IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JONATHAN ISAAC ROTSTEIN,

Respondent.
_______________________________/

Supreme Court Case

No. SC01-114

The Florida Bar File

Nos. 2000-30,672(07C);
2000-32,134(07C);
2000-32,142(07C)

On Petition for Review
of
the Referee's Report
in a Disciplinary
Proceeding.

RESPONDENT'S CROSS-REPLY BRIEF

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INTRODUCTION

In this brief, JONATHAN ISAAC ROTSTEIN is referred to as either "Respondent" or "Rotstein"; The Florida Bar is referred to as either the "Complainant" or the "Bar"; and Richard B. Orfinger is referred to as "Judge Orfinger"; and all other witnesses are referred to by their respective names or surnames for clarity.

Abbreviations utilized in this brief are as follows:

"B-IB" refers to The Florida Bar's Initial Brief.

"R-AB/IB" refers to Respondent's Answer Brief and Initial Brief on Cross Appeal

"B-AB" refers to The Florida Bar's Amended Reply Brief and Answer Brief on Cross Appeal

"TR" refers to the Transcript of Proceedings before the Referee held June 26, 2001, and June 27, 2001.

“ADM” refers to an admission made by the Bar in its Reply to Respondent’s Request for Admissions.

“RR” refers to the Report of Referee dated June 27, 2001.

“B-EX” refers to Bar Exhibits introduced in the proceedings before the Referee as Complainant’s Exhibits.

“R-EX” refers to Respondent’s Exhibits introduced in the proceedings before the Referee. Note: the record reflects that the transcript of the depositions of Hood and Judge Orfinger were both marked and admitted as R-EX 13. In this Brief R-EX 13 refers to Judge Orfinger’s deposition transcript.

ARGUMENT

v.CONCLUSORY ASSERTIONS THAT RESPONDENT'S ACTIONS VIOLATED RULE 4-1.7 DO NOT ESTABLISH A RULE VIOLATION. IN THE ALTERNATIVE, VIOLATION OF RULE 4-1.7 IS DE MINIMUS AND SHOULD NOT RESULT IN THE IMPOSITION OF DISCIPLINE.

The Bar has asserted that filing a motion to enforce a mediation settlement agreement constitutes a violation of Rule 4-1.7. However, the Bar has failed to identify any personal interest of Respondent and demonstrate by clear and convincing evidence that this personal interest materially limited his independent professional judgment on behalf of Beaver and Petrucha --- elements which must be proven to establish the charged violation. Conclusory assertions of a conflict of interest do not, ipso facto, establish the existence of an actual conflict of interest. Since the Referee adopted the Bar's conclusory assertions without articulating record support for the required elements necessary to find a Rule 4-1.7 violation, it is the Referee's legal conclusions which are at issue. This Court has stated that a referee's legal conclusions are subject to broader review than findings of fact. The Florida Bar v. Beach, 675 So.2d 106, 108 (Fla. 1996).

Significantly, the subject motions contain neutral language bringing to the

court's attention the clients' refusal to finalize settlements that were voluntarily agreed to at mediation.[1] These facts support finding that Respondent took appropriate action as an officer of the court; these facts do not support a finding that Respondent acted in furtherance of his own personal interest. Because the facts and evidence do not readily "fit" within Rule 4-1.7, the Bar presumes the existence of a per se conflict. This presumption is error as is the Bar's interpretation of Rule 4-1.7 to require client consent, discharge, or withdrawal prior to filing a motion to enforce a mediation settlement agreement. Further, the Bar's statement that Ms. Petrucha was not at risk of sanction exposure is speculative in that a party may seek assistance of the court to compel endorsement/negotiation of a settlement check in order to close their file.

Moreover, although the Bar asserts that the Referee noted that

[1] The Bar's assertion that neither client willingly accepted the settlement terms. . ." [B-AB at 7] is contrary to the record, including the Bar's admissions. The Bar cannot now dispute that each client determined at mediation that it was in their best interest to execute the mediation agreement rather than proceed to trial, and that they each voluntarily executed a written mediation settlement agreement to confirm their agreement to settle. ADM 50, 52, 98, 99, and 101; TR 24, 30, and 31; R-EX 7 and R-EX 8.

Respondent's actions "caused potential injury to each client" [B-AB at 6], the Bar overlooks the Referee's specific findings with regard to the degree of potential injury:

> The possibility of potential injury to the clients from those two acts were very minimal in that I believe that the evidence clearly showed that the judge in both those cases was going to order the client to comply with the settlement that was reached in the mediation, and so that the amount of potential injury to the client from Mr. Rotstein's filing those pleadings in conflict with his client's interest is minimal, if any. There is a potential injury to the client in each one, but it's minimal. (Emphasis added). TR 479-480.

Finally, Respondent denies the existence of any record evidence that would support "a significant rule 4-1.7 violation" as asserted by the Bar. In the event that Respondent's actions are found to be violative of Rule 4-1.7, the record establishes that such violation is de minimus.[2] As noted by the Referee, "standing alone"

[2] See testimony of Judge Will, Judge Monaco and Judge Rouse, as set forth in Respondent's Statement of Facts, which demonstrates that they did not perceive the filing of a motion to enforce a mediation settlement agreement by plaintiff's attorney

an appropriate sanction for Counts II and III might be a public reprimand, or even admonishment. TR 480. However, discipline is not always warranted for a rule violation. This Court has the discretion to find a violation, without imposing any disciplinary sanction, as it did in The Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983).

VI.

RULE 4-3.3 APPLIES TO LACK OF CANDOR TO A TRIBUNAL; RULE 4-8.1(a) APPLIES TO LACK OF CANDOR IN A DISCIPLINARY MATTER. CHARGING BOTH RULE VIOLATIONS FOR THE SAME INCIDENT INVOLVING LACK OF CANDOR TO THE GRIEVANCE COMMITTEE IS MULTIPLICITOUS.

While a grievance committee may act as an "intermediate agency" of the Supreme Court of Florida, it is not a tribunal because its primary function is investigatory, not adjudicatory.[3] Rule 4-3.3

to be a clear conflict or unethical. R-AB/IB at 15-17.

[3] See Black's law dictionary which defines tribunal as "a court or other adjudicatory body" and adjudication as the "legal process of resolving a dispute; the process of judicially deciding a case."

applies to lack of candor to a tribunal, which does not include a grievance committee. The Bar clearly recognizes this distinction when it suggests that "Bar disciplinary proceedings should be given the same weight as intentional deception upon a court or tribunal pursuant to Rule 4-3.3." B-AB at 9. However, the issue raised by Respondent is not "weight"; it is applicability of a disciplinary rule. The Bar's transparent attempt to extend the reach of disciplinary rules beyond Rule 4-8.1(a), which is applicable, to also include Rule 4-3.3, which is not applicable, for the same general conduct is multiplicitous.

The Bar cites The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997) to support its position that a Rule 4-3.3 violation may be based upon making a "false statement and misleading The Bar during its investigation." However, the respondent in Corbin was charged with violating Rule 4-3.3(a)(1) (for deliberately misrepresenting

material facts to the court in a motion for summary judgment and submitting an affidavit known to be false) as well as Rule 4-8.1(a) (for misrepresentation to the Bar). Accordingly, the facts alleged in Corbin justified the rules violations charged, whereas the facts in the instant case only justify a finding that Respondent violated Rule 4-8.1(a). Moreover, the Bar cannot properly rely upon The Florida Bar v. Orta, 689 So.2d 270 (Fla. 1997) to further support its position because Orta does not involve charges of violating either Rule 4-8.1(a) or Rule 4-3.3.

VII. THE AGGRAVATING FACTOR OF BAD FAITH OBSTRUCTION OF A DISCIPLINARY PROCEEDING IS NOT APPLICABLE WHEN A RESPONDENT OBJECTS TO AN INSTANTER SUBPOENA DUCES TECUM WHICH IS THEN ABANDONED BY THE BAR.

In conferring investigatory powers upon grievance committees, this Court required that there be a proper exercise of such powers. Rule 3-3.1, Rules Regulating The Florida Bar. A respondent is not precluded from raising objections to an improper

exercise of a grievance committee's investigatory powers. In the case sub judice, Respondent objected to the Bar's instanter subpoena of August 16, 2000. Significantly, the Bar's Answer Brief does not address the right of a respondent to object to any subpoena, prior to production. Further, the Bar does not acknowledge in its Answer Brief that Respondent did promptly assert objections as well as an intention to seek court review of the subject subpoena should the Bar insist on compliance.[4] Additionally, the Bar fails to acknowledge that it confirmed to Respondent that the subpoena would not be pursued, but that the possibility of a new subpoena would be explored. A new subpoena was never issued.[5]

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[4] A respondent has a fundamental right to seek judicial review of a subpoena issued during the course of a disciplinary investigation. This Court has the authority to quash an improper subpoena. A respondent should not be penalized for objecting to a subpoena and asserting an intention to seek judicial review.

[5] Respondent disputes the Bar's assertion that the "date of the fraudulent letter's creation **remained** at issue in the final hearing." [Emphasis added] B-AB at 12. The Bar cites no record evidence to support this statement or that Respondent was questioned at any time prior to the final hearing as to when the letter was created.

It would be a manifest injustice for the Bar to obtain a grievance committee subpoena; fail to pursue an available judicial remedy (contempt) to determine whether Respondent improperly refused to comply with a subpoena; and then successfully argue "bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency" as an aggravating factor under Standard 9.22(f). If the Bar's position is accepted, the right of a respondent to ever challenge a subpoena will be eviscerated. Rather than permit the Bar to engage in legal legerdemain, this Court should send a clear message that no penalty shall be imposed for exercising the right to challenge a grievance committee subpoena. Instead, the Bar should be instructed that the proper procedure is to initiate contempt proceedings which will allow judicial review to determine the validity of a challenged subpoena.

VIII. THE BAR'S USE OF REBUTTAL TESTIMONY TO INTERJECT EVIDENCE OF UNRELATED, UNCHARGED MISCONDUCT IS IMPROPER IN ANY PHASE OF DISCIPLINARY PROCEEDINGS, VIOLATIVE OF DUE PROCESS, AND SHOULD NOT BE THE BASIS FOR ENHANCED DISCIPLINE.

The Bar's first effort to inject into this proceeding allegations of uncharged misconduct occurred at Judge Orfinger's deposition and involved an incident which is clearly unrelated to the matters set forth in the Complaint. These efforts were abandoned by the Bar upon objection by Respondent's counsel. R-AB/IB 36.

The Bar's second effort occurred early in the fact-finding phase of the final hearing, rather than solely during the disciplinary phase, as suggested by the Bar. During direct examination conducted by the Bar, Respondent was asked whether he had "ever been sanctioned by any judge for any misconduct. . . ." TR 89. In sustaining an objection, the Referee directed the Bar to "narrow the question to conduct related to something in the allegations in this case. . . ." TR 89.

Undeterred, the Bar resumed its efforts by questioning Respondent during the disciplinary phase as to whether he had ever counseled a client to lie to the court.[6] After Respondent replied, "I would say no" [TR40], the Bar immediately announced that it wanted to call a rebuttal witness; this witness was Judge Orfinger. It is noteworthy that Bar Counsel, who had previously taken Judge Orfinger's deposition, knew that Judge Orfinger believed Respondent to be "an honest attorney." R-EX 13 at 11. Bar counsel also knew that Judge Orfinger's opinion of Respondent's honesty remained unchanged, notwithstanding Judge Orfinger's disappointment about "one particular incident":

> **Well, I'm not going to say that we have never had differences of opinion. You know, we - - we've had a few differences of opinion on matters where I have called into question what I thought were poor**

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[6] The record is replete with testimony from Judge Orfinger that establishes beyond peradventure that the question posed by the Bar did not accurately reflect Judge Orfinger's characterization of Respondent's conduct. TR 426, 428, 429-431. Furthermore, the Bar's question pertained to an incident that was remote in time; Judge Orfinger testified that it occurred five or six years ago. TR 432-433.

> **judgments on his part. I don't think they related to dishonesty. I do think they - - you know, at least one instance that I'm thinking of that didn't reflect carefully thinking through the consequences of one's actions. [Emphasis supplied]**
>
> **R-EX 13 at 11.**[7]

This "one particular incident" was the unrelated, uncharged misconduct, which the Bar then presented to the Referee, under the guise of rebuttal testimony, and has asserted in these proceedings as a basis to enhance discipline. B-AB at 14.

Contrary to the Bar's assertions, Judge Orfinger's trial testimony does not "conclusively" refute Respondent's testimony [B-AB at 14] -- nor, based upon his deposition testimony, could his final hearing testimony have been reasonably expected to support the Bar's preconceived notion that Respondent had engaged in a dishonest or fraudulent act involving "counseling clients to lie to the court". Indeed, Judge Orfinger's trial testimony is consistent with his deposition

[7] At final hearing, Judge Orfinger clarified his deposition testimony on one point: he should not have referred to plural incidents because there was only one incident that reflected "some ethical concerns." TR 434.

testimony in that the "one particular incident" involving Respondent was perceived as reflecting poor judgment, rather than a lack of honesty: [8]

> **I don't think it was a lack of honesty. I think it was a -- I think it was poor judgment.**
>
> **I think that Jon's clients desperately wanted a continuance. And I think that they all talked about this and clearly did not think through the ethical ramifications of what it would look like to an outsider if you discharge your lawyer with the idea that there is a high probability that you may re-engage him in the future if you can get a continuance.**
>
> **But I don't think -- after conducting a hearing on this with the other lawyer present, with the clients present, questioning them all, and understanding that I was very unhappy, I did not come away with the idea that they sat down and carefully thought through this is how we're going to commit a fraud on the court.**
>
> **I think that it was just a case of not really thinking about it much at all, as opposed to intentionally trying to commit a fraud on the court.**

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[8] Judge Orfinger testified regarding the only incident involving Respondent which raised "some ethical concerns." TR 434, 435. This incident involved Respondent's participation in facilitating his clients' ability to obtain a continuance by withdrawing from representation with the understanding that they could at some later point then re-engage him. TR 427-428. Judge Orfinger testified that when he confronted Respondent, "to his credit, he didn't dodge the issue. He owned up to it and said, that's what we talked about; yeah, that's what we did." TR 429, 430.

TR 435-436.

Judge Orfinger's testimony does not establish either a "pattern of dishonesty" or that Respondent testified "falsely in this disciplinary proceeding" when he denied that he had counseled clients to lie to the court or denied that he had been previously sanctioned by a court for counseling clients to lie. B-AB at 14, 15. In fact, Respondent did not counsel his clients to lie to the court, nor did Judge Orfinger so testify. Further, Respondent was not sanctioned for counseling clients to lie to the court, nor did Judge Orfinger so testify. Additionally, Respondent did not engage in "fraud upon his [Judge Orfinger's] court", as asserted by the Bar [B-AB at 14], nor did Judge Orfinger so testify. Moreover, formal sanctions were never imposed by Judge Orfinger; instead, there was a suggestion made that Respondent "take care of" attorney's fees. TR 431. Significantly, the Referee did not find, nor is there any record evidence to support the Bar's assertion that Respondent testified falsely in this disciplinary proceeding.[9]

[9] As set forth in his report, the Referee found as an aggravating factor Standard 9.22 (f) (submission of false evidence, false statements, or other deceptive practices during the disciplinary process). RR at 5. The record confirms that this

It was clearly the Bar's objective to use rebuttal testimony pertaining to unrelated, uncharged misconduct, to create the "totality of circumstances" upon which to base enhanced discipline. The Bar's actions in this regard are improper and violate due process. Discipline should be based upon the totality of circumstances surrounding the misconduct charged in the Bar's Complaint, not other prior unrelated acts which the Bar alleges to be unethical.

The Bar argues that The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998) is inapplicable to the instant case because the Referee "did not make any new or additional findings of guilt on uncharged rules." The Bar further argues that Judge Orfinger's testimony was properly considered during the disciplinary phase. B-AB at 15. However, the Bar's argument is flawed. Neither Vernell nor The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999) should be interpreted as restricting due process rights to the fact-finding phase of disciplinary proceedings. There is absolutely no difference between discipline based upon

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aggravating factor was based upon the nature of the charges in Count I and not for a lack of candor in testifying at final hearing. TR 477.

findings of guilt of unrelated, uncharged misconduct, evidence of which is presented in the fact-finding phase, and discipline based upon consideration of unrelated, uncharged misconduct, evidence of which is presented in the disciplinary phase and for which there are no findings of guilt. In both instances, the result is the same: the respondent is disciplined for conduct that is not within the scope of the specific allegations in the complaint or specifically referred to in the complaint. Clearly, such a procedure is fundamentally unfair, and a constitutionally impermissible violation of due process.

Due process rights are not extinguished once a referee makes recommendations as to whether a respondent should be found guilty of the disciplinary rule violations charged in the Bar's complaint. Accordingly, Respondent urges this Court to reject the Bar's argument and reaffirm the due process principles established by Vernell and Fredericks: unless allegations of unethical conduct are either specifically referred to in the complaint or are within the scope of the specific allegations in the complaint, such allegations should not be considered by the Referee in any phase of disciplinary proceedings.

CONCLUSION

Respondent urges this Court to find Respondent not guilty of violating Rule 4-1.7 with regard to Counts II and III, and not guilty of violating Rule 4-3.3 as alleged in Count I. Respondent requests that this Court reject the Referee's recommendation of a one-year suspension, with conditions, as discipline and in lieu thereof order Respondent suspended for 10 days as a disciplinary sanction for misrepresentation that is set forth in Count I. Further, Respondent requests that payment of costs be limited to $6,021.25, as set forth in the Bar's Second Amended Affidavit of Costs.[10]

[10] Respondent objected to the Bar's Affidavit of Costs and Amended Affidavit of Costs previously submitted to the Referee by the Bar. The Bar then filed a Second Amended Affidavit of Costs reflecting costs in the amount of $6,021.25, which was not disputed by Respondent. By separate filings with this Court, Respondent has objected to the Bar's Third Amended Affidavit of Costs dated January 17, 2002, which was filed by the Bar in conjunction with the Bar's Reply Brief and Answer Brief on Cross Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Respondent's Cross-Reply Brief was forwarded by U.S. mail to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to: Elizabeth Sikora Conan, Bar Counsel, The Florida

Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314, and John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this _____ day of February, 2002.

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PATRICIA S. ETKIN
Counsel for Respondent

CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY CERTIFY that Respondent's Cross Reply Brief is submitted in Times New Roman 14-point font, proportionately spaced.

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Counsel for Respondent