IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL VINCENT LAURATO,

Respondent.
_____/

CASE NO.: SC09-1953
TFB NO.: 2007-11,274 (13D)

CROSS ANSWER/REPLY BRIEF OF THE FLORIDA BAR

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SUMMARY OF THE ARGUMENT

The Referee's recommendation of guilt as to Rule 4-8.4(d) (conduct prejudicial to the administration of justice) should be adopted by this Court. Respondent's argument against the Referee's finding is based on a misinterpretation of the rule. Dishonesty to a court is not protected by the First Amendment.

The Referee's recommendation of guilt as to Rule 4-8.4(c) should also be adopted by this Court. The record contains substantial, competent evidence to support the Referee's finding, so this Court should not re-weigh the evidence presented. The intent requirement for a finding of guilt was met. Respondent's argument to the contrary is based on a misinterpretation of this Court's precedent.

The Referee's award of costs was made in accordance with Rule 3-7.6(q), was within the permitted scope of the Referee's discretion, and was in conformance with the policy preferences previously expressed by this Court. Respondent's efforts to impose new requirements on the Bar, beyond those contained in the Rules, should be rejected.

In reply, the Referee's recommended sanction is insufficient for the misconduct found by the Referee. Respondent's efforts to have this Court make new findings of mitigation should be rejected by this Court. Respondent's

argument that the most severe sanction permissible for his violations of Rule 4-8.4(c) and Rule 4-8.4(d) is an admonishment for minor misconduct is wholly without legal support. The Referee's recommended sanction of a public reprimand for false testimony under oath is outside the range of prior discipline for similar misconduct. This Court should impose a 60-day suspension.

ARGUMENT

I. The Referee's recommendation of guilt for conduct prejudicial to the administration of justice should be upheld; Respondent's First Amendment rights do not include the right to give dishonest testimony.

Respondent argues that the Referee's recommended finding of guilt for violating Rule 4-8.4(d) (conduct prejudicial to the administration of justice) must be rejected by this Court because Respondent claims his misconduct was not related to the practice of law. Respondent's argument is based on a misinterpretation of the rule; this Court should affirm the Referee's recommendation.

Rule 4-8.4(d) prohibits an attorney from engaging in "conduct in connection with the practice of law that is prejudicial to the administration of justice." Respondent claims that his misconduct occurred in a judicial proceeding in which he was a party, not an attorney, so his dishonest testimony in that proceeding could not have violated Rule 4-8.4(d). This Court has already rejected a similar argument in *Florida Bar v. Mogil*, 763 So.2d 303 (Fla. 2000).

Rule 4-8.4(d) was modified in 1994 to add the requirement that the misconduct occur "in connection with the practice of law." *In re Amendments to Rules Regulating The Florida Bar*, 624 So.2d 720, 722 (Fla. 1993). The purpose of this modification was to prevent the rule from unduly burdening the First

Amendment rights of attorneys. *Id*. at 721; *Mogil*, 763 So.2d at 311. In *Mogil*, the attorney argued that Rule 4-8.4(d) did not apply because the misconduct occurred during his judicial removal proceedings. *Id*. Mogil's misconduct, like Respondent's, involved dishonesty during those proceedings. *Id*. Because Mogil's conduct involved dishonesty, this Court held that Rule 4-8.4(d) was violated, stating, "[a]s Mogil certainly had no First Amendment right to be dishonest in his judicial removal proceedings, his misconduct in this regard falls outside the scope of the conduct intended to be protected by the language added to the rule in 1994[.]" *Id*. Similarly, Respondent had no First Amendment right to give dishonest deposition testimony in his civil case and is therefore not protected by the language of the 1994 rule amendment. In *Mogil*, this Court quoted an opinion from another jurisdiction which summarizes the correct analysis regarding an attorney's claim that dishonest conduct could be outside the scope of Rule 4-8.4(d):

> We reject this argument out of hand because, simply stated, an attorney has no First Amendment right to lie to a court … Even if an attorney's statement of a legal position may be entitled to First Amendment protection, a deliberate misstatement of fact to a court surely is not protected, just as obscenity or "fighting words" are not protected. We know of no case that holds otherwise; indeed, we would be astonished to find one.

Id., quoting *In re Benjamin*, 698 A.2d 434, 441 (D.C. 1997)(footnotes omitted).

This proceeding should not be that astonishing case.

This Court has also sanctioned other attorneys for violating Rule 4-8.4(d) outside the direct context of an attorney acting in court for a client. For example, in *Florida Bar v. Von Zamft*, 814 So.2d 385 (Fla. 2002), this Court sanctioned an attorney under Rule 4-8.4(d) for having *ex parte* communication with a judge. In *Von Zamft*, an assistant state attorney was friends with a judge who was presiding over a capital case. *Id*.at 387. The attorney prosecuting the case requested a continuance of the trial, which the judge indicated she was inclined to deny. A few weeks later, the judge took Von Zamft to lunch. At lunch, Von Zamft stated that he needed to speak to the judge about the capital case and, despite being advised by the judge not to do so, persisted in trying to convince the judge to grant the continuance. *Id*. This Court upheld the referee's recommendation of guilt as to Rule 4-8.4(d), notwithstanding the fact that Von Zamft was not the attorney handling the case and was acting in his capacity as a friend of the judge, not as an attorney, when he engaged in his misconduct. *Id*. at 389.

Von Zamft is also significant because this Court held that conduct need not have actually caused prejudice to the administration of justice in order to be sanctionable under Rule 4-8.4(d); the misconduct need not have been successful in

order to be improper. *Id*. In this proceeding, Respondent argues that no one was misled by his dishonest testimony. That his testimony was not credible does not excuse Respondent's dishonest testimony.

Respondent relies on *Florida Bar v. Brake*, 767 So.2d 1163 (Fla. 2000), in support of his argument that he did not violate Rule 4-8.4(d). This reliance is misplaced. *Brake* involved an attorney who was acting as personal representative of her mother's estate when she failed to negotiate in good faith with a potential purchaser of assets of the estate and when she filed a mortgage foreclosure action against the property. *Id*. at 1168. This Court rejected the recommendation that the attorney be found guilty of violating Rule 4-8.4(d) because of the language added in 1994. *Id*. The Rule 4-8.4(d) conduct in *Brake* related only to breaches of her fiduciary duties as personal representative, not dishonesty, and certainly not dishonesty to a court. Accordingly, *Mogil*, not *Brake*, is the appropriate precedent for this proceeding, and the Referee's recommendation of guilt for violating Rule 4-8.4(d) should be adopted by this Court.

II. The Referee's recommendation of guilt for conduct involving dishonesty should be upheld.

A. The record contains substantial competent evidence to support the Referee's recommendation of guilt.

Respondent argues that this Court should reject the Referee's finding of guilt

as to Rule 4-8.4(c). Because the Referee's finding is supported by substantial, competent evidence, this Court should not disturb that recommendation. *Florida Bar v. Shoureas*, 892 So.2d 1002 (Fla. 2004).

First, Respondent argues that the Referee failed to consider the context of the testimony in question. Specifically, Respondent argues that the testimony in question was limited to construction contracts, not to all contracts, and was thus truthful testimony when understood in the correct context. The deposition transcript, however, provides the best evidence of the context in which the testimony was given. After making the false statement in question, "[n]ever been sued for breach of contract," Respondent immediately stated, "[a]nd I want to tell you that I enter into thousands of transactions a year." TFB Exh. 3, p. 106. The next question asked related directly to the context in which Respondent as witness understood his own statement to have been made. "What kinds of transactions do you enter into, sir?" TFB Exh. 3, p. 106. Respondent answered, "[a]ll kinds," then, after further prompting, explained:

> I buy cars. I buy property. You see the property I have. It's like everybody else. I do business with hundreds of people through my businesses, through my law practice, my personal entity. I've renovated properties. Never had a problem. Paid.

TFB Exh. 3, p. 106. Thus, the deposition transcript itself provides the best

evidence that the context of Respondent's testimony was not limited to construction contracts. That statement did refer to construction contracts, but also referred to the purchases of cars and property, to transactions with his businesses, and to transactions with his law firm. The Referee was correct in relying on this evidence to understand the scope of Respondent's testimony, rejecting Respondent's later testimony attempting to limit it.

Respondent effectively admits that the evidence does not support his stated context for the testimony because he supplements the evidence in order to support his argument. Respondent literally inserts new language in brackets into his "quotation" of the deposition transcript to limit the scope of both his answers and opposing counsel's questions. Cross-Petitioner's Answer/Initial Brief, p. 18. The Referee understandably did not rely on this language, which was not in the transcript and which was apparently created by Respondent solely for his brief, long after the evidentiary hearing. Such after-revised evidence does not undermine the correctness of the Referee's findings.

Furthermore, the Referee also had the benefit of the testimony of witnesses, both with regard to the substance of that testimony and the

credibility of that testimony. Respondent argues that the Referee should have accepted his testimony and the testimony of his attorney regarding the context of the deposition testimony, notwithstanding the fact that the hearing testimony contradicted the deposition transcript. The Referee, having the opportunity to observe the demeanor of the witnesses, was able to assign an appropriate level of weight to that testimony based on the witnesses' credibility (or lack thereof). The Referee also had the opportunity to observe Respondent in the act of giving testimony and his lack of forthrightness in doing so. The Referee was entitled to rely on Respondent's behavior and demeanor at the final hearing in making his factual determinations.

Finally, Respondent argues that the Referee's recommendation of guilt should be rejected by this Court because his testimony was "literally true." First, even a statement which is literally true can be misleading and, therefore, sanctionable under Rule 4-8.4(c). In *Florida Bar v. Forrester*, 818 So.2d 477 (Fla. 2002), for example, the attorney hid an exhibit at a deposition. When opposing counsel asked about the exhibit, the attorney responded, "I'm not seeing it." *Id*. at 481. The referee found the statement to have been literally true, but to have been misleading; the attorney knew

where the document was when asked. *Id.* This Court upheld the referee's finding of guilt under Rule 4-8.4(c). *Id.*

Respondent testified that he entered into thousands of contracts per year, both individually and through his businesses and his law firm. He unequivocally stated that he had "never been sued once for breach of contract," and that he "never had a problem." The Florida Bar presented evidence of suits against Respondent prior to the deposition in question. TFB Exh. 4-11. In his brief, Respondent attempted to distinguish each of these prior lawsuits in an effort to prove that his statement was literally true. Even if it were literally true, it would still have been misleading, like the statement in *Forrester*.

But Respondent's testimony was not literally true. One example is sufficient to demonstrate the falsity of Respondent's testimony. At the time of the deposition, Respondent had been previously sued in *Laurato v. Zom Residential*. TFB Exh. 11. The Counterclaim filed in that litigation is clearly based on a breach of contract; copies of the contract are referenced as being attached to the Counterclaim. TFB Exh. 11. Respondent claims that this did not constitute being "sued for breach of contract." Respondent provides no explanation for why a counterclaim does not constitute being sued. In fact, once Respondent initiated a lawsuit on a related

matter, the defendant could **only** sue Respondent by means of a counterclaim. Fla.R.Civ.P. 1.170(a). In that counterclaim, Respondent was personally sued for breach of contract; Respondent's deposition testimony was false.

B. The evidence supports the Referee's finding of intent required to support a finding of guilt under 4-8.4(c).

Respondent argues that he should not be found guilty of violating Rule 4-8.4(c) because the Bar failed to demonstrate the required intent. Respondent's argument is based on a misunderstanding of the intent that must be shown.

In order to support a finding of guilt under Rule 4-8.4(c), intent must be shown. The Bar only needs to show, however, that the conduct in question was intentional or knowing. *Florida Bar v. Fredericks*, 731 So.2d 1249, 1252 (Fla. 1999). The evidence presented to the Referee supports the finding that Respondent's false testimony was deliberate or knowing conduct; nothing in the record suggests the misrepresentations were negligent. The Referee not only had the transcript of the original deposition on which to rely in making his finding, but also had the opportunity to observe Respondent's testimony at the final hearing. Having the opportunity to observe Respondent giving similarly evasive testimony and to observe the willful nature of such evasion, as noted in his Report, the Referee had ample support for his conclusion that Respondent's deposition

testimony was deliberate.

Ironically, Respondent's own brief supports the Referee's findings with regard to intent. Respondent argues that imposition of sanctions for his misconduct would infringe on his First Amendment rights. Cross-Petitioner's Answer/Initial Brief, pp. 53-59. Specifically, Respondent argues that the Referee's finding would burden attorneys' First Amendment rights to engage in, "[r]hetorical hyperbole, verbal abuse, name calling, ridicule, jest, satirical statements and parody[.]" Cross-Petitioner's Answer/Initial Brief, p. 54. While attorneys maintain the right to engage in such conduct in their ordinary private affairs, neither attorneys nor lay members of the public have the right to engage in such conduct while giving sworn testimony in a judicial proceeding. Permitting attorneys to disregard their obligations to testify truthfully would undermine the judicial system. *Dodd v Florida Bar,* 118 So.2d 17 (Fla. 1960). Having sworn to testify truthfully, Respondent was obligated to do so, not to make false statements in order to express his scorn for opposing counsel. Such purposes are not only impermissible in the deposition context, but they only explain motive, not intent. *See, e.g., Fredericks*, 731 So.2d at 1252. To the extent Respondent chose to give false testimony based on one of these motives, that fact merely confirms that the testimony was given

intentionally.

III. The Referee's award of costs was within his discretion and should be affirmed by this Court.

Respondent has challenged the award of costs in this proceeding, claiming that the cost award lacked a basis in the record. Rule 3-7.6(q)(3) provides for the award of costs to the Bar in any proceeding in which the Bar is successful "in whole or in part." Based on the Referee's recommendation of guilt as to Count II, the Bar was successful in this proceeding and should be awarded costs.

Rule 3-7.6(q)(5) provides the procedures for the seeking of costs. Specifically, a party seeking costs is required to file a motion seeking costs, along with a statement of costs incurred. The Bar filed the required motion and statement. Respondent seeks to impose the requirements for the award of costs in a civil action in place of the requirements of Rule 3-7.6(q). The Bar should not be subjected to the new requirements Respondent seeks to impose, but only the requirements imposed by this Court in the Rules. Having complied with Rule 3-7.6(q)(5), the Bar should have the Referee's award of costs upheld.

Respondent objects to the award of costs in part because the Referee did not recommend a finding of guilt as to Count I. As Respondent acknowledges, the Bar voluntarily reduced its claim for costs by not seeking investigative costs associated

with Count I. Had the Bar sought those costs and the Referee awarded them, such award would have been appropriate under Rule 3-7.6(q). *Florida Bar v. Kassier*, 730 So.2d 1273, 1276 (Fla. 1998). Given the choice between imposing costs on an attorney who has misbehaved and on the rest of the members of the Bar who have not misbehaved, this Court prefers that costs be taxed against the misbehaving member. *Id*. Nevertheless, Respondent seeks to have the entire cost awarded rescinded, in contravention of this Court's policy. This Court will not review an award of costs absent an abuse of discretion, such as the awarding of costs to a losing party. *Florida Bar v. Williams*, 734 So.2d 417, 419-20 (Fla. 1999). The Referee's award of costs was well within the discretion afforded by Rule 3-7.6(q) and should be adopted by this Court.

IV. Reply: The Referee's recommended sanction is inadequate for the misconduct at issue.

A. Respondent's efforts to add new mitigating factors after the sanctions hearing should be rejected.

In his Initial Brief on Cross-Petition, Respondent argues for two additional factors which he believes should be considered in mitigation which were not presented to the Referee. Respondent provides no explanation for why these mitigating factors, and any evidence supporting them, could not have been presented to the Referee and, thus, should be considered by this Court. This Court

should reject Respondent's efforts to add new issues. In the event this Court concludes Respondent's new issues should be considered, this Court should remand the case to the Referee so that evidence can be presented regarding these new issues.

Respondent argues that he should not be disciplined for his misconduct because of the mitigating factor of "unreasonable delay" by the Bar. In support of this contention, Respondent has offered supplemental evidence, some of which this Court has accepted for filing. Cross-Petitioner's Notice of Filing, Exhibits 1a,1b, and 1c. Respondent only offered supplemental evidence to support one of the three elements of the mitigating factor; Respondent has not and, the Bar contends, could not provide evidentiary support for the other two elements of the relevant mitigating factor.

The relevant mitigating factor is set forth in Standard 9.32(i) of the Florida Standards for Imposing Lawyer Sanctions which identifies as a mitigating factor, "unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay[.]" Respondent has supplemented the record with evidence related to the timing of receipt of the initial

complaint by The Florida Bar and the date probable cause was found by the Bar, in an effort to show the Bar delayed unreasonably. Respondent has not shown, however, any specific prejudice caused by the delay. The Bar contends that, if an evidentiary hearing were conducted on the matter, Respondent would be unable to make such a showing.

Respondent has also failed to make a showing regarding whether he substantially contributed to any delay. While proving a negative is inevitably problematic, because Respondent did not raise this issue before the Referee, the Bar had no opportunity to present evidence to demonstrate the extent of Respondent's contribution to the delay. Had the issue been raised at the sanctions hearing, the Bar would have had an opportunity to present evidence regarding whether Respondent requested that the Bar delay its consideration of the matter until the resolution of pending civil litigation on the same matter or whether Respondent contributed to the delay by bad faith obstruction of the process. Respondent has provided no explanation for why this Court should permit this new issue to be raised and considered after the close of evidence.

Related to unreasonable delay, Respondent argues that he should be excused from any sanction based on the precedent of *Florida Bar v. Rubin*, 362 So.2d 12

(Fla. 1978). In *Rubin*, the Bar, in contravention of the then-existing rules regarding confidentiality, issued press releases regarding an ongoing disciplinary matter, which this Court deemed an "inexcusable" breach of those rules. *Id*. at 16. No evidence in the record supports a remotely similar finding in this proceeding.

Respondent also argues that he should not be sanctioned for his misconduct because the original grievance was filed for an improper purpose – specifically, an opposing party in a civil proceeding was allegedly seeking an advantage in that proceeding. First, even if proven, such an assertion is not a basis for mitigation. It is not listed as a mitigating factor under the Standards and undersigned Bar Counsel is unaware of this Court in prior cases evaluating the intent and motives of the original grievant. Attorney discipline is intended to protect the public and regulate the conduct of lawyers; it is not intended to regulate the conduct of parties who find themselves involved in civil litigation against lawyers.

Furthermore, the evidence does not support any interference between the civil litigation and this disciplinary proceeding. The evidence at the final hearing showed that the civil case had already settled. March 16, 2010, Transcript, p. 139. The Bar's actions in pursuing discipline in this matter could not possibly have been related to a civil action which was already concluded. Furthermore, although

Respondent argued to the Referee that the Respondent's misconduct was explained in part by the actions of opposing counsel, there was no evidence presented regarding the purposes of the actual person who filed the initial grievance, Barbara Crocker. Cross-Petitioner's Notice of Filing, Exhibit 1a. Regardless of what such evidence might show, permitting attorneys to engage in misconduct without sanction in order to punish members of the public would be a perversion of the attorney disciplinary system. This Court should reject the additional mitigating factors urged by Respondent.

B. Relevant authority requires a suspension for misconduct involving dishonesty.

Respondent argues that, if any discipline is warranted, the most severe permissible sanction for his dishonesty under oath would be an admonishment for minor misconduct. Respondent cites no case law for this proposition (nor could he) but instead bases his argument on the incorrect application of the Florida Standards for Imposing Lawyer Sanctions. Relevant authority requires a much more severe sanction.

The definition of minor misconduct provided in the Rules specifically prohibits such a finding in cases involving, "dishonesty, misrepresentation, deceit, or fraud on the part of the respondent[.]" Rule 3-5.1(b)(1)(E). Although

Respondent claims that he was not found guilty on the more serious charges of the complaint, Respondent was, in fact, found guilty of violating Rule 4-8.4(c), which is an extremely serious violation. *Dodd*, 118 So.2d at 19. Furthermore, Respondent committed this violation in sworn testimony for a judicial proceeding. Imposing a mere public reprimand or an admonishment for such serious misconduct would not appropriately convey to Respondent or to other attorneys the seriousness of Respondent's offense.

Respondent relies on Section 5.1 of the Standards to support his argument for an admonishment, specifically Standards 5.12 and 5.13. Section 5.1 of the Standards applies to criminal conduct by attorneys; the relevant section for dishonest conduct by attorneys is Section 6.1. In that section, Standard 6.11(a) provides for disbarment when an attorney, "with the intent to deceive the court, knowingly makes a false statement or submits a false document[.]" The Florida Bar has already made allowances for substantial mitigation in seeking only a 60-day suspension in this proceeding, rather than disbarment or a rehabilitative suspension. The admonishment suggested by Respondent and the public reprimand recommended by the Referee are simply too lenient.

The Florida Bar maintains its contention that the case law regarding an

appropriate sanction cited in its Initial Brief remains the applicable authority for Respondent's misconduct. *Florida Bar v. Cibula*, 725 So.2d 360 (Fla. 1999); *Florida Bar v. Baker*, 810 So.2d 876 (Fla. 2002); *Florida Bar v. Germain*, 957 So.2d 613 (Fla. 2007). Although some mitigating factors are present, permitting a downward departure to a non-rehabilitative suspension, the substantial departure recommended by the Referee is unsupported by relevant authority.

CONCLUSION

The Referee's recommendations of guilt should be affirmed by this Court because they are supported by substantial, competent evidence. Respondent's arguments for rejecting those recommendations are based on misinterpretations of the applicable rules and should be rejected.

This Court should also affirm the Referee's award of costs in this proceeding. The Bar complied with the requirements of Rule 3-7.6(q) and the Referee's award was appropriate and within his discretion.

The Referee's recommended sanction of public reprimand, however, should be rejected in favor of a 60-day suspension. Neither the recommended public reprimand nor the admonishment suggested by Respondent is sufficient sanction for Respondent's dishonest testimony under oath.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Overnight Delivery to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925; true and correct copies by regular U.S. Mail to Michael Vincent Laurato, Austin & Laurato, 1902 West Cass Street, Tampa, Florida 33606; and Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, this 27th day of September, 2010.

Troy Matthew Lovell
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE

Undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

_____

Troy Matthew Lovell
Bar Counsel