IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

WARREN R. TRAZENFELD,

Respondent.
_____/

Supreme Court Case
No. SC00-2571

The Florida Bar File
No. 2000-70,234(11E)

RESPONDENT'S AMENDED ANSWER BRIEF

ROBERT M. KLEIN
Fla. Bar No. 230022
MARLENE S. REISS
Fla. Bar No. 864048

STEPHENS, LYNN, KLEIN
LACAVA, HOFFMAN & PUYA
9130 South Dadeland Boulevard
Datran Two - Penthouse II
Miami, Florida 33156
Telephone: (305) 670-3700
Facsimile: (305) 670-8592

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

INTRODUCTION

This appeal arises from a disciplinary proceeding that was filed by The Florida Bar against Respondent Warren R. Trazenfeld, Esq. The Referee's Order grants summary resolution in favor of Trazenfeld on the basis of res judicata. A prior disciplinary proceeding, before a *different* Grievance Committee, had previously resulted in a finding of no probable cause. The Bar did not seek review of the no probable cause finding. The Referee found that res judicata applied to preclude the Bar from proceeding with its second Complaint. The Referee also found that the Bar's allegation of a violation of an *additional* Rule of Professional Conduct was, likewise, barred because the "new" alleged violation could have been raised in the earlier proceeding, but was not.

Complainant THE FLORIDA BAR was the complainant below, and is referred to herein as The Florida Bar.

Respondent WARREN R. TRAZENFELD, ESQ., was the respondent below and is referred to herein by name.

The Record on Appeal consists of those documents that are appended to The Bar's Initial Brief, as well as the hearing transcript, (T -), which The Bar has appended to its Response to Trazenfeld's Motion to Dismiss Appeal. Citations to the record appear herein as they appear in The Bar's Appendix.

STANDARD OF REVIEW

Upon review of a Referee's Report in a Bar disciplinary proceeding, the burden shall be upon the party seeking review to demonstrate that the Referee's report sought to be reviewed is erroneous, unlawful, or unjustified. *See* Rule 3-7.7(c)(5).

Generally, appellate courts review summary judgment orders *de novo* with all facts and inferences to be resolved in favor of the party opposing the summary judgment. *See The Florida Bar v. Cosnow*, 797 So.2d 1255 (Fla. 2001).

STATEMENT OF THE CASE AND FACTS

This appeal arises from a formal Bar Complaint designated The Florida Bar File No. 2000-70,234(11E), (Trazenfeld II). This proceeding arises from the same set of facts and conduct which resulted in a finding of no probable cause in a *prior* Bar proceeding designated The Florida Bar File No. 98-71,747(11F)(Trazenfeld 1).[1]

In this case, Respondent Trazenfeld answered the Bar's Complaint and then moved for summary resolution on the basis that these proceedings were barred by res judicata because the Bar was seeking to relitigate matters that were raised or could have been raised in the prior proceeding. Granting summary resolution in favor of Respondent Trazenfeld, the Referee found that the Bar is precluded by the doctrine of res judicata from pursuing further disciplinary action against Mr. Trazenfeld with regard to this matter(Trazenfeld II).

The Underlying "Lent Litigation" on Which The Bar's Proceedings Have Been Based[2]

In 1996, Trazenfeld represented Monika Lent in a legal malpractice claim against Thomas Baur, Esq., and Baur, Miller & Webner, P.A., the attorneys who

---

[1] Grievance Committee 11F found no probable cause in a Letter of Advice, which is the equivalent of a No Probable Cause finding. (The Bar's Appendix "C," Exhibit "C").

[2] Record support for the facts of the underlying proceeding appear in the Brief of Monika Lent at The Bar's Appendix "A," at Exhibit "C."

had represented her in the probate of her late husband's estate. In the legal malpractice action, Baur moved to compel Lent to consent to the taking of the deposition of Dietrich Kermer, a German notary and attorney, who was involved in discussions and negotiations relating to the division of the estate amongst Monika Lent and her late husband's daughters. Kermer's testimony was dependent upon the consent of Lent *and* the daughters. The trial court entered an order compelling Lent to execute a consent which waived any attorney/client privilege that she may have had with Kermer.

The Third District Court of Appeal's decision in *Lent v. Baur, Miller & Webner*, 710 So.2d 156 (Fla. 3d DCA 1998), describes Trazenfeld's actions with regard to Kermer's deposition testimony. (T 16-17). To the extent that Trazenfeld's actions were supported by sound legal bases, his deposition testimony demonstrates that he never even realized that by protecting Lent's rights under German law, her pleadings would be stricken in this action. (T 32-34).[3] At the heart of these proceedings is the Bar's allegation that Trazenfeld did not communicate a remote - - but possible - - consequence that never dawned on him.

[3] Although not filed with the court, Trazenfeld's deposition was before the Referee by way of counsel's proffer, with no objection by the Bar's counsel. (T 32-34). Trazenfeld's deposition, unfortunately, was never provided to The Bar's expert, William Scarritt. (T 32, 38-39). Nor did Mr. Scarritt have the benefit of any other evidence that was a part of the original Bar investigation. (T 38-39).

Trazenfeld wrote to Kermer, informing Kermer that Lent objected to Kermer's testifying because such conduct would be a violation of German law relating to the duties of a German attorney/notary to his client - - a legally sound position. 710 So.2d at 157. Trazenfeld informed Kermer that a court's order in the United States, compelling Lent to consent to Kermer's deposition, would have no effect on Kermer's obligations under German law - - also a legally sound position. *Id.* (T 19). Trazenfeld informed Kermer that any such consent would not be "voluntary," but would, rather, be compelled. *Id.* (T 19). (Even The Bar has to concede that an order compelling a client to waive privilege is not a "voluntary" waiver.) He further advised Kermer - - as he had an obligation to do on behalf of his client - - that Lent would not forfeit any rights that she had under German law. *Id.* (T 19).

Kermer responded by advising Trazenfeld that he would not discuss the matter unless Lent executed a Power of Attorney, which she did. *Id.* Kermer next advised Trazenfeld that the Power of Attorney "does not release me from my duty to observe confidentiality" and that "deposition testimony [was] out of the question." 710 So.2d at 157.

In the meantime, Baur prepared and forwarded a consent and waiver for Lent to execute. 710 So.2d at 157. Lent returned the executed consent form with several

deletions, crossing out language that would have waived any privilege under German law because it would "act as a release of certain causes of action Mrs. Lent ha[d] under German law." 710 So.2d at 158.

Lent provided the revised consent and, in the end, Kermer did not appear for deposition. The Bar did not provide any evidence as to why Kermer was not deposed. There is no indication that Lent's late husband's daughters provided the requisite consent. (T 28-29). Indeed, to this day, no one has ascertained the exact basis for Mr. Kermer's refusal to testify. The Bar, and its expert, William Scarritt, have apparently surmised that Kermer's refusal to testify is based on the Lent consent. (T 29). Rather than obtaining an evidentiary basis for seeking a proper dismissal, Baur chose instead to move immediately for sanctions, seeking to dismiss Lent's Complaint with prejudice. The trial court granted Baur's motion. Lent's claims against her former attorneys was dismissed.

The Third District Court of Appeal affirmed the dismissal. *See Lent v. Baur, Miller & Webner, P.A.*, 710 So.2d 156 (Fla. 3d DCA 1998).[4] In its opinion, the Third District Court of Appeal stated:

> Not only did Monika Lent and her counsel, Warren Trazenfeld, willfully disregard the trial court's order, but they also acted in bad faith in an attempt to assure

[4] *See* Appendix "B" to the Bar's Initial Brief.

> noncompliance with the court's order by intimidating a key defense witness. We conclude that the trial court acted properly and wholly within its discretion when it dismissed Lent's complaint with prejudice as a sanction for her and her counsel's willful and contumacious disregard of the court's order.

Lent, supra, 710 So.2d at 158.[5]

Based upon these facts and the Third District's decision, The Florida Bar then initiated the first disciplinary proceedings against Trazenfeld (Trazenfeld I).

Trazenfeld I

The Bar sought disciplinary sanctions against Trazenfeld based upon alleged violations of three of the Rules of Professional Conduct, specifically, Rules 4-8.4(d)(Misconduct), 4-3.4 (Fairness of Opposing Party and Counsel), and 4-4.4 (Respect for Rights of Third Persons). *(See* April 20, 1999 Letter from The Florida Bar *RE: Complaint by The Florida Bar against Warren R. Trazenfeld, Esquire, The Florida Bar File No. 98-71,747(11F)*, "Exhibit B" to the Bar's Appendix

---

[5] Notwithstanding that the trial court's and the Third District Court of Appeal's findings with regard to Trazenfeld's actions demonstrated that his conduct was based on legally supported grounds, the Third District affirmed the dismissal. We respectfully submit that the Third District's decision affirming the dismissal of Lent's case was wrong in that, among other things, the court presumed that Trazenfeld knew that his actions - - all based on legally supported conclusions - - could result in a dismissal of Lent's case. The decision is replete with assumptions on the part of the appellate court that were not supported by the record.

"C"). The facts which formed the basis of the Complaint consisted of Trazenfeld's conduct in the underlying "Lent litigation."

The Bar conducted a full investigation of Trazenfeld I, which included a myriad of fact-finding processes, among other things, meetings with the Bar Examiner, the opening of Trazenfeld's entire file in the Lent matter to The Bar, including Monika Lent's deposition, and various interviews. (T 24-25).

In Trazenfeld I, the Eleventh Judicial Circuit Grievance Committee "F" issued a finding of no probable cause with regard to the alleged violations, including the alleged violation of Rule 4.8-4(d)(Misconduct). (See July 9, 1999 *Notice of No Probable Cause And Letter of Advice to Respondent*, "Exhibit C" to the Bar's Appendix "C").

Trazenfeld II

Thereafter, purportedly in response to a complaint filed with The Florida Bar by Monika Lent, The Bar filed the formal Complaint which gives rise to this appeal, styled The Florida Bar v. Trazenfeld, S.Ct. Case No. SC00-2571, The Florida Bar File No. 2000-70,234 (11E). (Initial Brief at 2). "Trazenfeld II" alleged a "new" violation of Rule 4-1.4(b) (Duty to Explain Matters to Client), as well as violations of Rule 4-8.4(d)(Misconduct) - - the same alleged violation that had been asserted in Trazenfeld I for which Grievance Committee "F" found no probable cause.

The Bar's position is that Trazenfeld breached his ethical obligation to inform Lent that her claims could be dismissed because of the form of the consent that she executed. This position presumes that Trazenfeld, himself, had knowledge that Lent's Complaint could be dismissed for asserting her rights under German law. He testified that it never dawned on him that the trial court would strike Lent's pleading. (T 32).

To the extent that Trazenfeld II arises out of the *identical* facts and conduct upon which Trazenfeld was premised, Trazenfeld filed a Motion for Summary Resolution on the grounds that the Bar's second Complaint was barred by res judicata.[6]

The Referee heard argument on Trazenfeld's Motion for Summary Resolution and granted the motion. (Transcript of August 9, 2001 Hearing; Bar's Appendix "D" to Initial Brief).

The Referee determined that, although no case deals directly with Bar Grievance Committee proceedings, sufficient authority exists to suggest that res

---

[6] For some reason, the Bar states that Trazenfeld's Motion for Summary Resolution was also based on "double jeopardy" grounds. (Initial Brief at 2, 4, 5). In fact, Trazenfeld never raised double jeopardy as a basis for summary resolution. Rather, the Bar has focused on a double jeopardy analysis because most of the cases upon which the Bar relies arise in the context of criminal proceedings - - cases which are distinguishable from this case.

judicata is applicable to Bar Grievance proceedings. The Referee further determined that the additional new allegation of a Rule 4-1.4(b) violation is barred by res judicata because the Bar had a full and fair opportunity to investigate and litigate *all* of Trazenfeld's conduct arising out of the underlying litigation and it should have done so in Trazenfeld 1. The Referee stated, "[t]he Bar has not alleged any facts before the 2000 grievance committee which were not known or which could not have been known by the 1998 committee." (Bar's Appendix "D," Order at 4).

Not surprisingly, as The Bar points out, the Referee did not enter any finding regarding double jeopardy, because Trazenfeld never raised double jeopardy as a basis for summary resolution. (Initial Brief at 5).

The Bar now appeals the Referee's Order.

ISSUES ON APPEAL

I. **WHETHER THE REFEREE PROPERLY ENTERED SUMMARY RESOLUTION IN FAVOR OF TRAZENFELD ON THE BASIS OF RES JUDICATA BECAUSE RES JUDICATA APPLIES TO GRIEVANCE COMMITTEE DISPOSITIONS**

II. WHETHER SUMMARY RESOLUTION WAS PROPERLY ENTERED IN FAVOR OF TRAZENFELD ON THE BASIS OF RES JUDICATA WHERE THE REFEREE FOUND, AS A MATTER OF LAW, THAT THE BAR WAS PRECLUDED FROM RELITIGATING ISSUES ON WHICH THE BAR HAD ALREADY FOUND NO PROBABLE CAUSE

SUMMARY OF THE ARGUMENT

This is a Florida Bar proceeding in which the Referee has entered summary judgment in favor of the Respondent, Warren Trazenfeld, on the basis of res judicata. The Bar appeals, claiming that res judicata does not apply.

The Florida Bar's *second* proceeding against Mr. Trazenfeld is barred because res judicata applies to disciplinary proceedings. To the extent that the Bar has argued that the Grievance Committee's finding of no probable cause in the *first* proceeding was not a final order issued by a court of competent jurisdiction sufficient to invoke res judicata, the Bar's own failure to follow its governing Rules is what precluded such a "final" order.

Had the Bar sought review of Grievance Committee 11F's finding of no probable cause, the Disciplinary Review Committee of the Board of Governors could have returned the matter to the Grievance Committee for further proceedings. *See* Rule 3-7.5(a)(2)(d). A finding of no probable cause by the Board would have been "final" precluding any further proceedings by the Bar. *See* Rule 3-7.5(d). The Bar chose not to avail itself of the review procedures available to it, which would have resulted in a final and unassailable finding of no probable cause. The Bar should not be allowed to disregard its own rules and then rely on its own inaction to bring further proceedings against a respondent.

As its second argument, the Bar claims that summary judgment was inappropriate because Trazenfeld did not support his Motion for Summary Judgment with any sworn testimony and because issues of fact existed to preclude summary judgment. Summary judgment is available in attorney disciplinary proceedings. *See The Florida Bar v. Cosnow,* 797 So.2d 1255, 1258 (Fla. 2001).

The fact that Trazenfeld did not submit any affidavits is of no import. A party may move for summary judgment "with or without supporting affidavits... ." *See* Fla.R.Civ.P. 1.510(a), (b). In fact, at the hearing, Trazenfeld raised the deposition testimony of the *Bar's* expert in support of his own position.

As for Trazenfeld's argument that summary judgment is precluded because questions of fact existed, the Bar never raised issues of fact as a basis for precluding summary judgment before the Referee. It does so for the first time on appeal by suggesting a series of hypothetical questions that *may* have existed to preclude summary judgment. (Initial Brief at 24). Absent jurisdictional or fundamental error, arguments raised for the first time on appeal should not be considered. *See Florida Emergency Physicians-Kang and Associates, M.D., P.A. v. Parker,* 800 So.2d 631 (Fla. 5th DCA 2001); *Ward v. Ward*, 742 So.2d 250, 255 (Fla. 1st DCA 1996).

On these bases, the Referee's Order should be affirmed.

ARGUMENT

I. THE REFEREE PROPERLY ENTERED SUMMARY RESOLUTION IN FAVOR OF TRAZENFELD ON THE BASIS OF RES JUDICATA BECAUSE RES JUDICATA APPLIES TO GRIEVANCE COMMITTEE DISPOSITIONS

The issue before this Court is whether res judicata applies to a Bar Grievance Committee finding of no probable cause.

Significant public policy principles support the Referees' application of res judicata in this case. Res judicata is recognized as an effective means of preventing a "relitigation of matters" already decided and to "produce certainty as to individual rights." *State Department of Revenue v. Ferguson*, 673 So.2d 920 (Fla. 2d DCA 1996). *See also Denson v. State*, 775 So.2d 288, 290 (Fla. 2000)*; Gordon v. Gordon*, 59 So.2d 40, 44 (Fla. 1952), *cert. denied*, 344 U.S. 878, 73 S.Ct. 165 (1952).

Res Judicata Applies to Bar Proceedings

Bar disciplinary proceedings are quasi-judicial administrative proceedings. *See The Florida Bar v. Roberts*, 770 So.2d 1207 (Fla. 2000). There is no question that administrative proceedings are subject to the doctrine of res judicata. *See*

Rubin v. Sanford, 168 So.2d 774 (Fla. 3d DCA 1964).[7]

This Court has suggested that res judicata applies to Bar proceedings where the elements of res judicata are satisfied. *See The Florida Bar v. Gentry*, 447 So.2d 1342 (Fla. 1984). Curiously, The Bar has completely ignored *Gentry*, choosing instead to focus on the cases relied on by Trazenfeld as persuasive authority from other jurisdictions, which have addressed the issue head-on. The Bar goes to great lengths to distinguish Trazenfeld's persuasive authority, but does not give this Court's decision in *Gentry* so much as a nod.

While this Court, in *Gentry*, did not specifically say that res judicata applied to Bar proceedings, it has certainly suggested as much. Specifically, in *Gentry*, this

---

[7] Although not specifically relating to bar proceedings, a host of other Florida court decisions demonstrate that res judicata applies in administrative proceedings. See *Thomson v. Department of Environmental Regulation*, 511 So.2d 989 (Fla. 1987); *Wager v. City of Green Cove Springs*, 261 So.2d 827 (Fla. 1972); *City of Miami Beach v. Prevat*, 97 So.2d 473 (Fla. 1957); *Yovan v. Burdines*, 81 So.2d 555 (Fla.1955), *superseded by statute*; *White v. School Board of Dade County*, 466 So.2d 1141 (Fla. 3d DCA 1985); *Marion County School Board v. Clark*, 378 So.2d 831 (Fla. 1st DCA 1979)(Ervin, J. specially concurring); *Metropolitan Dade County Board of County Commissioners v. Rockmatt Corporation*, 231 So.2d 41 (Fla. 3d DCA 1970); *Rubin v. Sanford*, 168 So.2d 774 (Fla. 3d DCA 1964); *Carol City Utilities, Inc. v. Miami Gardens Shopping Plaza*, 165 So.2d 199 (Fla. 3d DCA 1964). *See also* Fla.Jur.2d Judgments and Decrees §134 (Res judicata and estoppel by judgment are available in administrative proceedings in the same manner as they are available in judicial proceedings.)

Court found that the subject of a prior disciplinary hearing[8] and the allegations in a subsequent complaint did not possess an "identity of fact," as required for the application of the res judicata doctrine. 447 So.2d at 1343. Although both the initial proceedings and the subsequent complaint both involved the withholding of trust funds and the transfer of those funds to a personal account, the subsequent complaint was also based on *separate, additional, and continuing misconduct* on the part of the respondent attorney. Thus, the Court found that the requisite "identity of facts" did not exist in order to apply the res judicata doctrine. *See Albrecht v. State*, 444 So.2d 8, 11-12 (Fla. 1984).[9] Had there not been allegations of separate, additional *and* continuing misconduct, *Gentry* suggests that res judicata would have applied to bar the subsequent complaint.

In this case, the essential relevant facts out of which Trazenfeld 1 arose consisted of Trazenfeld's alleged "intimidation" by letter, in 1996, of a fact witness

---

[8] The only distinction between this case and *Gentry* is the fact that, in *Gentry*, the prior proceeding reached the *hearing* stage. In this case, the prior proceeding concluded with a finding of no probably cause by Grievance Committee 11F. As explained *infra*, the Bar's own actions - - or inaction - - precluded Trazenfeld 1 from reaching a hearing. The Bar did not follow the appropriate procedure to seek further review by the Board of Governors, which would have allowed for further proceedings before Grievance Committee 11F.

[9] *Albrecht* was superseded by statute on other grounds. *See Bowen v. Florida Dept. of Environmental Regulation*, 448 So.2d 566 (Fla.2d DCA 1984).

in a legal malpractice action which Trazenfeld had initiated on behalf of his client, Lent. The purpose of the alleged "intimidation" was to keep the German witness from testifying in the civil action in the United States, despite a court order compelling Lent to provide her consent to allow that witness to testify. *See Lent v. Baur, Miller & Webner*, 710 So.2d 156 (Fla. 3d DCA 1998).

These are exactly the facts alleged in the Bar's Complaint in Trazenfeld II. However, the Bar essentially puts a twist on those facts by alleging that Trazenfeld's alleged violative conduct was in failing to inform his client of the potential "repercussions or ramifications of executing the subject consent" thereby implicating Rule 4-1.4(b), which the Bar raised for the first time in Trazenfeld II. (Bar's Appendix "A" at ¶6).

To the extent that, in Trazenfeld 1, Grievance Committee 11F found no probable cause, it issued a Letter of Advice in which it stated that its finding "does not indicate that it condones your conduct in this matter." (Bar's Appendix "C," Exhibit "C"). The Bar's Letter of Advice demonstrates a comprehensive and exhaustive investigation of the conduct which formed the basis of the Bar's complaint in Trazenfeld I. There is nothing to indicate that the Committee did not consider Trazenfeld's conduct *in its entirety* in connection with the Lent litigation, including the conduct it now raises in an entirely new proceedings. Indeed, in

Trazenfeld I, The Bar specifically stated, "[p]ossible violations of the following rules, *and other rules deemed applicable will be considered... .*" (Bar's Appendix "B," Exhibit "B"). Therefore, there is a greater likelihood than not that Grievance Committee 11F in Trazenfeld I considered *all* applicable rules, including Rule 4-1.4(b), which the Bar purports to allege as a "new" violation.

There is no reason to think that the Grievance Committee in Trazenfeld 1 did not consider *all* of Trazenfeld's conduct in the Lent litigation before it issued its finding of no probable cause.

The Court need go no further than *Gentry* to decide this matter. However, sufficient authority demonstrates that other Florida courts have applied res judicata in similar, though not identical, disciplinary proceeding cases.

In *Rubin v. Sanford*, 168 So.2d 774 (Fla. 3d DCA 1964), removal proceedings were instituted by the Fire Chief of Miami Beach against Sanford for conduct unbecoming a city employee. Specifically, Sanford had been convicted of misleading advertising in connection with the sale of a used car. A hearing was held before the City's Personnel Board, at which time evidence was produced in support of the charges. The Personnel Board dismissed the charges of conduct unbecoming. The next day, Sanford was relieved of duty on the same charge. A second hearing was held before the same Personnel Board and, this time, the

charges were sustained and Sanford was fired. Sanford appealed to the circuit court, which ordered Sanford's reinstatement. The appellate court affirmed the reinstatement, stating that "[t]here is little question that administrative proceedings are subject to the doctrine of *res judicata*... ." 168 So.2d at 775 (citations omitted).

The Bar Had an Opportunity to Follow Appropriate Procedures to Re-Open Trazenfeld I But It Chose Not to Do So

While it is true that a finding of no probable cause does not preclude a *re-opening* of the case and further proceedings therein, that is not what happened in this case.[10] Grievance Committee 11F *did not* re-open Trazenfeld I, as it may do under the Rules Regulating The Florida Bar. Rather, the Bar proceeded to initiate an entirely *new* proceeding, before a *different* Grievance Committee (11E). The Rules Regulating the Florida Bar do not provide for such a procedure. Under the Bar's theory, there may never be finality to this matter, because the Bar can continue to file new complaints *ad infinitum*.

---

[10] Rule 3-7.4(j)(3) of the Rules Regulating the Florida Bar provides, in pertinent part:

> (3) *Effect of No Probable Cause Finding*. A finding of no probable cause by a grievance committee shall not preclude the reopening of the case and further proceedings therein.

The fact of the Bar's failing to *re-open* Trazenfeld I is critical to a determination of whether res judicata applies to Trazenfeld II. Without re-opening Trazenfeld I, there was never any possibility that the matters contained therein could reach "a court of competent jurisdiction," i.e., a hearing before a Referee.[11] That fact, in and of itself, should give the finding of no probable cause sufficient finality to preclude "relitigation" of the alleged violations *and* any other violations that could have been raised in Trazenfeld I. Indeed, the Bar had an opportunity to seek review of Grievance Committee 11F's finding of no probable cause by the Board of Governors, but it did not do so.

Rule 3-7.5 specifically provides, in pertinent part:

> (a) Review of Grievance Committee Matters.
>
> (1) The disciplinary review committee shall review those grievance committee matters referred to it by a designated reviewer. The committee shall make a report to the board and unless overruled by the board the report shall be final.

Rule 3-7.5(a)(1) of the Rules Regulating the Florida Bar.

Had the Bar sought review of Grievance Committee 11F's finding of no

---

[11] At the hearing on Trazenfeld's Motion for Summary Resolution, the Bar's counsel conceded that, had Trazenfeld I proceeded to a hearing before a Referee and the Referee found no probable cause, res judicata would apply to preclude the Bar's second complaint. (T 68).

probable cause, the Disciplinary Review Committee of the Board of Governors could have, *inter alia*, returned the matter to the Grievance Committee 11F for further proceedings. *See* Rule 3-7.5(a)(2)(d). Moreover, a finding of no probable cause by the Board "shall be final and no further proceedings shall be had in the matter by The Florida Bar." *See* Rule 3-7.5(d). Thus, the Rules have their own built-in version of res judicata. The Bar chose not to avail itself of the review procedures available to it. That should make Grievance Committee 11F's finding of no probable cause unassailable. The fact that the Bar's own actions precluded Trazenfeld I from proceeding to a point of finality by a "court of competent jurisdiction" is sufficient reason to preclude the Bar from now arguing that res judicata does not apply.

Court in Other Jurisdictions Have Applied Res Judicata to Bar Proceedings

Courts in other jurisdictions addressing circumstances similar to those in this case have recognized the applicability of res judicata to subsequent bar disciplinary proceedings. *See, e.g., Statewide Grievance Committee v. Presnick*, 577 A.2d 1058 (Conn. 1990); *Kucej v. Statewide Grievance Committee*, 686 A.2d 110, 116 (Conn. 1996); *Statewide Grievance Committee v. Dey*, 1998 WL 707804, (Conn.1998).

In *Presnick*, *supra*, the attorney failed to secure an adoption for his client, and was subject to a claim of attorney misconduct by the Statewide Grievance Committee, in which there was insufficient evidence to discipline the attorney . *Presnick, supra* at 1059. Subsequently, another claim of attorney misconduct was filed, alleging that the attorney had been guilty of violating other rules of professional conduct in his handling of the same adoption matter. *Id*. The Court rejected the notion that the Bar proceedings should proceed "in a piecemeal fashion" and concluded that res judicata is equally applicable to such proceedings. *Id.* at 1059-60; *see also Kucej, supra* at 116.

The Bar attempts to distinguish the Connecticut cases by pointing out that the Statewide Grievance Committee "litigates" its bar proceedings. While this may be true, as discussed earlier, it was only the Bar's actions in Trazenfeld I that precluded it from litigating its original proceedings in a court of competent jurisdiction. The Bar should not now be able to benefit by its own failure to avail itself of the Rules which would have allowed Trazenfeld I to proceed to a "court of competent jurisdiction." Review by the Board of Governors would have resulted in an actual *re-opening* of Trazenfeld I before Grievance Committee 11F or would given the Committee's finding of no probable cause sufficient finality to have foreclosed The Bar from filing its second formal Complaint.

Res Judicata Precludes the Bar From Raising Alleged Violations That Could Have and Should Have Been Raised in Trazenfeld 1

The Bar has claimed that it may effectively prosecute what it characterizes as a new complaint in this matter simply because it is proceeding under a different set of disciplinary rules. Under this theory, the Bar may prosecute Mr. Trazenfeld indefinitely for the same alleged misconduct, as long as it cites different disciplinary rules each time it commences a proceeding.

Grievance Committee 11F's first finding of no probable cause is conclusive as to all matters which were *or could have been* determined. *See Gordon v. Gordon*, 59 So.2d 40, 44 (Fla. 1952), cert. denied, 344 U.S. 878, 73 S.Ct. 165 (1952). *All* of the facts that gave rise to Trazenfeld 1 were - - *or should have been* - - considered in that proceeding. They certainly could have been and, in all likelihood, were considered. The fact that Grievance Committee 11F in Trazenfeld 1 did not make a probable cause finding as to any possible violation of Rule 4-1.4 does not mean that it did not consider *and reject* any such alleged violation. There was sufficient evidence in Trazenfeld 1 with regard to Ms. Lent's informed execution of the modified consent to raise any concerns that the Bar may have had in connection with Trazenfeld's communications to Lent regarding the repercussions or ramifications of the consent. Indeed, even the Third District

acknowledged Ms. Lent's *informed* execution because it affirmed the dismissal of her claim based on her own "willful and contumacious disregard of the court's order," a sanction which necessarily implicates the client's own wrongdoing. 710 So.2d at 158. In essence, the Third District's opinion - - the very opinion on which the Bar bases its second Complaint - - precludes the Bar from litigating a matter that it should have raised in its initial proceedings!

The broad scope of the investigation of Trazenfeld I demonstrates that the evidence it considered is identical to the evidence in Trazenfeld II. Nothing supports an inference that the investigation in Trazenfeld 1 did not include all aspects of the violations alleged in Trazenfeld II. If, in fact, the Bar chose *not* to investigate *all* possible ethical violations on the part of Trazenfeld in Trazenfeld 1 when it could have - - and should have - - Trazenfeld should not be subjected to yet another bar proceeding because of the Bar's failure to do so.

II. SUMMARY RESOLUTION WAS PROPERLY ENTERED IN FAVOR OF TRAZENFELD ON THE BASIS OF RES JUDICATA WHERE THE REFEREE FOUND, AS A MATTER OF LAW, THAT THE BAR WAS PRECLUDED FROM RELITIGATING ISSUES AS TO WHICH THE BAR HAD ALREADY FOUND NO PROBABLE CAUSE

The Florida Bar argues that summary judgment [12]was erroneously entered in favor of Trazenfeld because issues of fact precluded its entry. The Bar raises this issue for the first time on appeal. On this basis alone, the Referee's Order should be affirmed. *See Murphy v. International Robotics Systems, Inc.*, 766 So.2d 1010 (Fla. 2000); *Florida Emergency Physicians-Kang and Associates, M.D., P.A. v. Parker*, 800 So.2d 631 (Fla. 5th DCA 2001); *Ward v. Ward*, 742 So.2d 250, 255 (Fla. 1st DCA 1996).

Summary judgment is available in attorney disciplinary proceedings. *See The Florida Bar v. Cosnow*, 797 So.2d 1255, 1258 (Fla. 2001); *The Florida Bar v. Miravalle*, 761 So.2d 1049 (Fla. 2000); *The Florida Bar v. Daniel*, 626 So.2d 178 (Fla. 1993). Appellate courts review summary judgment orders de novo with all facts and inferences to be resolved in favor of the party opposing the summary judgment. *Id*.

The Bar argues that summary judgment was improper because Trazenfeld

---

[12] Trazenfeld's Motion for Summary Judgment requested a "dismissal" of the Bar's Complaint and, in fact, the Referee's Order "dismisses" the Bar Complaint. However, to the extent that Trazenfeld earlier had answered the Bar's Complaint, the practical effect of his Motion for Summary Resolution was entry of summary judgment. The record reflects that the Referee considered evidence outside of the pleadings, including the deposition testimony of the Bar's expert, William Scarrit, Esq., Monika Lent and Trazenfeld. Accordingly, the Referee's Order is before this Court on a summary judgment standard.

did not offer "sworn evidence of any kind including affidavits." (Initial Brief at 21). However, Fla.R.Civ.P. 1.510 provides that a party may move for summary judgment "with or without supporting affidavits... ." Fla.R.Civ.P. 1.510(a), (b). In this case, there was no requirement that Trazenfeld support his Motion for Summary Resolution with affidavits or any other sworn testimony. Nonetheless, Trazenfeld did present the Referee with the deposition testimony of the Bar's expert, William Scarritt, Esq. (Bar's Appendix "C," Exhibit "D").

The Bar further argues that Trazenfeld's Motion for Summary Resolution "merely created a mystery," and that "[m]any reasonable inferences existed which required denial of the Motion for Summary Judgment." (Initial Brief at 24, 8). The Bar raises a number of points that *might have* demonstrated that issues of fact existed to preclude summary judgment, i.e., "Why the Bar re-opened the case was unknown," "Whether the previous facts were identical was not established,"[13] Whether the same party in interest provide the reason for reopening was unknown." (Initial Brief at 24). However - - again - - the Bar raises these issues for the first time on appeal. The record demonstrates that these issues were *not* raised before the Referee.

---

[13] The Referee had the record of *both* proceedings before her. Moreover, as discussed *supra*, in order to bring some finality to proceedings, res judicata bars the relitigation of issues that *could have been* raised in the first proceeding.

The Referee's Order should not be reversed on the basis that summary judgment was not appropriate because issues of fact existed. Summary resolution was appropriate. The Referee's Order should be affirmed.

CONCLUSION

For the foregoing reasons, the Referee's Order should be affirmed.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the above and foregoing was faxed and/or mailed this _____ day of March, 2002, to: **RANDOLPH M. BROMBACHER**, Assistant Staff Counsel, 444 Brickell Avenue, Suite M-100, Miami, FL 33131; **KATHI KILPATRICK**, Assistant Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Talahassee, FL 32399-2300; and **PATRICIA ETKIN**, Co-Counsel for Respondent, 8181 West Broward Boulevard, Suite 262, Plantation, FL 33324-2049.

STEPHENS LYNN KLEIN LACAVA
HOFFMAN & PUYA
Co-Counsel for Respondent
9130 South Dadeland Boulevard,PH II
Two Datran Center
Miami, FL 33156
Telephone: (305) 670-3700
Facsimile: (305) 670-8592

By: _____
ROBERT M. KLEIN
Fla. Bar No. 230022
MARLENE S. REISS
Fla. Bar No. 864048

CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that, in compliance with Fla.R.Civ.P. 9.210(a)(2), this Brief has been computer generated in Times New Roman 14-point font.

STEPHENS LYNN KLEIN LACAVA
HOFFMAN & PUYA
Co-Counsel for Respondent
9130 South Dadeland Boulevard,PH II
Two Datran Center
Miami, FL 33156
Telephone: (305) 670-3700
Facsimile: (305) 670-8592

By: _____
ROBERT M. KLEIN
Fla. Bar No. 230022
MARLENE S. REISS
Fla. Bar No. 864048

T:\BRIEFS\Briefs - pdf'd\00-2571_AmdAns.wpd