IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 94,433

THE FLORIDA BAR,

Complainant,

vs.

MICHAEL DEAN RAY,

Respondent.

BRIEF OF *AMICUS CURIAE*

AMERICAN IMMIGRATION LAWYERS ASSOCIATION

ON REVIEW OF REPORT OF REFEREE

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STATEMENT OF INTEREST

The American Immigration Lawyers Association ("AILA") is an independent national bar association with approximately six thousand members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration law. AILA is organized to promote reforms and to facilitate the administration of justice in the field of immigration law. AILA's members practice regularly before the Immigration and Naturalization Service and before the Executive Office for Immigration Review (immigration courts), as well as before United States District Courts, Courts of Appeals, and the Supreme Court of the United States. AILA and its members have a vital concern about the interpretation and application of disciplinary rules that its members are subject to in the various states in which they practice.

SUMMARY OF ARGUMENT

AILA submits this brief in support of the following two propositions: (1) the "knowledge or reckless disregard" standard in Rule 4-8.2(a) does not include conduct that is negligent, ill advised, or unpalatable; and (2) in a matter involving a dispute between a lawyer and an immigration judge in which the statements uttered are private statements that do not interfere with any administrative proceedings, it is the federal agency that should consider appropriate disciplinary action rather than the State Bar.

ARGUMENT

I. "KNOWLEDGE OR RECKLESS DISREGARD" IS THE STANDARD

Under the Rules Regulating The Florida Bar, an attorney can be disciplined if he or she makes a statement about an adjudicatory official "that the lawyer knows to be false or with reckless disregard as to its truth or falsity". Rule 4-8.2(a). This is similar to the standard used in nearly every other jurisdiction in the United States'.

AILA submits that this standard is not an exacting standard. An attorney should not be disciplined under this rule for conduct that is negligent, ill-advised, or even lacking good taste. The rule is targeted at factual statements made by an attorney about an adjudicator; it is not targeted at words that reflect animosity or ill-will, and it is not targeted at characterizations of reports made by others, even if those words or characterizations lack appropriate decorum. For example, Federal Jury Instructions offer the following guidance on when a person "recklessly" makes a false statement:

> "Recklessness" implies a higher degree of culpability than negligence. . . . In order to establish recklessness, the plaintiff must prove that the defendant had a high degree of awareness of the probable falsity of the statements published.

DeVitt, Blackmar & Wolff, *Federal Jury Practice and Instructions* (4th ed.), § 84.10.

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[1] As of 1998, forty (40) jurisdictions had adopted THE MODEL RULES OF PROFESSIONAL CONDUCT. See; G. Hazard & W. Hodes, The Law *of Lawyering; A Handbook on* THE MODEL RULES OF PROFESSIONAL CONDUCT (2nd ed. Supp. 1998)Appendix 4, at 1269.

The Model Penal Code distinguishes three levels of culpability: knowing, reckless, and negligent. A person acts "knowingly" if he is "aware that such circumstances exist". **MODEL PENAL CODE**, § 2.02(b). In other words, a person makes a false statement "knowingly" if he is consciously cognizant of the fact that the statement is false. A person acts "recklessly" if he "consciously disregards a substantial and unjustifiable risk that the element exists". *Id.*, § 2.02(c). Under this standard, a person makes a false statement recklessly if he or she has been put on notice that the statement is false and consciously disregards this notice. This conduct involves "a gross deviation from the standard of conduct a law-abiding person would observe."

In contrast, a person acts "negligently" if the person "should be aware of a substantial and unjustifiable risk that the element exists". Id., § 2.02(d). A person makes a false statement negligently if he or she should have known the statement was false but did not bother to investigate. It should be observed that such conduct may "involve a gross deviation from the standard of a reasonable person", but it nevertheless is not sanctionable as conduct that has been committed "knowingly" or "recklessly".

Thus, under the "knowledge or reckless disregard" standard, a person is not liable unless he or she either knows the statement made was false, or he or she was put on notice that the statement was false and willfully ignored the evidence. It does not include other language that a person uses, even if that language would not have been used by a prudent or reasonable person.

Further, the case law concerning libel or defamation of public officials, which adopts the same "knowledge or reckless disregard" standard, is relevant. Under this case law, a defendant is not liable for making a false statement unless he or she has deliberately *falsified* information or published the statement recklessly despite his awareness of the probable falsity of the statement. In a libel suit, the plaintiff must demonstrate that the defendant "in fact entertained serious doubts as to the truth of his publication . . . or acted with a high degree of awareness of . . . probable falsity." *Masson v. New Yorker Magazine,* 501 U.S. 496, 510 (1991). The "knowledge or reckless disregard" standard "should not be confused with the concept of malice as evil intent or a motive arising from spite or ill will." Id. *See also Garrison v. Louisiana,* 379 U.S. 78 (1964) (improper to punish statements even if made with ill-will; the standard is based "not on mere negligence, but on reckless disregard for the truth"); New *York Times v. Sullivan,* 376 U.S. 254, 286-288 (1964) (a finding of negligence as to the falsity of the statements is not sufficient). *See also: Nodar v. Galbreath,* 462 So.2d 803, 810 (Fla. 1984)(long before *New York Times v. Sullivan,* for generations Florida has recognized broad privilege and freedom of speech protection for statements of citizens to political authority regarding matters of public concern, *i.e.* performance of public employees).

Under Rule Regulating The Florida Bar 4-8.2(a), an attorney can be disciplined only for false statements "knowingly" or

"recklessly" made, but not for statements made "negligently". Although Florida could have adopted a higher standard for its attorneys, it did not, and it is not appropriate to discipline an attorney for conduct that does not actually fall under the standard adopted, the "knowledge or reckless disregard" standard.

II. THIS IS A MATTER FOR FEDERAL, NOT STATE RESOLUTION

Where there is a dispute between an immigration attorney and an immigration judge and the attorney's statements are private statements that do not interfere with any ongoing administrative proceedings, the matter should ordinarily be resolved under the governing federal regulations. According to the federal regulations that govern the conduct of participants in immigration court proceedings: "The Chief Immigration Judge shall be responsible for the general supervision, direction, and scheduling of the Immigration Judges , . . [and] evaluation of the performance of Immigration Courts, making appropriate reports and inspections, and taking corrective action where indicated." 8 C.F.R. § 3.9.

Attorneys who practice before the Executive Office for Immigration Review (immigration courts) are also subject to federal disciplinary rules. According to the regulations:

> The Immigration Judge, Board, or Attorney General may suspend or bar from further practice before the Executive Office for Immigration Review or the Service, or may take other appropriate disciplinary action against, an attorney or representative if it is found that it is in the public interest to do so. . . .

8 C.F.R. § 292.3(a).

The regulations list fifteen different grounds for taking disciplinary action against an attorney practicing before the immigration court, including sanctions for willfully making false statements to an employee or officer of the Department of Justice, and for engaging in contumelious or otherwise obnoxious conduct. 8 C.F.R. § 292.3(a)(3), (11).

Significantly, Respondent Ray has never been the subject of discipline by the Executive Office for Immigration Review. **TR3-170-174**

AILA submits that when there is a dispute involving an attorney practicing before an immigration judge, and the dispute involves the propriety of the conduct of one or both of such individuals, then the dispute should be resolved under the governing federal regulations. This is especially so where the conduct complained of has occurred in the context of an administrative complaint mechanism that is not open to the public and neither interfered with nor impaired any ongoing administrative proceedings. Under these circumstances, a state court should generally defer to the rules established in the federal forum. If the federal rules have not been violated and the attorney is not sanctioned under those rules, as Respondent Ray has not, then the state should generally not intervene. Otherwise an attorney practicing before a federal agency in one state may be disciplined for conduct that is not disciplined in another state. In order to facilitate uniform disciplinary rules for immigration attorneys practicing before a federal agency, ALLA submits it is best for the

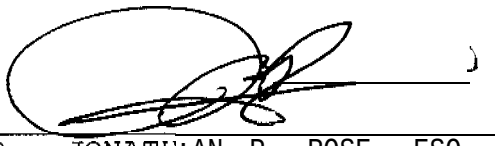
state to defer to the agency's decision concerning the appropriate discipline, if any.

CONCLUSION

The American Immigration Lawyers Association does not take a position as to the propriety or tone of the statements made by the Respondent, Michael D. Ray.

However, AILA does submit that (1) under the Rule 4-8.2(a)'s "knowledge or reckless disregard" standard, Mr. Ray can be sanctioned only if the record reflects that he knew the statements were false or he was consciously aware of a high degree of probability that the statements were false; and in any event, (2) it is more appropriate for the state not to intervene in this dispute, but instead allow the federal agency to handle disciplinary issues under governing federal regulations, if warranted.

Respectfully submitted,



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CERTIFICATE OF FONT SIZE

Counsel certifies that the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Amicus Curiae Brief were sent by overnight delivery to the Clerk of the Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399 and that a true and correct copy was sent by regular mail, postage pre-paid to the following, all this 24th day of February, 2000.

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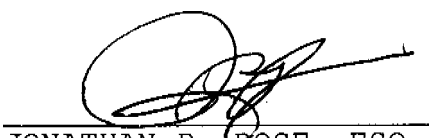

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