bar will be referred to as either the "Complainant" or "the Bar"; and the Report of Referee pertaining to Supreme Court Case No. 85,109 will be referred to as "non-final report".

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee.

"RR" refers to the Report of Referee.

"Bar Brief" refers to the Answer Brief of The Florida Bar which the Bar has designated as "The Florida Bar's Initial Brief".

"R.Brief" refers to the Initial Brief of Respondent

ARGUMENT

I. A RESPONDENT'S ADMISSION OF GUILT AS TO ONE RULE VIOLATION DOES NOT JUSTIFY THE BAR'S PRESENTATION TO THE REFEREE OF EVIDENCE AND ARGUMENT AS TO DISCIPLINE PRIOR TO AN ADJUDICATION OF MISCONDUCT BY THE REFEREE.

Just as proceedings relating to sentencing follows adjudication in criminal proceedings and proceedings relating to damages follows liability in civil proceedings, presentation of evidence and argument as to discipline is permissable only after a respondent has been adjudicated guilty of misconduct in disciplinary proceedings. To hold otherwise allows the introduction of argument and evidence relating to discipline, including prior disciplinary history, which is likely to influence a referee to issue findings based upon a perception of respondent as having a bad character or propensity to engage in unethical activity, rather than based upon a referee's careful consideration of evidence relevant to the case at issue.

In responding to our argument, The Florida Bar overlooks the fundamental principle behind bifurcation and instead interprets Rule 3-7.6(k)(1)(D), Rules Regulating The Florida Bar, to permit the presentation of evidence and argument as to discipline prior to findings of guilt as long as a respondent admits guilt as to one of several charges (Bar brief at 10). The Bar, however, offers no support for this interpretation based upon case law or by analogy to any fundamental legal principle.

Rule 3-7.6(k)(1)(D), Rules Regulating The Florida Bar, states, in pertinent part::

> after a finding of guilt, all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent) . . . [Emphasis added]

The Rule does **not** state or suggest that "after either an admission by the respondent or a finding of guilt by the referee as to at least one charge, all evidence of prior disciplinary measures may be offered by bar counsel . . . ."

In its brief, the Bar states that "there is no prerequisite that the referee must find a respondent guilty of all of the alleged violations, or even a majority of the alleged violations, before the referee may properly consider the respondent's prior disciplinary history." The Bar then argues that it is only one finding of guilt which triggers a dispositional hearing. (Bar brief at 10).

Respondent maintains that it is not one or any particular number of referee findings which establishes the right to proceed to the disciplinary phase but rather the **completion** of that portion of the disciplinary proceeding wherein the referee considers evidence and argument relevant to the issue of guilt. This phase culminates in findings as to guilt rendered by the referee (i.e., either an acquittal or adjudication of misconduct).

Only after an adjudication of misconduct is made by the referee is it permissible to proceed to the next phase of the proceedings, to wit: consideration of the appropriate disciplinary sanction (i.e., sentencing). It is only during this latter phase at which time evidence, including all evidence of prior disciplinary measures, and argument as to discipline should be presented.

The potentially adverse impact on disciplinary proceedings when bifurcation is not followed is demonstrated by the case *sub judice*. As set forth in Respondent's Initial Brief, the Bar's presentation of evidence relating to prior and proposed discipline improperly influenced the referee, as evidenced by the comments of the Referee and finding pertaining to lack of candor set forth in the referee's report [R.Brief at 12; TR 125; RR 3, No. 15; RR 5, V(e)].

Although the Bar now submits that the Referee's conclusions as to truthfulness of Respondent's statements concerning receipt of court orders are based solely upon Respondent's testimony, there is simply no reasonable explanation for the Referee's conclusions other than the effect of the prejudicial evidence (Bar Brief at 12).

This conclusion is supported by the fact that in the dispositional portion of the proceeding, the Bar argued factors in aggravation and specifically rejected any argument that Respondent submitted false evidence as an applicable factor (TR 123). Further, although Bar counsel

acknowledged the Referee's concern with the issue of candor, Bar counsel, herself, confirmed the position of the Bar which did not support a finding of lack of candor.

> [t]he Bar would submit perhaps due to sloppy record keeping or inappropriate way of date stamping documents when they came in, they may have been misplaced, therefore not acted upon appropriately and misplaced . . . .(TR 125).

Where procedural rules are not followed, proceedings should be dismissed. The Florida Bar v. Catalano, 651 So. 2d 91(Fla. 1995). These proceedings should be dismissed because evidence and argument as to discipline was improperly presented to and considered by the Referee prior to a finding of guilt. The effect of failing to comply with a principle of bifurcation has tainted the findings and recommendations of the referee and rendered these proceedings fundamentally unfair.

II. THE REFEREE'S CONSIDERATION OF THE NON-FINAL REFEREE'S REPORT IN AN UNRELATED DISCIPLINARY PROCEEDING WAS NOT HARMLESS ERROR

During the presentation of evidence and argument as to discipline in the instant proceeding, the Bar introduced a non-final referee's report in an unrelated disciplinary proceeding and in response to Respondent's objection, argued that the non-final referee's report was relevant to the proceedings (TR 115).

At final hearing, the Bar reassured the Referee that it was proper to consider the non-final referee's report as constituting "cumulative misconduct" (TR 121). In its brief,

however, the Bar now concedes Respondent's position that the non-final referee's report does not constitute "cumulative misconduct" (Bar brief at 15).

Respondent maintains that the introduction of the non-final referee's report cannot be justified based upon cumulative misconduct, as originally argued by the Bar, or for any other proper purpose.

In its brief, the Bar does not establish the relevance of the non-final referee's report to the instant proceeding or even attempt to justify its presentation to the referee. Instead, the Bar asserts that any error in providing the non-final report to the Referee was harmless (Bar Brief at 15). In support of this position, the Bar suggests that the non-final report was considered by the Referee as one of "many factors in arriving at his recommendation for a one year suspension." (Bar brief at 16).

The fact that the non-final report was, as the Bar argues, one of several factors which the Referee considered in determining discipline does **not** render the error in its admission harmless. In order to establish that the error was harmless, the Bar must demonstrate that the error did not affect the referee's determination.

Fla. Stat. § 59.01 which pertains to harmless error provides:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of . . . improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

In evaluating harmless error arguments in the criminal context, this Court has established a test which focuses on the effect of the error on the trier of fact. Applying this principle to criminal cases, for example, requires "not only a close examination of permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict. . . ." State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986).

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a reasonable possibility that the error affected the verdict. . . .If the appellate court cannot say beyond a reasonable dubt that the error did not affect the verdict, then the error is by definition harmful. Id. at 1139.

Further, the principle of harmless error has been applied to administrative proceedings. It has been held that "the fact that the case was not heard by a jury does not mean that the introduction of the inadmissable evidence

was harmless error. Had the trial judge stated that he based his findings only upon certain evidence and that he disregarded the challenged evidence, the error, if any, in the admission of such evidence could have been determined harmless." Lieberman, M.D. v. Department of Professional Regulation, Board of Medicine, 573 So. 2d 349, 352 (Fla. 5th DCA 1990)(citation omitted).

In the instant case, the Bar does not dispute that the non-final referee's report was considered by the Referee and was one of the factors which affected his determination. Therefore, based upon the harmless error analysis, the error in the admission of the non-final referee's report was, by definition, **harmful**. The Bar cannot now claim harmless error by arguing that even if the improper evidence had not been considered by the Referee, the findings and recommendations of the Referee were justified based upon sufficiency-of-the-evidence or any other evidentiary tests. Accordingly, since consideration by the Referee of the non-final referee's report was improper, any findings or recommendations of the Referee based upon this improper evidence should be rejected.

III. THE REFEREE'S RECOMMENDATION OF A ONE (1) YEAR SUSPENSION, PROOF OF REHABILITATION AND REQUIREMENT THAT RESPONDENT PRACTICE UNDER ANOTHER ATTORNEY'S SUPERVISION, IF AND WHEN HE IS REINSTATED, IS CLEARLY EXCESSIVE

As in all disciplinary cases, Bar Counsel makes a disciplinary recommendation to the referee after a

respondent has been adjudicated guilty of misconduct. Such recommendation is made with the approval of the designated Board Reviewer and is based upon consideration of multiple factors, including the nature of the misconduct, case law, and Florida Standards for Imposing Lawyer Sanctions.

In the instant case, Bar Counsel made a disciplinary recommendation for a ninety-one (91)day suspension, proof of rehabilitation and payment of costs. Presumably, this recommendation was based upon consideration of <u>all</u> applicable factors, including Respondent's prior discipline.

The Referee, however, rejected the Bar's recommendation and instead recommended a significantly harsher sanction, to wit, a one-year suspension followed by a perpetual probation which requires that Respondent practice forevermore under another attorney's supervision (RR 5).

If the Bar believed that its recommendation for a ninety-one (91) day suspension was appropriate, how can it now justify its support for the Referee's recommendation which provides for a suspension for one-year, four times greater than the suspension originally recommended by the Bar?

There is simply no justification for the unduly harsh disciplinary sanction recommended by the Referee.

Respondent acknowledged that he did not respond to the Bar's initial inquiry (TR 75, 109). Respondent did,

however, respond to the inquiry of the grievance committee member (TR 75,77, 82,109) two to three months later (EX 12 at 46) and was found by the Bar to have been cooperative (TR 124). Other than not responding to the Bar's initial inquiry letters, the allegations involved in this proceeding involve neglect, incompetence and lack of communication with respect to the representation of a client in a criminal matter.

Even considering Respondent's prior disciplinary history, it is difficult to justify the discipline recommended by the Referee. In fact, as stated in Respondent's Initial Brief, none of the cases cited by the Referee support a one-year suspension. The three (3) cases cited by the Referee which are the most similar to the instant case indicate that the range of appropriate discipline for neglect and inadequate communication is between a public reprimand and a six-month suspension. The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1982); The Florida Bar v. Rolle, 661 So.2d 296 (Fla. 1995) and 661 So.2d 301(Fla. 1995).

In its brief, the Bar attempts to support a one-year suspension by reference to case law. The cases cited by the Bar are not applicable. In fact, all but one of the cases relied upon by the Bar were decided before the Florida Standards for Imposing Lawyer Sanctions were adopted by the Board of Governors in November 1986.

In addition, each of the cases cited by the Bar involve other factors which distinguish these case from the instant case, to wit: The Florida Bar v. Fussell, 474 So. 2d 210 (Fla. 1985)(the respondent's prior discipline included a six-month suspension following a felony conviction); The Florida Bar v. Sheldon, 446 So .2d 1081 (Fla. 1984)(the respondent was found guilty of deceit or misrepresentation and of improper handling of trust funds); The Florida Bar v. Gunther, 390 So. 2d 1192 (Fla. 1980)(the respondent failed to notify his client of the granting of a corporate Charter and failed to take the necessary steps to vest ownership of the corporation in the client; the referee's report was uncontested); The Florida Bar v. Seidler, 375 So. 2d 849 (Fla. 1979)(the respondent engaged in misconduct involving four different clients; the misconduct included failing to account for trust funds in connection with a real estate closing, issuing a worthless check, and failing to appear in court on behalf of clients); The Florida Bar v. Reed, 299 So. 2d 583 (Fla. 1974)(the respondent failed to cooperate in the disciplinary proceedings after the appointment of the Referee); The Florida Bar v. Zokvic, 216 So. 2d 208 (Fla. 1968)(the respondent's prior discipline included a one-year suspension for similar misconduct).

The only case cited by the Bar decided since the Florida Standards for Imposing Lawyer Sanctions were adopted is The Florida Bar v. Grigsby, 641 So 2d 1341 (Fla. 1994). Even the more recent Grigsby case does not support a one-

year suspension. Grigsby received a public reprimand followed by a three-year probation for failing to cooperate with a disciplinary authority in violation of Rule of Professional Conduct 4-8.1(b). The probationary period was imposed to ensure that Grigsby participated in mental health counseling necessitated by his diagnosis of clinical depression. In fact, Grigsby had prior discipline which included an admonishment for inadequate communication with a client and failure to respond to the Bar's inquiries and, in addition, a three-month suspension for failure to act with reasonable diligence in representing clients on three separate occasions and filing to keep them informed.

CONCLUSION

The Referee's recommendation for one-year suspension and perpetual probation is unwarranted. In the event that the Court does not dismiss this proceeding, Respondent would urge the Court to impose a suspension for ten (10) days followed by probation for a period of two (2) years. The terms of probation would consist of consultation with Law Office Management Advisory Service (LOMAS), quarterly review and certification by LOMAS that adequate procedures are being maintained and the filing with Staff Counsel of The Florida Bar of quarterly status reports on all pending cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Reply Brief of Respondent was mailed AirBorne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927 and that a true and correct copy was mailed to John T. Berry, Staff Counsel, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to Rose Ann DiGangi, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801 this 9 day of July, 1996.

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