IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BERNARD MARC MOGIL,

Respondent.
_____/

Supreme Court Case
No. 94,861

The Florida Bar File

No. 99-00772-02

On Petition for Review

of
the Referee's Report
in a Disciplinary
Proceeding.

REPLY BRIEF OF RESPONDENT

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INTRODUCTION

In this reply brief, BERNARD MARC MOGIL is referred to as either "Respondent" or "Mogil"; The Florida Bar will be referred to as either the "Complainant" or the "Bar"; Counsel for The Florida Bar will be referred to as "Bar Counsel"; the proceedings against Respondent as a Judge of the County Court before the Commission will be referred to as "judicial removal proceeding"; the proceedings against Respondent before the State of New York, Grievance Committee for the Ninth Judicial District will be referred to as "NY disciplinary proceeding"; and the opinion and order issued December 16, 1998 by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department in the NY disciplinary proceeding will be referred to as "NY disciplinary order."

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee in The Florida Bar disciplinary proceeding held June 21, 1999.

"SJ" refers to the transcript of the hearing before the Referee on the Bar's motion for summary judgment held May 17, 1999.

"RR" refers to the Report of Referee dated June 30, 1999.

"AB" refers to the Answer Brief of The Florida Bar.

ARGUMENT

SUMMARY JUDGMENT WAS IMPROPER BECAUSE IT DENIED RESPONDENT AN OPPORTUNITY TO SHOW THAT THE FOREIGN DISCIPLINARY JUDGMENT SHOULD NOT BE ACCEPTED AS CONCLUSIVE PROOF OF GUILT

Respondent asserts that summary judgment in this case was error because it precluded judicial consideration as to whether the foreign disciplinary judgment should be given conclusive effect.

The Bar's Answer Brief cites The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965) and The Florida Bar v. Friedman, 646 So.2d 188 (Fla. 1994) to support the principle that a respondent has the burden of demonstrating why the adjudication of guilt in a foreign disciplinary proceeding should not be accepted as conclusive proof of guilt in a Florida disciplinary proceeding. The Bar suggests that Respondent did not meet this burden, as evidenced by the fact that the "New York transcripts" [transcripts of judicial removal proceeding] were not filed until after the referee had filed his report.[1]

The Bar fails to recognize that when a respondent raises issues regarding the foreign disciplinary order, summary judgment should be denied in order to allow the respondent a full opportunity to demonstrate why the foreign adjudication should not be accepted as conclusive proof of guilt.

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[1] The Referee granted the Bar's motion for summary judgment based upon the NY disciplinary order and the operation of Rule 3-4.6, Rules Regulating The Florida Bar and not because the transcripts of the judicial removal proceeding were not part of the record at that time.

It is fundamentally unfair to both impose a burden on a respondent and deny the respondent the opportunity to meet the burden by granting summary judgment.

Although the Wilkes and Friedman cases confirm that it is the respondent's burden to demonstrate a basis to deny giving conclusive effect to a foreign disciplinary order, neither case supports summary judgment to preempt judicial consideration of the issues raised by the respondent concerning the foreign disciplinary proceeding. On the contrary, Wilkes establishes the necessity for this Court and its agencies to consider the record of the foreign disciplinary proceeding:

> This inquiry into that record may serve either or both of two principal objectives. First, if the accused attorney in the Florida proceedings properly raise the issues, we may be required to determine whether the proceedings in the sister state were so deficient as to make the foreign judgment unreliable as an automatic adjudication of guilt . . .
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> * * * *
>
> The second reason for considering the record of the proceedings is simply to enable this court and its agency, The Florida Bar, to make an informed judgment as to the fitness to practice of the accused attorney, as it may be demonstrated by his actions of misconduct in the sister state. The is the same basic question necessary to be resolved in every disciplinary proceeding. . . . Id. at 198[2].

Likewise, rather than support summary judgment, the Friedman case illustrates the appropriate procedure of providing respondent with an "ample opportunity" before and

[2]It is significant that although Wilkes holds that a respondent has the burden to show why the foreign judgment should not be accepted as conclusive proof of guilt, Wilkes does not unilaterally place the responsibility on the respondent to file in the Florida disciplinary proceeding the record of the proceedings in the foreign disciplinary forum. It is apparent that the Bar shares an interest in filing the record of the foreign proceeding in order to ensure that the referee and this Court make an "informed judgment" as to the respondent's fitness to practice law and the appropriateness of the Bar's disciplinary recommendation. Wilkes at 198.

during his disciplinary proceeding to demonstrate the deficiencies in the New York disciplinary proceeding. Although an opportunity was provided, Friedman did not meet his burden. Friedman at 190. This Court noted that the Friedman referee made relevant findings of fact with regard to the adequacy of respondent's showing of deficiency in the foreign disciplinary proceeding. The instant case, however, is easily distinguishable from Friedman in that in this proceeding the referee did not consider the substantial relevant issues raised by Respondent involving the NY disciplinary proceeding and did not make any findings concerning these issues. Judicial consideration of these issues and rendering appropriate findings were obviated by summary judgment based upon the operation of Rule 3-4.6, Rules Regulating The Florida Bar.

Summary judgment should have been denied by the Referee based upon the disputed issues that were raised in the filings of the Respondent which were of record at the time summary judgment was granted. These filings establish that Respondent vehemently and consistently denied the "truth or veracity of the alleged facts or conclusions" set forth in the NY disciplinary order.

[3] In addition, the materials submitted as part of Respondent's Addendum raised significant due process and evidentiary issues involving the NY disciplinary proceeding and the judicial removal proceeding which mandated judicial consideration in this Florida disciplinary proceeding. Although Respondent urged the Referee to consider these

[3] Respondent's Response to Complainant's Motion for Partial Summary Judgment. See also Respondent's Answer at Paragraph 4; Respondent's Admissions at D and E.

materials and "come to his own conclusions of fact,"[4] the Referee did not undertake consideration of these issues and did not render findings. Instead, the Referee granted summary judgment based solely upon the NY disciplinary order and the application of Rule 3-4.6, Rules Regulating The Florida Bar.[5]

[4] Respondent's Response to Complainant's Motion for Partial Summary Judgment at 2.

[5] RR at 2: "By operation of Rule 3-4.6, Rules Regulating The Florida Bar, the aforesaid final adjudication [NY disciplinary order] shall be considered conclusive proof of misconduct".

In its Answer Brief, the Bar refers to a comment made by Respondent at the end of the summary judgment hearing that suggests Respondent's "consent" to summary judgment.[6] However, there is no language in the Referee's order granting summary judgment or in the Referee's report that supports a conclusion that the Referee granted summary judgment based upon agreement of the parties or the consent of the Respondent.[7] Moreover, considering the context in which Respondent's comment was made, it is apparent that this comment reflects Respondent's appreciation of the futility of continuing to argue his position and is consistent with Respondent's statement immediately following the Referee's first pronouncement that he is "required under the rules to grant a partial summary judgment . . ." SJ 9

Your Honor, I will burden you no further. I'm burdened out . . . SJ 9[8]

The record establishes that summary judgment was granted in this case based upon the Bar's argument of entitlement to summary judgment as to the issue of guilt predicated by the fact that Respondent had admitted the discipline imposed by the New York Bar. SJ 4. The Referee's statements at the summary judgment hearing confirm his

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[6] SJ 11

[7] Respondent intended to and did appear at the hearing on the Bar's summary judgment motion for the purpose of opposing summary judgment, as indicated in his response to the Bar's motion.

See Respondent's Response to Complainant's Motion for Partial Summary Judgment at 2. If Respondent was not contesting summary judgment, it would not have been necessary for him to appear at the summary judgment hearing or file a response in opposition to the Bar's motion.

[8] Respondent did not attend the final hearing on discipline. The Referee's comments at this final hearing confirms a recognition that even the Referee appreciated Respondent's sense of futility: "It's my understanding he [Respondent] could see the handwriting on the wall with respect to the disbarment. He doesn't want to be disbarred in Florida. . . ." TR 5.

misapprehension that he was "required under the rules to grant a partial summary judgment." SJ 9, 10.

It was error for the Referee to grant summary judgment in this proceeding; instead the referee should have denied summary judgment and fully examined the issues raised by Respondent concerning the NY disciplinary proceeding. However, Respondent's comment suggesting "consent" did not "invite" this error by the Referee and in granting summary judgment there was clearly no reliance by the Referee upon any remark made by Respondent suggesting "consent." Accordingly, Respondent is not precluded from asking this Court to review the proceedings and reject the referee's report based upon the numerous errors that are the subject of this appeal.[9]

RESPONDENT'S NY DISCIPLINARY ORDER SHOULD NOT CONSTITUTE CONCLUSIVE PROOF OF GUILT IN THIS PROCEEDING BASED UPON A LACK OF DUE PROCESS, INSUFFICIENT PROOF, AND FUNDAMENTAL FAIRNESS.

The Bar's Answer Brief does not address the issues of lack of due process and fundamental fairness raised by Respondent in his Initial Brief. Instead, the Bar argues that this Court gave conclusive effect to New York adjudications of guilt in the Wilkes and Friedman cases, both of which were decided in a jurisdiction which requires preponderance of the evidence as the standard of proof. However, the fact that conclusive

[9] See Gupton v. Village Key & Saw Shop, Inc., 656 So.2d 475, 478 (Fla. 1995) which discusses the invited error rule: "a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court to make". The invited error rule is inapplicable to this case. See also Robbins v. Thompson, 291 So.2d 225, 226 (Fla. 4th DCA 1974) which confirms that a party's 'acquiescence' to a trial judge's erroneous view does not constitute a waiver of the right to submit the matter for review.

effect was given to disciplinary orders in the Wilkes and Friedman cases does not prove that deficiencies did not exist in Respondent's NY disciplinary proceeding which would mandate rejection of Respondent's NY disciplinary order as conclusive proof of guilt in this proceeding.

A lack of due process justifies rejection of the NY disciplinary order as conclusive proof of guilt in the instant case. Rejection is justified based solely upon a lack of due process and without regard to the merits of any of the other issues raised by Respondent.

THE ISSUES RAISED BY RESPONDENT ON APPEAL ARE PROPERLY BEFORE THIS COURT

This Court has the authority to review and reject a referee's findings of fact and guilt as well as recommendation as to discipline. The Florida Bar v. Rubin, 709 So.2d 1361 (Fla. 1998). See also The Florida Bar v. Pettie, 424 So.2d 734, 737-738 wherein this Court rejected a referee's findings of guilt as to disciplinary rule violations. Respondent urges the Court to reject the Referee's findings of fact and guilt as well as the recommendation as to discipline in this case based upon the arguments set forth in Respondent's Initial Brief.

Respondent was thwarted in his efforts to obtain judicial consideration of relevant issues pertaining to the foreign disciplinary judgment in the proceedings before the Referee, as evidenced by the Referee's order granting summary judgment. Respondent's pro se efforts to obtain judicial consideration can hardly be described as strategic maneuvers, as suggested by the Bar. AB 8. In addition, efforts undertaken by counsel on Respondent's behalf in the proceeding before the referee were similarly summarily dismissed, as evidenced by the Referee's denial of Respondent's motion for rehearing. Significantly, Respondent's motion was denied by the Referee without a hearing, notwithstanding the fact that it was not opposed by the Bar.

The record before this Court was thereafter properly supplemented pursuant to Court order granting Respondent's motion to supplement. Respondent's motion to supplement

the record was not opposed by the Bar.[10]

Notwithstanding this position, Respondent's brief raises significant issues regarding due process and fundamental fairness concerning the foreign disciplinary proceeding which is the basis for this proceeding. Issues involving due process and fundamental error may be considered by an appellate court even if these issues are raised for the first time on appeal. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970).

THE REFEREE'S FINDINGS OF GUILT AS TO VIOLATIONS OF RULES 4-8.4(d) AND 4-8.4(c) ARE NOT SUPPORTED BY EVIDENCE AND CONSTITUTE ERROR

The Bar asserts that referring to counsel as "Donkey-turd", "defensive superstar", "traffic court jerk" and a "laughing stock" constitute conduct prejudicial to the administration of justice. AB at 10. The Bar characterizes this language as "disparaging". However, an allegation of disparaging language by a judge (or an attorney) is not ipso facto conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d), Rules Regulating The Florida Bar. Further, it is undisputed that in this instance the disparaging remarks did not even occur in court. In fact, the disparaging remarks cited by the Bar were contained in an anonymous communication which, although was ultimately attributed to Respondent, was never attributed to Respondent in his capacity as an officer of the court, judicial or otherwise.

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[10] The supplemental material that was filed consisted of the transcripts and exhibits of the judicial removal proceeding which was the basis for Respondent's NY disciplinary proceeding. This supplemental material represents the "necessary" record pursuant to this Court's holding in Wilkes. Wilkes at 198.

This Court has criticized the Bar for a "bald assertion" of a disciplinary rule violation in the absence of case law or other authority. In The Florida Bar v. Pettie, 424 So.2d 734, 737 (Fla. 1983), this Court rejected the Bar's argument and the referee's finding that engaging in illegal conduct by an officer of the court is ipso facto conduct prejudicial to the administration of justice. In defining conduct that is prejudicial to the administration of justice pursuant to Disciplinary Rule 1-102(A)(5), the predecessor to Rule 4-8.4(d), Rules Regulating The Florida Bar, this Court stated:

> One definition of 'obstructing the administration of justice' defines the term as 'hindering witnesses from appearing, assaulting process servicer [sic], influencing jurors, obstructing court orders or criminal investigations.' Blacks at 972 . . . The recent case of an attorney theatrically appearing in the courtroom on a stretcher dressed in bedclothing is a prime example of conduct prejudicial to the administration of justice. See The Florida Bar v. Burns, 392 So.2d 1325 (Fla. 1981). Pettie at 737, 738. [11]

The Bar's assertion of a violation of Rule 4-8.4(d), Rules Regulating The Florida Bar, in this case is clearly a "bald assertion". According to the Bar, the NY disciplinary order sets forth a "laundry list" of acts which gave rise to disciplinary action. RB 9. However, the NY disciplinary order does not find Respondent guilty of conduct prejudicial to the administration of justice. The Referee's finding of a violation of Rule 4-8.4(d), Rules Regulating The Florida Bar, based upon an allegation of making disparaging remarks in anonymous communications is, therefore, without any support and clearly erroneous.

Further, The Florida Bar, cites The Florida Bar v. Vining, 707 So.2d 670 (Fla. 1998),

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[11] The respondent in Burns was suspended from the practice of law for thirty days and also received a public reprimand for this conduct. The Florida Bar v. Burns, 392 So.2d 1325 (Fla. 1981).

as support for finding Respondent guilty of deceit or misrepresentation in violation of Rule 4-8.4(c), Rules Regulating The Florida Bar based upon a finding of false testimony before the Commission. The Bar specifically noted that such a finding could be based upon the Referee's consideration of findings in the NY disciplinary proceedings and "absent any rebuttal offered by Respondent." See AB at 11.

Respondent agrees with the Bar that based upon Vining, the Referee could consider the findings of the NY disciplinary proceeding as relevant evidence. However, in Vining, the "[r]espondent was not precluded from denying the allegations and presenting evidence refuting them". Vining at 672, FN 10. The Bar overlooks the fact that in this disciplinary proceeding, Respondent was precluded from rebutting any finding of guilt of a violation of Rule 4-8.4(c), Rules Regulating The Florida Bar, based upon summary judgment. Accordingly, Vining was not followed in this case. [12]

CONCLUSION

The referee's report should be rejected and these proceedings dismissed.

Even if the Referee's findings of fact and recommendation as to guilt are upheld, this Court should reject the Referee's recommendation of disbarment and in lieu thereof enter an order directing that no additional discipline is warranted. If the Court determines to impose discipline, Respondent would urge the Court to suspend Respondent from the

[12] In addition, case law upholds a respondent's right to assert innocence in disciplinary proceedings which cannot be used against him in determining discipline. The Florida Bar v. Corbin,. 701 So.2d 334 (Fla. 1997); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

practice of law for ninety days or less, with automatic reinstatement, as a final order of discipline.

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 sent by AirBorne Express to Debbie Causseaux, Acting Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was sent by AirBorne Express to Donald M. Spangler, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this __day of December, 1999.

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