IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ALEC J. ROSS,

Respondent.

Supreme Court Case
No. 89,012

/

Respondent's Corrected Reply Brief

On Petition for Review

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OTHER AUTHORITIES:

SYMBOLS

T.T._____, shall refer to the Trial Transcript of July 15, 1997, and page number.
D.T._____, shall refer to the Transcript of Hearing on Discipline of September 26, 1996, and page number.
R.R._____, shall refer to the Referee Report, and page number.
A.B._____, shall refer to Petitioner's Answer Brief, and page number.

SUMMARY OF ARGUMENT

The Bar's Answer Brief is unresponsive to Respondent's Initial Brief , fails to rebut and/or distinguish the authority which Respondent relies upon, and the authority it does cite is inapplicable.

As to the issue of the vagueness doctrine, the Bar fails to set forth meaningful analysis. The Bar cites case law dealing with issues involving the constitutional authority to levy taxes, and the constitutionality of a statute dealing with the introduction of contraband into a correctional institution, which have nothing to do with the issues presented.

As to the issue regarding the referee's findings of fact, the Bar attempts to remedy the referee's flawed report by citing to selected passages of the testimony, without responding to the issues raised by the Respondent. The Bar totally ignored the fact that the report failed to specifically set out what acts on the part of the Respondent were "dishonest". Additionally, the Bar failed to rebut and/or distinguish the authority cited by Respondent.

As to the issue regarding the referee's failure to make an independent findings of fact, the Bar asserts that Respondent waived any rights to raise that issue, and alludes to the referee's "procedure". Respondent did in fact object and thus the issue was preserved. Once again, the Bar fails to rebut and/or distinguish the authority cited by Respondent and relies upon case law which is inapplicable.

Finally, the Bar relies on a litany of cases in support of disbarment which deal with criminal bribery and extortion and have nothing to do with this case.

I

THE REFEREE COMMITTED ERROR BY DENYING RESPODENT'S MOTION TO DISMISS, BASED ON RULE 4-8.4© BEING UNCONSTITUTIONALLY VOID FOR VAGUENESS

The Bar has failed to address the issues raised by Respondent in its Initial Brief. The Bar merely states that "Respondent's position is sustained neither logic nor authority". (A.B., 7) The Bar does not distinguish any of the cases cited by Respondent and only mentions Warren v. State, 572 So.2d 1376 (Fla. 1991), and misconstrues it by stating that the "case merely held that *ill fame* is an antiquated term", without engaging in any type of analysis as to the law and the facts, as applied to this case. (A.B., 7-8).

The Bar cites the case of Florida Department of Education v. Glasser, 622 So.2d 944 (Fla. 1993) for the proposition that "there is a presumption in favor of the constitutionality of statutes", without any further analysis. (A.B., 7). The facts and law set forth in Glasser *infra* have nothing to do with this case. In Glasser, a school district filed a declaratory judgment action against the county tax collector seeking to declare laws authorizing school to levy nonvoted current

operating discretionary mileage limited to .0510 mills (F.S. 236.25 et seq.) unconstitutional and directing tax collector to collect and remit to school taxes assessed against nonvoted discretionary mileage as set by the school board. The trial court determined the laws were unconstitutional. The District Court affirmed, and on appeal to the Supreme Court, this court reversed and remanded. That case dealt with whether school districts have the constitutional authority to levy taxes assessed against nonvoted discretionary mileage in the absence of enabling legislation. This case does not deal with the vagueness doctrine and its application.

The Bar then cites Wells v. State, 402 So.2d 402 (Fla. 1981) for the proposition that a "statute need not furnish a detailed plan and specification of acts or conduct prohibited. The Bar cites keynote four of this opinion verbatim, but fails to render any type of analysis as to how this case is to be applied to the case at bar. The Wells case involved a challenge by Defendant of her convictions for unlawful possession of controlled substance, possession of narcotics paraphernalia, and introducing contraband into a state prison, on the basis that the trial court erred in

denying her motion to suppress contraband seized from her while a visitor at the state prison. Defendant challenged F.S. 944.47 as unconstitutionally vague. This court held that she did not have standing to challenge as vague subsections of section 944.47 under which she was not charged, and that this statute conveys a sufficiently definite warning of the proscribed conduct when measured by common understanding and practice. Id. at 406. This court reasoned that Defendant's "concerted effort at concealing the marijuana belies any assertion that she did not know that her conduct of introducing the marijuana into the prison was illegal. To perceive that smuggling drugs into a prison is prohibited activity requires only a minimum of common understanding". Id.

As interpreted by the Bar and the Referee, the word dishonesty is contrary to common understanding, and was misapplied to the conduct for which Respondent was charged. This is especially true, when compared to the cases relied upon by the Bar, because the Respondent was never investigated for, much less charged with committing any crime. For example, if an attorney is unfaithful to his wife, although many people may view

this as dishonest, can he be charged with committing a dishonest act in violation of Rule 4-8.4©? If an act is not illegal, as is the case with the acts of Respondent in the instant case (See D.T., 53), what makes it dishonest? The Bar has placed a great deal of emphasis on testimony regarding Respondent's efforts to avoid service. (A.B., 10), although the gravamen of its complaint was the Ross' failure to notify the trial judge of Quisenbery's false affidavit was the dishonest act. Is the avoidance of service a violation of the Rules Regulating The Florida Bar or Florida Statutes for that matter? Is there an affirmative duty to seek out the process server and accept service of process? One person's view as to what constitutes dishonesty may be totally different from the next person. How can this line be drawn when dishonesty is in the eye of the beholder? Accordingly, as applied to this Respondent, Rule 4-8.4©, with respect to the term "dishonesty", is vague and fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may invite arbitrary and discriminatory enforcement. See State vs. Rawlins, 623 So.2d 600 (Fla. 1993). This opens the door for The Florida Bar to charge dishonesty

when in its opinion such is the case. It would allow arbitrary decisions to be made by aggressive prosecutors.

The Bar also cites Warren v. State, 572 So.2d 1376 (Fla. 1991), which Respondent relies upon, and distinguishes it by stating that it, "merely held that *ill fame* is an antiquated term". (A.B., 7-8). This case stands for the proposition that a statute which does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct is vague. Respondent does not argue that the term "dishonesty" is an antiquated term. Respondent does argue that as applied to him, the term "dishonesty" is vague, and Rule 4-8.4© should not be used as a catch all when there are no other rules or statutes under which to charge him .

Accordingly, the Referee committed error when she denied Respondent's Motion to Dismiss.

II

THE REFEREE'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS AND LACKING IN EVIDENTIARY SUPPORT

Not a single finding of fact in the referee's report is corroborated by a citation to the testimony offered during the trial. In its Answer Brief, The Bar attempts to remedy this flaw by citing to the testimony. Interestingly, the Bar picks and chooses the testimony it wants to cite and fails to refer to the testimony at trial which showed that Respondent wanted to "Buy" an interest in the property (T.T., 36).

The Bar attempts to distinguish The Florida Bar v. Vining, 23 Fla. L. Weekly, S82 (Fla. Feb. 12, 1998), by stating that the discussion of factual citations in Vining "was merely a response to an argument that the Referee adopted findings of fact from a different proceeding. (A.B., 11). Respondent does not argue that the Referee's finding of fact was from a different proceeding, but rather from Bar Counsel who drafted the report to the exclusion of Respondent's participation and input. Respondent argues that the Referee's finding of fact are unsupported by competent and substantial evidence, and clearly erroneous. The Vining case is

instructive on this point in that it tells us that when there is an attack on a Referee's finding of fact, citation to the testimony is a strong argument in support of the finding of fact. This was not the case here, and the Referee's report is therefore vulnerable to such an attack. Compliance with Rule 3-7.6(K)[1] will not immunize a Referee's report from an attack as to the findings of fact.

Additionally, the Referee made no specific finding of fact as to what acts on the part of the Respondent were "dishonest". Although Respondent was never charged nor convicted with a violation of criminal statutes (D.T., 53), it appears that the Referee, without making a specific finding of fact, considered Respondent guilty of bribery and extortion, and extrapolated that opinion into a conclusion that he violated Rule 4-8.4©, and thus those actions had to be dishonest. (D.T., 8). Accordingly, the Referee's findings of fact were clearly erroneous and lacking in evidentiary support, and respectfully should not be accepted by this Court.

[1] Rule 3-7.6(k) provides a general framework as to what needs to be included in a Referee's report. It does not provide detailed instructions on the drafting of a report.

III

THE REFEREE DID NOT MAKE INDEPENDENT FINDINGS OF FACT

The Bar's Answer Brief (A.B., 12-13) characterizes as the Referee's "procedure" for determining the factual findings and tries to suggest that this procedure provided Respondent with ample opportunity to object. The Referee's procedure that the Bar refers to is as follows; "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". (T.T. 154-155). There was no opportunity at the time the Referee made this pronouncement to object to this procedure because at the time, Respondent's counsel had no knowledge that the Referee was going to determine that the Bar would be the prevailing party and that she would allow the Bar to prepare such a report, without any regard for the facts, the testimony, and the law. Nor did the Respondent's counsel see a fully prepared proposed order prior to the hearing.

The proper procedure expected in all court proceedings is for counsel to submit to the other side the proposed order, thereby giving counsel the

opportunity to object. That was not done in this case. Respondent was not given any opportunity to object to the findings of fact. In fact, the Referee's response when Respondent attempted to challenge the findings of fact was as follows:

> MR. MARX: Thank you, your Honor. Judge, the first thing I would like to do is challenge the findings of fact.
>
> THE REFEREE: I don't think this is the appropriate forum for that, sir. We are not going to do that today. We are simply here on a hearing to o determine the punishment, if any.
> MR. MARX: Most respectfully, Judge, the penalty is dependent upon the findings of fact. If they are erroneous, then the penalty that will be provided will be based on an erroneous set of facts.
>
> THE REFEREE: You can argue that to the Supreme Court. (D.T. 17-18).

The Bar cites Morales v. Sperry Rand Corp., 601 So.2d 539 (Fla. 1992) for the proposition that Respondent waived the issue as to the Referee's findings of fact. The Morales case dealt with a personal injury claim which was dismissed at the trial level for failure to serve process within 120 days of the filing of the complaint. The District Court affirmed, as did the

Supreme Court. These facts have no relevance to this case.

The Bar asserts that Anderson v Bessemer City N.C., 470 U.S. 564, 105 S.Ct. 1504 (1985), "adds nothing to this argument". (A.B. 14). What Anderson adds to this issue is that when an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming. Id. at 1510. That is precisely what has taken place, and unfortunately, the Bar has succumbed to that temptation.

IV

THE RECOMMENDED DISBARMENT IS EXCESSIVE AND CONTRARY TO ESTABLISHED CASE LAW

The cases relied upon by the Bar in support of disbarment are inapplicable to this case. The Bar cites these cases without any analysis whatsoever, and totally disregards the cases of The Florida Bar v. Colee, 533 So.2d 767 (Fla. 1989) and The Florida Bar v. Jackson, 490 So.2d 935 (Fla. 1985) which Respondent cites in its Initial Brief and which are directly on point. In the Colee and Jackson cases the attorneys had been charged with violating a rule which imposed upon them an affirmative duty to report fraudulent activities to the court. However, that rule no longer exists. The Bar assumes that Respondent has been found guilty and/or convicted of bribery and then infers that these cases must apply. Those cases dealt with criminal bribery and extortion, and the majority of them involved criminal convictions. (See A.B., 15-16) Respondent was never charged charged, or even investigated for a criminal act.

In The Florida Bar v. Ricardi, 264 So.2d 5 (Fla. 1972), the attorney was tried and convicted in Federal

Court of bribing an Internal Revenue Agent. After his conviction, the Bar filed a Petition for Suspension and for Notice to Show Cause why appropriate disciplinary action should not be entered against respondent. The attorney was disbarred.

In The Florida Bar v. Kastenbaum, 263 So.2d 793 (Fla. 1972), the attorney was convicted in Federal Court of interference with commerce by threats or violence. After his conviction, the Bar filed a Petition for Notice to Show Cause why appropriate disciplinary judgment should not be entered. The attorney was disbarred.

In The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991), the attorney attempted to bribe an Assistant State Attorney in order to get a reduced sentence for his client. The attorney plead guilty to conspiracy to commit unlawful compensation. The Bar filed a complaint against respondent and charged him with attempting to bribe an assistant state attorney. The Referee recommended a two year suspension, but this court order disbarment.

In The Florida Bar v. Rambo, 530 So.2d 926 (Fla. 1988) the attorney delivered a bribe to a county

commissioner in the amount of $4,000. Federal criminal charges were brought against him, but the attorney made a full confession to the U.S. Attorney under an agreement of use immunity. One of the charges brought against the attorney by the Bar was engaging in illegal conduct. The referee recommended a thirty month suspension, but this court ordered disbarment.

In The Florida Bar v. Swickle, 589 So.2d 901 (Fla. 1991) the Florida Department of Law Enforcement caught the attorney in a sting operation involving a bribe to a Judge. The attorney was tried and acquitted. The Bar then filed a complaint against him alleging several ethical violations. The referee recommended disbarment and this court affirmed.

In The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958), the attorney was accused of falsely accusing a circuit judge of accepting a bribe in consideration of increased fees to parties handling a receivership in an attempt to compel the judge to enter orders more favorable to claimants in whom the attorney was interested. This court ordered disbarment.

The Bar's reliance upon these cases for the proposition that bribery requires disbarment, without

any type of analysis of the facts, and applying them to the instant action is misplaced. The evidence failed to prove that that Respondent's conduct constituted bribery and extortion. Furthermore, Respondent was never charged with a violation of a criminal statute. This type of rationale, without distinguishing the misconduct involved, will inevitably lead to illogical and inflexible results, as has happened in this case. Referee failed to evaluate all of the relevant factors of respondent's misconduct in crafting a punishment which would be fair to society, fair to the attorney and severe enough to deter other attorneys from similar misconduct. *See* The Florida Bar v. Nue, 597 So.2d 266 (Fla. 1994).

The Bar has taken the position in this case that disbarment is the appropriate sanction and the referee so found. This mind set seems to ignore the fact that Respondent was already suspended from the practice of law, and this pending matter has kept him from applying to be reinstated for the past three years. Even if there had been no disbarment, before he could ever practice again, he would have to go through the reinstatement process which would require a Referee

trial. At the Referee Trial, he would have the burden of proving his fitness to practice law in terms of integrity as well as professional competency by the standard of "clear and convincing" evidence. The trial would place special emphasis on the protection of the public and The Florida Bar in determining Respondent's fitness to resume the privilege of practicing law. Respondent would have to establish conduct to justify the restored confidence of the public generally, the restored confidence of his professional contemporaries and the restored confidence of the Supreme Court. In Re Dawson, 131 So.2d 472 (Fla. 1961); Petition of Wolf, 257 So.2d 547 (Fla. 1972).

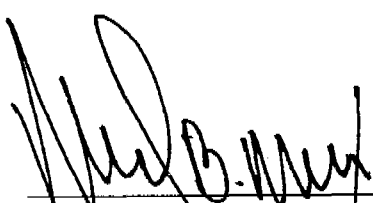
Even if he is successful in the Referee Trial for reinstatement and the referee finds that he is fit to resume the practice of law, he would no doubt have to sit for a portion of the Bar examination. Furthermore, reinstatement is not final until the Supreme Court approves the Referee's Findings of Fact and Recommendations, providing the Bar the opportunity to file a Petition for Review.

The sanction of disbarment is inconsistent with the offense committed and as such the Referee's recommendation of disbarment should not be approved.

CONCLUSION

Based upon the foregoing authority, the referee's disciplinary recommendation of disbarment should be rejected by this Court, and in its place, this Court should order a public reprimand or a suspension, based upon the unique set of circumstances involved in this case.

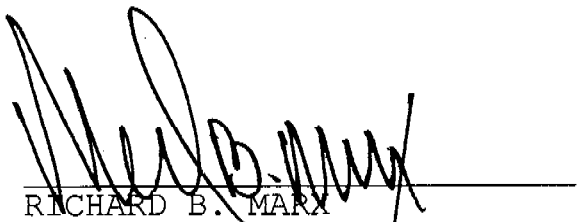
Respectfully submitted,



RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the original and seven copies of Respondent's Reply Brief were sent via U.S. Mail to Sid White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32399; and a copy was sent to Cynthia Lindbloom, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; and John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 5 day of May, 1998.



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