IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ALEC J. ROSS,

Respondent.
_____/

Supreme Court Case
No. 89,012

Complainant's Answer Brief

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Other Authorities:

Rules Regulating The Florida Bar

Florida Standards for Imposing Lawyer Sanctions

STATEMENT OF THE CASE AND OF THE FACTS

This case primarily involves two specific factual questions. First, did the respondent seek a substantial financial reward in exchange for testifying as to the truth from one attorney and that attorney's client? Second, did the respondent also alternatively seek a substantial financial reward for being unavailable to testify from a second attorney? The witnesses presented by the Bar testified that he did. (T. 23-26, 53, 69, 71, 72, TFB Exh. 6)

It is somewhat difficult to respond to respondent's Statement of the Case and Facts since no citations to the record were included. Therefore, the Bar will present herein the salient facts and citations to the record.

Steve Newburgh was the attorney for Mr. Robert Lazar who foreclosed on property which had previously been owned by Roger Quisenberry. He testified as to a telephone call from his client and his own personal reaction, stating:

> My client made it clear to me he was concerned because of a request that the person who called him, being Alec Ross, be offered a participation interest in the property which was acquired by my client at the foreclosure sale. (T. 25)

Respondent was asking for an "interest in the property" based upon his offer of testimony that Quisenberry had lied in an

affidavit submitted subsequent to the foreclosure (T. 32). Newburgh's reaction to the same offer which he heard directly from Ross. (T. 25, 26) was clearly hostile:

> "A. I don't believe I had a tantrum, but I do recall that I was angry and angry because -- and I stated directly to Mr. Ross, "Mr. Ross, it is your duty and your obligation to come to Court and testify and to controvert the allegations in the affidavit and to provide what proof is required in order that justice be done in this case."
>
> It was at that point that I advised Mr. Ross that the only consideration, so to speak, that would be offered in exchange for such testimony would be a check for $7.40 representing a witness fee. (T. 26)

Kim St. James had been the attorney for Quisenberry. She testified as to a similar type of offer from the respondent. She testified that Ross stated that he would "make himself absent" for six or seven thousand dollars. (T. 69, 71) He also told St. James that Quisenberry was a liar (T. 71). St. James testified that it was "absolutely not" true (T. 73) that Ross was attempting to negotiate an "unrelated claim" as Ross claimed. Ross admitted to telling St. James that he could stay away longer on a planned vacation if he had more cash (T. 134).

Ross took the stand in respondent's case in chief (T. 104). He believed that Quisenberry owed him money (T. 109, 111). He had

been discussing that debt in the telephone conversation with St. James (T. 111). He did not intend to violate any rules of the Florida Bar (T. 113). He maintained that he merely offered to purchase half of Lazar's interest in the property (T. 116).

Rule 4-8.4(c) 3

After a full hearing, the Referee concluded that the respondent was guilty of violating Rule 4-8.4(c) of the Rules of Professional Conduct, i.e., that he had engaged in conduct characterized by dishonesty, fraud, deceit or misrepresentation. The Referee recommended disbarment of the Respondent. Previous discipline of the Respondent included a 91 day suspension in 1990.

SUMMARY OF ARGUMENT

In regard to his first argument, Respondent has failed to overcome the presumption in favor of constitutionality. He has presented no authority which holds that the word "dishonesty" is void for vagueness. The authority cited by the Bar supports the opposite conclusion.

Second, Respondent has failed to establish that the Referee's findings were clearly erroneous or lacking evidentiary support. There are numerous statements by the witnesses, attorneys on opposite sides of a case, to the effect that Respondent sought to profit by either appearing or not appearing as a witness. There is also substantial evidence that the Respondent sought to avoid service.

Respondent failed to object to the procedure suggested by the Referee for drafting the Referee's Report. Therefore, that issue is not properly before this Court. The Referee utilized the standard practice of permitting the prevailing party to draft the report and providing a copy of the proposed document to opposing counsel. Assuming arguendo that this Court will consider the issue, it is, nevertheless, apparent that the authority advanced by the Respondent is inapplicable to this factual context.

Finally, the Respondent is a suspended attorney. That is an aggravating factor. Even without that factor The Florida Standards

for Imposing Lawyer Sanctions mandate disbarment. Furthermore, numerous cases involving similar misconduct resulted in disbarment.

POINTS ON APPEAL

I

THE RESPONDENT HAS FAILED TO OVERCOME THE PRESUMPTION FAVORING THE CONSTITUTIONALITY OF STATUTES.

II

THE RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE REFEREE'S FINDINGS WERE CLEARLY ERRONEOUS OR LACKING EVIDENTIARY SUPPORT.

III

THE RESPONDENT HAS FAILED TO DEMONSTRATE ANY ERROR IN REGARD TO THE PROCEDURE FOR DETERMINING THE FACTUAL FINDINGS.

IV

DISBARMENT IS THE APPROPRIATE DISCIPLINE.

I

RESPONDENT HAS FAILED TO OVERCOME THE PRESUMPTION FAVORING THE CONSTITUTIONALITY OF STATUTES. (REPHRASING THE RESPONDENT'S ISSUE #1)

The Respondent argues that the Referee erred by not dismissing the Bar complaint due to unconstitutionality. Specifically, he contends that Rule 4-8.4(c) is void for vagueness, insofar as the meaning of "dishonesty" is not clear. Respondent's position is sustained by neither logic nor authority.

There is a presumption in favor of the constitutionality of statutes. Florida Department of Education v. Glasser, 622 So.2d 944 (Fla. 1993). A statute need not furnish a detailed plan and specification of acts or conduct prohibited. Wells v. State, 402 So.2d 402 (Fla. 1981).

The word "dishonesty" is obviously a word of common usage. Where a statute does not define a term of common usage, such words are construed according to their plain and ordinary sense. State v. Hagen, 387 So.2d 943 (Fla. 1980).

The lack of definition in a rule, does not ipso facto render it unconstitutional. State v. Barnes, 686 So.2d 633 (Fla. 2d DCA 1996). Respondent suggests the contrary by citing Warren v. State, 572 So.2d 1376 (Fla. 1991). That case merely held that "ill fame"

is an antiquated term. Hopefully, "dishonesty" is not an antiquated term. In the absence of a definition, the plain and ordinary meaning of a term can be ascertained by reference to a dictionary. Barnes, supra.

II

THE RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE REFEREE'S FINDINGS WERE CLEARLY ERRONEOUS OR LACKING EVIDENTIARY SUPPORT.

The Respondent correctly recognizes the presumption of correctness in favor of the Referee's factual findings. Furthermore, it is axiomatic that the respondent must establish that the findings are clearly erroneous or lacking evidentiary support. The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994). The Respondent has clearly failed to overcome that presumption and has failed to establish that findings were clearly erroneous or lacking evidentiary support.

There was ample testimony at the final hearing regarding conversations with the Respondent in which he sought to profit financially in exchange for his testimony (T. 23, 25, 26). Attorney Newburgh testified as to such a conversation. (T. 25, 26). His client, Robert Lazar, reported a similar conversation to him (T. 23-25). Another attorney, Kim St. James testified that the Respondent offered to take a longer vacation, during the time scheduled for discovery, if he received some additional cash (T. 69, TFB Exh. 6). Respondent admitted to the conversation. His explanation was hardly exculpatory:

> Well, yes. During the conversation I said,

> "I'm going away on vacation. By the way, if I had extra spending money, I might stay longer or leave earlier. I sort of inflected my voice, so I thought the average person would think it's like a little tease thing (T. 131-132).

There was also substantial testimony regarding Respondent's efforts to avoid service. The Referee found that he did avoid service in an effort to not testify (ROR, para. Q).

Respondent's deposition was scheduled for December 8, 1994 (T. 27). When the process server attempted service, he encountered a posted notice that Respondent would be away until December 20, 1994, one day after the date of the final hearing. (T. 30).

Respondent suggested that the process server was mistaken and that December 2, 1994 was the date on the notice. (T. 130). Respondent testified that he had gone on vacation from November 28-December 2, 1994 (T. 130) but subsequently backed off of that testimony and confirmed that he took only a one day trip during that time period (T. 131).

Respondent seeks to rewrite the Rules Regulating The Florida Bar by misapplying, The Florida Bar v. Vining, Case 84,641, Opinion filed February 12, 1998. A review of the Referee's Report will confirm that every requirement under Rule 3-7.6(k) was met. Vining does not add a new requirement that each finding of fact pursuant

to 3-7.6(k)(1)(A) must contain a citation to the record, nor does any other portion of the rule, nor does any other case. The discussion of factual citations to the record contained in the Referee's report in Vining was merely a response to an argument that the Referee adopted findings of fact from a different proceeding.

III

THE RESPONDENT HAS FAILED TO DEMONSTRATE ANY ERROR IN REGARD TO THE PROCEDURE FOR DETERMINING THE FACTUAL FINDINGS. (REPHRASING RESPONDENT'S ARGUMENT III)

The record before this Court establishes that the determination of the factual findings was made by the Referee after a full hearing. At the conclusion of the July 15, 1997, hearing the Referee stated:

> "THE REFEREE: All right. I guess that will conclude this hearing.
>
> I want to see the court reporter. I want one portion of the testimony read back to me, which I think I'm permitted to do since I'm the trier of fact.
>
> I'm going to rule on this and like I said, I want to review all the documents and the rest of the file.
>
> Let's see. What's today, Tuesday? I should have a decision by Friday at the latest.
>
> Basically what I will do is, I will get in touch with -- if I'm not mistaken, either way, there are supposed to be findings of fact and decisions of law. So I'll contact the party who is going to prevail and ask them to prepare the paperwork and then I'll call the other party as well and inform them of my decision.
>
> Then if we need to set a further hearing, we'll set it up some time next week of the week -- like I said, although I'm technically on leave as of the 25th, I have the week after

that available if we need to have a further hearing." (T. 154-155)

MR. MARX: Thank you Judge. (T. 155)

If there was any defect in regard to the proposed findings, or the circumstance that the prevailing party was asked to draft the Referee's Report, no objection to the procedure or the findings was made and, therefore, the issue is waived. Morales v. Sperry Rand Corp., 601 So.2d 539 (Fla. 1992)

Respondent could obviously have objected to the procedure stated on the record by the Referee, but did not. Respondent could also have sought rehearing or filed a motion of his choice in regard to the procedure for summarizing the factual findings, but did not.

The only initiative taken by Respondent's counsel was an attempt to revisit the factual findings at the hearing set for determining discipline. (Respondent's brief, p. 14). No motion of any kind was pending, or set for that hearing and, therefore, there was no basis for rearguing the facts at the disciplinary hearing.

The issue presented by respondent is elusive since he does not contend that he was not given a copy of the proposed order. Furthermore, the Respondent has not established any fact finding errors. There is no authority which supports the premise that an

order drafted by the opposing party is ipso facto a source of error. The case cited by the Respondent, Anderson v. Bessemer City, 470 U.S. 564, 105 S.Ct. 1504 (1985), adds nothing to his argument. Anderson held that there was a lack of evidence of uncritical acceptance of an order prepared by the prevailing party. The facts in the instant case point to a similar lack of evidence.

IV

DISBARMENT IS THE APPROPRIATE DISCIPLINE.

Respondent, a suspended attorney, engaged in conduct which undermines the legal system. He sought to obtain a financial reward for (1) telling the apparent truth and/or (2) avoiding testifying as to the apparent truth. In The Florida Bar v. Riccardi, 264 So.2d 5, 6 (Fla. 1972) this Court declared:

> "Such conduct strikes at the very heart of the attorney's responsibility to the public and the profession. We are, therefore, not inclined to leniency in bribery matters, absent mitigating factors in an individual case."

In determining the appropriate discipline for this Respondent, the aggravating factors of prior discipline, Standard 9.22(a) of the Standard for Imposing Lawyer Sanctions, as well as 9.22(b), dishonest or selfish motive, must also be considered.

Even without the foregoing aggravating factors, disbarment would be appropriate for this Respondent. The governing standards are 5.11(b) and 5.11(f). Those standards follow:

> 5.11 Disbarment is appropriate when:
>
> .....
>
> 5.11(b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing,

> misrepresentation, fraud, extortion, misappropriation, or theft; or
>
> 5.11(f) a lawyer engaged in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

In addition, innumerable cases have resulted in disbarment when bribery was involved. In addition to Riccardi, cited above, those cases are: The Florida Bar v. Kastenbaum, 263 So.2d 793 (Fla. 1972); The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991); The Florida Bar v. Rambo, 530 So.2d 926 (Fla. 1988); The Florida Bar v. Swickle, 589 So.2d 901 (Fla. 1991); The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958).

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's recommendation of disbarment should be accepted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Answer Brief was forwarded Via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Richard B. Marx, Attorney for Respondent, at 1221 Brickell Avenue, Suite 1010, Miami, Florida 33131, on this 2nd day of April, 1998.

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