IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GERALD JOHN D'AMBROSIO

Respondent.
_____/

Supreme Court Case
Nos.: SC07-1369 & SC08-256

The Florida Bar File
Nos.: 2008-50,083(15C)(OSC)
and 2007-50,946(15C)

RESPONDENT'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

At issue in this case is whether a lawyer should be disbarred on two cases that should never have been joined for resolution together. The Florida Bar purposefully delayed the prosecution of one matter to enhance the possibility of a sterner sanction being imposed in one or both cases. This is the type of misconduct that this Court has never condoned and has insisted that the Bar "turn square corners" in all of its cases. A Referee declined to dismiss one of the two disciplinary actions because of this misconduct and this ruling should be overturned.

Further, the Referee in this case has made factual findings that are not supported by the record and in fact fly in the face of uncontroverted testimony and evidence. The Bar failed to meet its burden of proof and the Referee ignored that fact and even allowed (and assisted) Bar counsel to introduce, during Bar counsel's rebuttal argument, information that would fill a glaring whole in the Bar's prosecution (the failure to introduce any evidence of the law in Illinois on the unlicensed practice of law) that was revealed (well after the Bar had rested) during defense counsel's closing argument.

Notwithstanding the lack of evidentiary support, the Referee has found that the Respondent wrote one letter where he held himself out as an attorney post his suspension in Florida and that the Respondent assisted a longtime friend who had

an Illinois judgment against him due in part to the malpractice of an Illinois attorney. It is the Bar's position, as adopted by the Referee, that these two matters warrant disbarment. At all times material to this second issue, the Respondent was licensed to practice law in Florida. The Respondent, in this appeal, has demonstrated why disbarment is an inappropriate sanction and that based upon the nature of the facts of this case and existing precedent, no more than a public reprimand should be imposed.

ARGUMENT

I. THE REFEREE COMMITTED ERROR BY DENYING RESPONDENT'S MOTION TO DISMISS CASE NO. SC08-256.

In the Initial Brief, the Respondent carefully set forth the rationale for why the Referee should have dismissed Supreme Court Case No. SC08-256 due to the Bar's improper attempt to "stack" disciplinary actions. See *The Florida Bar v. Rubin*, 362 So. 2d 12, 16 (Fla. 1978). The simplified version of the facts are that the Bar had two distinct cases under review in the Fort Lauderdale Office of The Florida Bar and that rather than consolidate the cases the Bar purposefully chose to delay the prosecution of one matter (the older of the two cases)[1] while it tested the waters on its first case and only on the eve of trial of the first matter did the Bar file its complaint in the second case. This was done, in the Respondent's view, to improperly influence the Referee who found out about the second case after the contempt case was tried and while he was deliberating his ruling on the merits of that case.

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[1] In the Initial Brief the Respondent referred to Supreme Court Case No. SC07-1369 as the "contempt case" as this matter was initiated via a Petition for Rule to Show Cause that was directly filed with the Court on July 20, 2007. The Respondent will continue to use that designation herein and will refer to Supreme Court Case No. SC08-256 as the "grievance case" as that case was opened in January 2007, a full six months prior to the contempt case, and was pending before a grievance committee for eleven months with no record activity for approximately six months. Probable Cause was found in the grievance case in November 2007 but the Bar purposefully chose not to file its complaint until two plus months later when it could affect the resolution of the contempt case.

In its Answer Brief the Bar fails to justify its improper decision to withhold the timely processing of the grievance case and instead advance the newer case, the contempt case. Instead the Bar argues that a colloquy between trial counsel and the Referee just prior to closing argument found at page 96 of the May 9, 2008 trial transcript solves this issue *in toto*. See Answer Brief at page 13. However, a review of the comments made by trial counsel reveals that the decision to argue sanction as to both cases was understood to be the process that would be followed at the end of the trial of the grievance case. While not contained within the trial transcript or other transcript in the record, the decision to hold off ruling on the contempt case until after the trial of the grievance case, was made prior to the trial.[2] Admittedly, when the Referee made the decision, he did inquire how the Respondent desired to proceed with the resolution of both matters and the Respondent who was now faced with a Hobson's choice opted to have a Report of Referee that addressed both cases together. However, the Respondent, but for the Bar's misconduct and delay, would not have been required to pick between the potential for two distinct sanction recommendations[3] or one.

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[2] This was done either at an emergency telephone hearing scheduled by the Referee upon his receipt of the grievance complaint or at the conclusion of the hearing on the motion to dismiss the grievance case.

[3] Presumably the first sanction recommendation could have been used to enhance any sanction being recommended in the second case.

The Bar, in its Brief at page 14, also tries to misdirect the Court's attention away from its failure to timely prosecute the grievance case through the filing of the complaint by attempting to argue that the Court's decision making process on the contempt case is to blame for the two cases being stacked. However, it is the Bar that sought to divide its prosecution into two distinct cases and hold one in reserve until the right moment in time. This is exactly the evil that was not condoned in *Rubin*. As such, the Referee committed error in not dismissing the contempt case.

II. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION OF GUILT ARE NOT SUPPORTED BY THE RECORD OR CLEAR AND CONVINCING EVIDENCE.

The Respondent's Initial Brief fully discusses why the Referee's findings of fact and his ruling on ethical violations are not supported by the record in this case and that the Bar failed to produce evidence of a clear and convincing nature to support its claim of unethical conduct in both cases. The majority of the Bar's argument in response to this issue is to simply contend that the Bar presented credible evidence to support its factual allegations. However, as is pointed out in the Initial Brief, the Bar failed to present any evidence on certain key elements of its case[4] and some of the factual findings (while true) do not support a finding that

[4] The Bar, in its Brief, acknowledges that it was not seeking to overturn the factual findings on the Folsom issue and fails to provide any support for the

the Respondent practiced law in violation of the Supreme Court Order of Suspension. For example the Bar continues to maintain that the mere fact that the Respondent chose to maintain an office to conduct non-law related business and that office happened to be the same location as his prior law office equals the practice of law in violation of the Supreme Court Order of Suspension. The Bar has advanced no case law or other authority that a suspended lawyer can not continue to use his prior office to conduct non-law related business. In fact the Bar can not do this as its jurisdictional reach only concerns the practice of law and it has no authority to regulate any business outside the practice of law.

The Bar also attempts to turn another innocuous fact into a grave violation. There is uncontroverted testimony in the record that the Respondent was asked by Dr. Bolera to allow the doctor to use the Respondent's office as a mailing address for the doctor's *pro se* Illinois malpractice action as the doctor traveled frequently and wanted to make sure that important mail reached him. What has the Bar presented to counter this testimony – nothing. They chose not to call Dr. Bolera, admitted that they never even contacted Dr. Bolera and instead decided that it is easier just to claim that the Respondent is not being truthful, rather than have called the witness that would have drove a dagger into their argument that the Respondent was practicing law in Illinois without a license to do so.

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allegation of misrepresentation regarding the grievance case. As such, for all practicable purposes, the Bar has conceded these points.

The Bar, in its Brief, also continues its claim that the alleged practice of law in violation of the Supreme Court Suspension Order is repetitive of the violations found in the earlier suspension case. See *The Florida Bar v. D'Ambrosio*, 946 So. 2d 977 (Fla. 2006). However, as is pointed out in the Initial Brief, the Respondent was found not guilty of the practice issues[5] and was only found to have failed to timely file his compliance affidavit and to timely notify two clients about the suspension order. *Id.* The attempt to piggy back on a previous finding of fact, which was overturned, is clearly inappropriate.

The only other argument advanced by the Bar that requires a response concerns the Bar's fundamental failure to introduce any evidence of the law in Illinois concerning the unlicensed practice of law in order to establish a violation of R. Regulating Fla. Bar 4-5.5(a) [A lawyer shall not practice law in a jurisdiction other than the lawyer's home state, ***in violation of the regulation of the legal profession in that jurisdiction,*** or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so. (emphasis supplied)]. In fact, the Bar did not even try to talk about the Illinois regulations until its closing rebuttal argument as it needed to counter the Respondent's closing argument wherein the Bar's failure to introduce any evidence on this point should

[5] To be precise, the Court found that "(i)n this case, the referee's report and the record do not sufficiently establish that D'Ambrosio clearly violated this Court's order of suspension by appearing in court." *Id.*

equate to a not guilty finding on this alleged rule violation. It was improper for the Bar to seek to introduce evidence of the Illinois regulations after the Bar had rested and it was even more improper to do so during its rebuttal argument. Nonetheless, the Referee took judicial notice of the Illinois regulation.

The Bar in its Brief asserts that *The Florida Bar v. Tobkin*, 944 So. 2d 219 (Fla. 2006) stands for the proposition that a Referee can take judicial notice of certain matters. This reliance is misplaced regarding the facts of this case as the Referee in *Tobkin* took judicial notice of a Fourth District Court of Appeal's decision during the Bar's case in chief and not during rebuttal argument. Further, the very statute cited in *Tobkin* and mentioned in the Bar's Brief does not address judicial notice of another state's regulatory law. As the Respondent noted in his Initial Brief when a trial court takes judicial notice of a matter on its own initiative, pursuant to Sec. 90.204(1), Fla. Stat. the opposing party must be afforded a reasonable opportunity to present information relative to the propriety of the taking of judicial notice. The Bar's Brief fails to address this argument.

The Notice requirement in Fla. Stat. §90.204(1) is very clear as to the procedure to be taken when judicial notice is requested by opposing counsel or taken by the court on its own volition. To merely say that judicial notice was taken in a decision with no notice as required is a denial of fundamental due process as it

prevents the party against whom the Notice is asserted to answer or dispute the finding or to confront the accusations against him.

Notwithstanding this improper review of evidence and statutes by the Referee and the Bar, the fact is that judicial notice is governed under the Florida Evidence Code and is limited to specific categories of generally known matters. Pursuant to Fla. Stat. §90.204(1) one takes judicial notice of facts which are "open and notorious," involve "common notoriety" or are "commonly known." Illinois law is not commonly known in Florida. Further, the Florida Evidence Code contemplates that the request for judicial notice and judicial notice of a matter on its own initiative under Fla. Stat. §90.204(1) must afford the opposing party a "reasonable opportunity to present information relevant to the issue." *Craig v Craig*, 982 So2nd 724, (Fla. 1st DCA 2008).

The Bar has decided to rely upon the testimony of two attorneys from foreign jurisdictions, both with significant adverse and monetary interest in this case. Notwithstanding the assertion in the Bar's Answer Brief, the Respondent's letter to Mr. Kurtz did not refer to any party as "clients." No legal issues were discussed; only factual issues regarding an attempt by Mr. Kurtz's client to secure payment from a company that the Respondent had a financial interest in at that time. The letter should be taken in its entirety. As to Mr. Pcolinski, the Bar has

elevated this attorney to expert status, but if the pro se complaint submitted into evidence by the Bar is believed, then by any definition Mr. Pcolinski committed malpractice at worst and may have violated ethical rules by failing to properly represent his client (Bolera) by failing to answer discovery requests to the extent that damages were assessed with all mitigating evidence being bared by Mr. Pcolinski's negligence. Additionally, the finding by the Referee that the Respondent represented `Illinois clients' as set forth in the Report is unsupported by any evidence as there was no testimony concerning the residence of any defendant in the underlying matter. By failing to critically look at the evidence and to render a Report on speculation and innuendo demonstrates the flaws in the Referee's decision.

The Bar has failed to present clear and convincing evidence of guilt for either case before the Court and therefore the Referee's Findings of Guilt should be reversed.

III. DISBARMENT IS UNREASONABLE AND CONSTITUTES AN EXCESSIVE SANCTION.

The Respondent has fully briefed the sanction issue in his Initial Brief, inclusive of demonstrating the case law raised by the Florida Bar does not support the conclusion that disbarment is warranted on the facts of this case. However, a

few small points need to be raised concerning the arguments advanced by the Bar in its Answer Brief.

At page 25 of its Brief the Bar makes an incorrect claim that there is a "presumption of disbarment under existing case law." However, the Bar fails to cite to the case(s) supporting this proposition. The Respondent would readily concede that the Court has not hesitated to disbar a lawyer who systematically violates an order of suspension by continuing to go to court, file pleadings or hold themselves out as an attorney. However, these cases do not state that disbarment is presumed and even if they did the facts of this case (writing one letter to a California lawyer while suspended in Florida but on a matter that involved the Respondent's personal business interests) pale in comparison to the facts in these disbarment cases. The referee has ignored the simple fact Respondent in both cases advised the hiring of local counsel, making it clear that Respondent was not acting on behalf of any client.

The Bar, also at page 25 of its Brief, continues its argument that the violations in this case are "the same kind of misconduct" as that found in his prior case. As is explained above and in the Initial Brief, this argument is factually incorrect when one carefully reads the facts of the Courts prior suspension case.

This Court has consistently held that it has broad discretion when reviewing a sanction recommendation because the responsibility to order an appropriate

discipline ultimately rests with the Supreme Court. See *The Florida Bar v. Thomas*, 698 So. 2d 530 (Fla. 1997). It is respectfully submitted that the Court should exercise this discretion by rejecting the draconian sanction of disbarment and instead impose no more than a public reprimand.

CONCLUSION

The Respondent in this case did not violate this Court's Order of Suspension by engaging in the practice of law while suspended. If the Court finds otherwise it is clear that this practice was limited to one letter to an out-of state attorney regarding a matter that related to the Respondent's personal business interests. Further, the Respondent in this case did not engage in the unlicensed practice of law in Illinois. If the Court upholds the Referee, it is clear that such practice was extremely limited. While the Respondent verily believes that he should be found not guilty of both cases, they are clearly not the type of cases that warrant the disbarment recommended by the Referee.

WHEREFORE the Respondent, GERALD JOHN D'AMBROSIO, respectfully requests that this Court find him not guilty of the Bar's complaints, and in the event that the Court sustains the Referee's recommendation of guilt, impose no more than a public reprimand as an appropriate sanction and grant any other relief that this Court deems reasonable and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via regular U.S. mail on this ____ day of December, 2008 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to Kenneth Marvin, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief or the e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

Respectfully submitted,

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