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SID J. WHITE
JUN 30 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,879

JULIETA ARTHUR,
APPELLANT

v.

FLORIDA BAR BOARD OF GOVERNORS,
APPELLEE.

REPLY BRIEF

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RESTATEMENT OF THE CASE AND FACTS

Appellant adheres to her original statement of the case and facts. The supplementary facts that fallows, are in response to the Bar's version of these sections of the brief.

The Bar asserts Appellant's statement of the facts is immaterial and irrelevant, Yet, in his version of these sections, opposing counsel makes references to facts of other sham disciplinary cases that were abandon. Also, contrary to what is stated in the answer brief, Appellant did respond to the Bar's complaint. Counsel for Appellee asserts the committee found probable cause for violation of rule 3-7.13; he selectively cites to out-of-context, undisputed statements fromthe transcript of the grievance hearing on May 3, 1995 (copy which has not been provided to Appellant) and (post facto) ascribe these statements as the committee's basis for concluding Appellant is incapable of practicing law.

The rules provide that the allegations of the petition are to be proven at a "noticed" trial, 3-7.6(h), to be held by a referee. 3-7.6 (b). The proceedings before referee #2 and #3 were case status conferences. In his answer brief, counsel for Appellee cites to a telephone conversation on November 1, 1995 with referee #2. Yet, at the time of his recusal on November 28, 1995, referee #2 had entered no written order for discovery nor a referee's report. Referee #3 concluded Appellant was not unfit due to mental incapacity but rather, because she would not respond to his question of whether she

was tape recording the phone conversation. However, unlike Appellant, the referee was not labeled "paranoid" for making such statement or for being preoccupied with this litigant exercise of her legal rights. In any event, by the time the Clerk of this court announced on May 13, 1996 that there was no evidence to support placement on the inactive list due to mental incapacity, the rehabilitation period had ran.

Appellant did not attend the December 7, 1995 conference because she was working on an appellate brief due December 8 (95-2850); had commenced work on another appellate brief (95-3434); was handling circuit court matters; was 8-months pregnant and using public transportation. As to the January 22, 1996, conference, the rules have no provision that a referee can hold subsequent meetings after filing his report. In addition, Appellant had given birth 2-weeks earlier; had discomfort from minor surgery; and was under doctor's order to stay-off her feet.

Rule 3-7.7 makes no provision that a referee can enter subsequent orders once the court rejects his report. And contrary to opposing counsel's assertion, Appellant did not raise constitutional violations for the first time on appeal. Constitutional violations were raised from inception and throughout the proceeding: answer to the complaint (02/24/95) (Appellant argued for less restrictive means of proof); answer to the petition for placement on the inactive list (07/11/95) (Appellant argued that rule 3-7.13 requires proof of incapability; is subject to constitutional limitations; and

that her constitutional right to practice her profession of choice was being abridge); response to ruling (11/07/95)(discovery is subject to 1.360, Fla. R. Civ. P.); response to motion for placement on inactive list (08/06/96)(examination is subject to right to privacy. No mental standard for attorney. Referee's order is arbitrary. Action is unconstitutional); motion for rehearing/for relief from order (11/13/96)(Bar is subject to the mandates of the constitution and must also comply with Gibson v. Florida Legislative Investigation Committee, 372 U. S. 539, 83 S. Ct. 889, 9 L. Ed. 929 (1963)).

See also Supreme Court of New Hampshire v. Piper, 470 U. S. 274, 84 L. Ed. 2d 205 (1985)(the opportunity to practice law is a fundamental right). This is true even if one's profession is a privilege. See Amendment XIV, sec. 1, United States Constitution ("No state shall enforce any Law which abridge the privileges or immunities of citizens of the United States"); Art. VI, sec. 2, United States Constitution ("The United States constitution and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, and the judges in every state shall be bound thereby"); and State v. Smith, 118 So. 2d 792 (Fla. DCA 1960) (" The duty of the court to apply to admitted facts a correct principle of law is such a fundamental and essential element of judicial process that a litigant cannot be said to have had the remedy afforded by due course of law guaranteed by our constitution, if the judge fails or refuse to perform that duty").

SUMMARY OF ARGUMENT

The Board erred in assuming the discovery order entered by the referee is a final and enforceable order. The order is not an appealable judgment under the bar rules. In addition, the order does not comply with the rule for discovery and the constitution. Appellant need only comply with orders that are legally proper.

The Board also erred in concluding it had no authority to review the Clerk's order placing Appellant on the inactive list and enjoining her from practicing law. The order is not justified under the bar rules as Appellant was not proven incapable of practicing law due to mental incapacity. Even under Hughes, the Board had to prove incapability to practice at a trial. The Clerk's order did not become final when Appellant did not appeal the referee's recommendation for placement on the inactive list, as the recommendation is not appealable under the bar rules and his report was rejected by this court. Thus, the Board, as the entity in charge of administering and enforcing the bar rules, has authority under the rules for the proper disposition of the case (to readmit Appellant).

The Board also erred in concluding that review by this court of Appellant's petition for readmission is unwarranted. This court has jurisdiction under the rules to review the Board's rejection of a petition. Given the facts of the case, if the court does not exercise jurisdiction the state will be stripped of its jurisdiction over Appellant's right to practice.

ARGUMENT

1. THE BOARD **ERRED** IN **ASSUMING THE** REFEREE'S **ORDER** FOR COMPULSORY MENTAL **EXAMINATION IS A** FINAL **AND ENFORCEABLE ORDER**

Whereas under 3-7-11 **(f)(2)** a judgment **in** a contempt proceeding is appealable, no such judgment was entered here as contempt proceeding under 3-7.7 **(g) was** not instituted. Thus, counsel for Appellee is incorrect in stating that the referee's order became final (and enforceable) because it was not appealed.

Under **4-3.4 (d)** Appellant need only comply with a legally proper discovery request, Eventhough Florida rules of civil procedure apply in proceeding before a referee, 3-7.6 **(e)(1),** discovery under **1.360**, Fla. R. Civ. P., does not affect the substantive rights of litigants. Gordon v. Davis, 267 So. **2d 874** (Fla. 3 DCA 1972). Constitutional limitations, which Appellant argued for, must be observed. Bar members must adhere to their oath to support the constitution. **3-4.7.** The test for discovery of mental examination is not whether it is "valuable" or "meaningful, " as counsel argues. Rather, mental capacity to practice law (?) must genuinely be in controversy and only be adequately evinced by scientific expert testimony. Fruh v. Dept. of HRS, 430 So. 2d **581, 584** (Fla. 5 **DCA 1983).**

In summary, the **order** is unenforceable and unconstitutional.

2. THE BOARD ERRED IN CONCLUDING IT CANNOT REVIEW THE CLERK'S ORDER TO PLACE APPELLANT ON THE INACTIVE LIST AND ENJOIN HER FROM THE PRACTICE OF LAW.

opposing counsel argues that both rule 3-7. 13 and Florida Bar v. Hughes, 504 So. 2d 751 (Fla. 1987), authorize placement on the inactive list. The rule authorize placement when an attorney is incapable of practicing law due to mental incapacity, which finding was not made here. In the case of Hughes, the action proceeded to trial.

Next, counsel argues the Board cannot review the order because Appellant did not appeal the referee's recommendation. However, only specific unappealable referee reports become fin 1 under 3-7, 7 (a)(3). A referee's recommendation is not a report nor judgment appealable under 3-7. 7.

Finally, counsel argues the Board cannot review the order because it cannot act as an appellate court, This argument is also without merit for it is the Board who is in charge of administering and enforcing the rules against all members of the bar. 2-3.1; 1-8.1; 1-10.1. The Board is cognizant that court's have inherent and statutory contempt power to punish only violation of valid orders. Wells v. State, 654 So. 2d 145 (Fla. 3 DCA 1995). And that lawyers having knowledge that a judge committed violation of applicable rules of judicial conduct shall inform the appropriate authority, 4-8.3 (b), and not knowingly assist the judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or the law. 4-8.4 (f); 4-8.3 (b); 4-1.13 (b).

In this case the necessary power of the Board was to subvert the rule which was being invoked by the Board, opposing counsel, the committee, the referee, and the clerk as an unconstitutional procedural weapon.

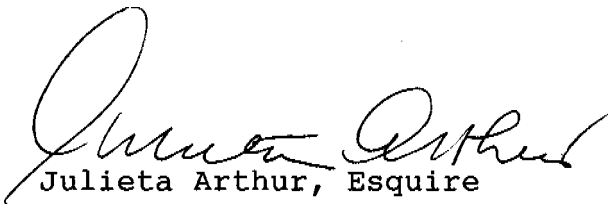
3. THE BOARD ERRED IN CONCLUDING THE CLERK'S ORDER FOR PLACEMENT ON THE INACTIVE LIST IS A FINAL ORDER AND THAT FURTHER REVIEW BY THIS COURT IS UNWARRANTED

Rule 1-3.7 states that inactive members may seek reinstatement. Rule 3-7.13 further provides that rejection of a petition for reinstatement or readmission is reviewable by the Supreme Court. The Supreme Court also reviews extraordinary writs. 3-7.7 (e). If there is no state corrective process to remedy severe constitutional deprivation from a sham proceeding, as the Board argues, the state court will be stripped of jurisdiction. Meaning, this court will have no say over Appellant's exercise of her constitutional right to practice in her chosen profession. Moore v. Dempsey, 261 U. S. 86, 91, 43 S. Ct. Rep. 265 (1923).

This court as successor judge must not limit itself, as the Board did, to whether the referee's order was complied with but also must look to see if the prior order is based on a correct interpretation of the law. Keathley v. Larson, 348 So. 2d 382, 385 (Fla. 2 DCA 1977).

"The love of justice in most men is simply
the fear of suffering injustice."

Francois, Duc de La Rochefoucauld
Sentences and Moral Maxims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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing document was provided to The Florida Bar Board of Governors, c/o Executive Director, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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