IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL LEE VON ZAMFT,

Respondent.
_____/

Supreme Court Case
No. SC95831

The Florida Bar File
No. 1998-71,733(11F)

ANSWER BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

The Bar wishes to add a few facts which may not be entirely clear. First,

note the following answer (T. 53) and the question which had been addressed to Judge Platzer, regarding defense counsel, Mr. Guralnick:

> Q. Did he tell you though, in that hearing that he had taken all the major witnesses' statements and that, in fact, he would be ready for a July date if that had to come to pass?
>
> A. Yes.
>
> Also, the respondent was asked:
>
> Q. And also, are you aware whether or not he [defense attorney] did a thorough investigation of the case?
>
> A. I have no idea what he did on that case. (T. 40, 41).

SUMMARY OF THE ARGUMENT

First, respondent has failed to establish that Bar Rule 4-8.4(d) is unconstitutional. The presumption in favor of constitutionality cannot be overcome by cases applicable to criminal law since Bar proceedings are administrative in nature and only quasi-criminal.

Furthermore, numerous courts have upheld similar rules against constitutional attacks. In contrast to the overwhelming authority upholding similar rules, respondent has offered no case which invalidates rules prohibiting conduct prejudicial to the administration of justice.

Second, respondent has failed to overcome the presumption of correctness of the Referee's findings of guilt. Respondent admits that he gave ex parte advice to Judge Platzer. He offers the defense that his advice was correct. However, the case law is abundantly clear to the effect that the nature (correctness) of the advice is neither material nor relevant.

Third, respondent clearly violated rule 4-3.5(a) which prohibits attempts to influence, among others, judges. Respondent offers no supporting authority for his claim that the subsection in question addresses only conduct and not communication.

Fourth, the Referee recommended a published admonishment. It is clear that

is what the Referee intended. An admonishment is public discipline and thus, its publication is not improper, nor is it inconsistent with Rule 3-5.1(a).

Fifth, the Referee did not abuse his discretion by taxing costs to the respondent. The Bar was the prevailing party. Furthermore, neither the record nor logic supports respondent's claim that costs were unfairly assessed. Absent abuse of discretion , an award of costs shall not be reversed.

ARGUMENT

I

THE RESPONDENT HAS FAILED TO MEET HIS BURDEN OF PROVING FACIAL UNCONSTITUTIONALITY OF RULE 4-8.4(d).

Respondent has constructed his argument regarding constitutionality upon a faulty premise. Respondent seeks to define Bar proceedings by quoting from The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998) and leaping to the conclusion that Bar rules should be examined from the standpoint of criminal or penal statutes.

In Vernell this court held that due to the quasi - criminal character of Bar proceedings, a party must be put on notice as to the charges which he or she faces. That limited finding does not convert Bar proceedings into criminal proceedings. Respondent ignores Rule 3-7.(e)(1) of the Rules of Discipline which provides:

> (e) Nature of Proceedings
>
> (1) Administrative in Character. A disciplinary proceeding is neither civil nor criminal but is a quasi-judicial administrative proceeding. The Florida Rules of Civil Procedure apply except as otherwise provided in this rule. (Emphasis added)

The test for vagueness is more lenient for an administrative rule than for a penal statute Bertens v. Stewart, 453 So.2d 92 (Fla. 2d DCA 1984). Respondent nevertheless argues that the portion of Rule 4-8.4(d) which refers to "...conduct prejudicial to the administration of justice..." is void for vagueness. In order to

sustain that argument, the respondent must overcome the presumption in favor of constitutionality. Florida Department of Education v. Glasser, 622 So.2d 944 (Fla. 1993).

Clearly, respondent has not met that burden. Even if the more stringent standard applicable to a criminal statute is considered, Rule 4-8.4(d) would withstand constitutional scrutiny.

The lack of a definition in a law does not render it unconstitutional. State v. Barnes, 686 So.2d 633 (Fla. 2d DCA 1996). When 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). Construction can be assisted by resort to a dictionary. Barnes, supra.

A statute need not furnish a detailed plan or specification of acts or conduct prohibited. Wells v. State, 402 So.2d 402 (Fla. 1981), Bertens, supra. If persons of ordinary intelligence can understand the enactment, it cannot be held unconstitutional. The Florida Bar v. Ross, 732 So.2d 1037 (Fla. 1998); Trushin v. State, 425 So.2d 1126 (Fla. 1982). Abstract words are not inherently vague. The words "decency" and "respect" used in the context of decency and respect for diverse beliefs and values, were not void for vagueness. National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed 2d 500 (1998).

In regard to proving overbreadth of a statute (or rule) which regulates conduct as well as speech, the overbreadth must be demonstrated to be real, and substantial as well, judged in relation to the statute (or rule's) legitimate sweep. Trushin, supra. 1130. The overbreadth doctrine only applies if there is susceptible application to conduct protected by the first amendment. Southern Fisheries v. Department of National Resources, 453 So.2d 1351 (Fla. 1984). There is no first amendment right to give uninvited ex parte advice to a judge.

The identical language and similar rule have been challenged in numerous jurisdictions. In In Re Dorothy Jones, 534 A.2d 336 (D.C. 1987) the former disciplinary rule containing the same language as in the instant cause was upheld. The Court reasoned that:

> The disciplinary rules are treated somewhat differently than criminal statutes for purposes of determining whether a particular rule is void for vagueness. In In re Keiler, 380 A.2d 119 (D.C. 1977), the court rejected the argument that the prohibition against conduct prejudicial to the administration of justice was unconstitutionally vague. In sustaining the finding of misconduct, the court stated:
> The rule was written by and for lawyers. The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen. (at 342).

In State v. Nelson, 504 P.2d 211 (Kans. 1972), the Court added that the word "prejudicial" sufficiently defines the degree of conduct expected of an attorney.

Likewise, in Commission for Lawyer Discipline v. Benton, 980 SW 2d 425

(Texas 1998) the Court rejected challenges to the rule based upon vagueness and overbreadth, stating:

> To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids. "Words inevitably contain germs of uncertainty." Broadrick, 413 U.S. at 608, 93 S.Ct. 2908. Due process is satisfied if the prohibition is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 579, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). Because we are concerned with whether an enactment give "fair notice to those to who [it] is directed," Grayned, 408 U.S. at 112, 92 S.Ct. 2294 (alteration in original (citing American Communications Ass'n v. Douds, 339 U.S. 382, 412, 70 S.Ct. 674, 94 L.Ed. 925 (1950), in scrutinizing a disciplinary rule directed solely at lawyers we ask whether the ordinary lawyer, with "the benefit of guidance provided by case law, court rules and the 'lore of the profession,' "could understand and comply with it. Howell v. State Bar of Texas, 843 F.2d 205, 208 (5th Cir. 1988) (holding disciplinary rule forbidding "conduct that is prejudicial to the administration of justice" not unconstitutionally vague).
> The vagueness doctrine requires different levels of clarity depending on the nature of the law in question. Courts demand less precision of statutes that impose only civil penalties than of criminal statutes because their consequences are less severe. See Village of Hoffman Estates, 455 U.S. at 498, 102 S.Ct. 1186. (At 438).

In Howell v. Texas, 559 SW 2d 432, 436 (Texas Civ.App. 1977) the same language was upheld in respect to a vagueness contention. The Court declared:

> We do not believe that the language "a lawyer shall not: ...engage in conduct that is prejudicial to the administration of justice" is so vague and indefinite that it violates the due process and equal protection clauses of the Constitution of Texas. Conduct prejudicial to the administration of justice may consist of any one or more of many acts too numerous to list. See 7 C.J.S. Attorney and Client sec. 23, p. 741,

> et seq. However, although the State Bar rule may be in general terms, in our opinion conduct which falls within the above definitions is prejudicial to the administration of justice and is professional misconduct.
> The Supreme Court of Kansas has written on the question as to whether State Bar Rule DR 1-102(A)(5) is vague in State v. Nelson, 210 Kan. 637, 639, 504 P.2d 211, 214 (1972):
> With respect to issue 3, respondent argues that the word 'prejudicial' as it appears in DR 1-102(A)(5) is unconstitutionally vague and casts a 'chilling effect on First Amendment freedoms'. Respondent's position is unsupported in both instances. The word 'prejudicial' is universally found throughout the legal and judicial system. Specific definitions are found in any dictionary. In Prunty v. Light Company, 82 Kan. 541, 108 P. 802, this court, referring to Webster's Universal Dictionary, defined prejudicial as 'hurtful', 'injurious', 'disadvantageous'. It cannot be seriously contended that 'prejudicial' does not sufficiently define the degree of conduct which is expected of an attorney."
> The Supreme Court of Oregon has also addressed the question in Complaint of Rook, 276 Or. 695, 556 P.2d 1351, 1357 (1976).

In Mississippi Commission on Judicial Performance v. Russell, 691 So.2d 929 (Miss. 1997) a judicial disciplinary rule addressed to conduct prejudicial to the administration of justice was upheld against a vagueness attack. The Court stated that the language of that provision and interpretations of that language were "sufficient to put persons of common intelligence on notice of what type of conduct was prohibited."

The Oklahoma Bar in State ex.rel Oklahoma Bar Association v. Bourne, 880 P.2d 360 (Okla. 1994) ruled against the vagueness challenge. The Court adopted reasoning similar to that in Russell. They referred to a Maryland case in which the

Court emphasized that "the regulation applied only to lawyers, who are professionals having the guidance provided by case law, court rules and the 'lore of the profession'" (at 362, referring to Bar v. Ficker, 572 A.2d at 506 (Md. Ct.App. 1990).

A judicial rule referring to "conduct prejudicial to the administration of justice" was upheld against a vagueness challenge in In Re McCully, 942 P.2d 327 (Utah, 1997). The Utah Supreme Court held that a statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader of what conduct is prohibited.

Respondent has provided no case in which a similar rule has been declared unconstitutional. Rather, respondent submits a number of irrelevant criminal cases. The strict construction discussed in State v. Buchanan, 191 So.2d 33 (Fla. 1966) does not pertain to the Rules of Professional Responsibility as discussed above in detail. Buchanan's holding regarding the vagueness of the term "a reasonable fee" in the context of a criminal statute does not pertain to the portion of the rule being questioned herein.

Respondent has also failed to present any reasons why the vagueness of the term "common law duty" in a criminal statute discussed in Roque v. State, 664 So.2d 928 (Fla. 1995) has an application to the facts before this court. This is

equally true of Cuda v. State, 639 So.2d 22 (Fla. 1994) in which the term "illegal" was deemed to be void for vagueness.

Respondent's failure to meet his burden of proof is also apparent in his reliance upon several additional cases dealing with (1) language not comparable to the instant case and (2) criminal statutes. State v. Jenkins, 469 So.2d 733 (Fla. 1985) addresses "official misconduct" which encompassed "any statute or lawfully adopted regulation or rule relating to his office." State v. Wershow, 343 So.2d 605 (Fla. 1977) dealt with the phrase "guilty of any malpractice in office not otherwise especially provided for ..." As in Jenkins, the challenge was to a criminal statute. Again, respondent has failed to present any logical reasons or authority which indicate relevance to the rule challenged herein.

Finally, respondent raises the question of how respondent's conduct could be prejudicial to the administration of justice. That constitutes the factual issue presented in respondent's second issue. The Bar will address respondent's query in that context.

II

THE RESPONDENT HAS FAILED TO OVERCOME THE PRESUMPTION OF CORRECTNESS IN FAVOR OF THE REFEREE'S FINDINGS.

A referee's findings are presumed correct and must be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Rue, 640 So.2d 1080 (Fla. 1994). Undisputed facts in this record support the findings of guilt.

Respondent gave advice to a judge regarding a potential continuance. The communication was unsolicited. In fact the judge told him twice that advice regarding the pending case was taboo. (T. 49-50). Respondent was not an attorney of record and the communication was ex parte.

Respondent offers a rather unique defense. He argues that since his advice was "correct"[1] there was no violation of Rule 4-8.4(d).

No Florida case of record has presented this issue. However, guidance is available from cases in other jurisdictions.

In In Re Keiler, 380 A 2d 119 (D.C. 1977), [overruled on other grounds, In Re Hutchinson, 534 A. 2d 919 (D.C. 1987)] respondent offered the defense that his fraudulent conduct produced the right result. The Court stated:

> We cannot agree with respondent's position. He fails to realize that the prohibition against "conduct prejudicial to the administration of justice" bars not only those activities which may cause a tribunal to reach an incorrect decision, but also conduct which taints the decision making process. Improper conduct may prejudice the administration of justice even though it fosters a correct decision. (at 124, 125).

[1]There is obviously an issue as to whether in fact it was "correct", but that is not material. Respondent's argument merely reinforces the conclusion that he does not understand that (non-party) ex parte communication with a judge regarding a pending case is prejudicial.

The logical implication of respondent's position is that any individual who has an opinion regarding a matter in any case and who believes that (s)he is "right" or "correct" may become a self-anointed judge and join the decision making process by contacting the judge. Respondent's theory would convert the administration of justice into a circus. As this Court stated in The Florida Bar v. Calhoon, 102 So.2d 604, 608 (Fla. 1988):

> ...we are impelled to the inescapable notion that any conduct which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties.

In In Re Bemis, 938 P. 2d 1120 (Ariz. 1997) the respondent expressed the belief that ex parte communications were violative of the rule prohibiting conduct prejudicial to the administration of justice only when one seeks an unfair advantage. The Court rejected that argument.

The Court also noted "respondent's continued unwillingness to acknowledge the wrongfulness of his conduct." Further, it referred to the American Bar Association which had published this salient response:

> "Ex parte communications are barred even if it is not clear that the lawyer intended to influence the judge." "ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct, 338 (3rd edition, 1996)"

Similarly, the fact that an appellate court had already decided a case in regard to which an attorney offered ex parte advice was held to be immaterial in In

Re Roy B. Thompson, 940 P. 2d 512 (Or. Ct. App. 1998). Whether or not Thompson's gratuitous advice was "correct" or influenced the Court to rule in a particular manner was immaterial. The Oregon Court held that Thompson's conduct was prejudicial to the administration of justice.

In Office of Disciplinary Counsel v. Ferreri, 727 N.E. 2d 908 (Ohio 2000), respondent, a judge, indulged in ex parte communications with the representatives of a party to litigation (an agency) regarding the consolidation of cases, a procedural matter as in this case.

The Court did not consider the wisdom of the respondent's advice and held that it constituted conduct prejudicial to the administration of justice. In other words, the improper intrusion, without regard to the sagacity of the advice, violated a rule containing the language of 4-8.4(d).

III

RESPONDENT HAS FAILED TO ESTABLISH ANY ERROR IN REGARD TO THE FINDING THAT RESPONDENT VIOLATED RULE 4-3.5(a).

The logic of respondent's argument is difficult to discover. Here again, respondent has failed to meet the burden of overcoming the presumption of

correctness of the Referee's findings. Rue, supra. Subsection (a) of Rule 4-3.5 is clear in terms of the conduct it prohibits.

It states:

> **(a) Influencing Decision Maker**. A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.

Clearly, it applies to all acts outside of the regular proceedings designed to influence a judge even if it is not ex parte and does not require a communication directly with the judge or an act related to the merits. In other words, subsection (a) is clearly different from subsection (b) and respondent's construction by attempting to limit (a) to conduct, as distinguished from communication referred to in subsection (b) cannot be sustained by logic or authority.

Respondent readily admits that he sought to influence the judge. (T. 37, 38). Clearly, he violated the rule.

No statute, case, rule or treatise is cited in support of respondent's claim that the above quoted section of the rule is limited to conduct. The rule is unambiguous. When there is a lack of ambiguity there is no legal basis for interpretation or construction. State ex rel. Florida Jai Alai, Inc. v. State Racing Comm., 112 So.2d 825 (Fla. 1959).

Furthermore, the Referee relied upon In Re McCaffrey, 549 P. 2d 666 (Or.

1976) solely for the correct proposition that both negligent and intentional conduct are prohibited. McCaffrey is not only utilized correctly, but is not required to support the Referee's report. It is basic, obvious and readily apparent that respondent sought to influence the judge. That is why the judge, a friend of respondent, felt that she was obligated to report respondent to the Bar. (T. 57).

Respondent adds another non-sequitur to his "argument". He submits that in order to find that an attorney acted with dishonesty, deceit, misrepresentation, or fraud, the element of intent must be proven by clear and convincing evidence. That is an interesting argument. However, Rule 4-3.5(a) does not depend upon proof of dishonesty, deceit, misrepresentation or fraud.

IV

AN ADMONISHMENT IS PUBLIC DISCIPLINE AND AS SUCH MAY BE PUBLISHED

The Referee made no mistake by recommending that respondent's admonishment be published.

Admonishments for minor misconduct, all discipline for that matter, is public. Rule 3-7.1, Rules of Discipline.

In the instant case, the Referee specifically held and recommended that:

> ". . . An admonishment would likely suffice with respect to this Respondent to prevent his further violation of the rules of Professional Conduct, provided however, that it should be published in order to emphasize the concern of a court with similar violations and all lawyer misconduct." (R.R. p.5)

Rule 3-5.1(a) of the Rules of Professional Conduct states:

> "A Supreme Court of Florida order finding minor misconduct and adjudging an admonishment *may* [emphasis added] direct the respondent to appear before the Supreme Court of Florida, the board of governors, grievance committee, or the referee for administration of the admonishment . . ."

Rule 3-5.1(a) does not preclude the referee from recommending that an admonishment for minor misconduct be published.

Respondent's contention that the referee made a mistake in recommending

respondent's admonishment is incorrect. The referee specifically adorned the admonishment with the requirement that said admonishment be published. The referee clearly stated his intent when he ordered, "it should be published in order to emphasize the concern of a court with similar violations and all lawyer misconduct." (RR p.5)

The Referee's recommended discipline was not improper. The Court should uphold the Referee's recommendation and the respondent's admonishment should be published.

V

RESPONDENT HAS FAILED TO ESTABLISH ANY ERROR IN REGARD TO COSTS.

Rule 3-7.6(o)(3) of the Rules of Discipline provides that when the Bar is successful in whole or in part, the referee may assess the Bar's costs against the respondent unless shown to be unnecessary, excessive, or improperly authorized. Respondent makes no such showing, nor even such an allegation. Rather, respondent contends it would be "unfair" to tax costs against him because he offered to accept an admonishment, the same sanction ultimately recommended by the referee. In short, respondent seeks to create an argument based on settlement discussions which are privileged and consequently not supported by any portion of the record, nor could they be.

The referee has discretion to determine the Bar's entitlement to costs and the amount. The Florida Bar v. Glant, 645 So.2d 962 (Fla. 1994). In the instant case, the Bar prevailed and costs were taxed to the respondent. The referee shall have discretion to award costs and, absent an abuse of discretion, the referee's award shall not be reversed. Rule 3-7.6(o)(2), Rules of Discipline.

There has been no abuse of discretion by the referee nor is any alleged. The Bar's costs were properly taxed to respondent.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully requests that the Referee's Report should be approved and that the respondent should receive an admonishment and that said admonishment be published.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's answer brief was forwarded via Airborne Express (airbill #3370021723) to **Thomas D. Hall**, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to **Louis M. Jepeway, Jr.**, Attorney for respondent, at 407 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130, on this _____ day of July, 2000.

_____
GREGG DAVID WENZEL
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

_____
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