IN THE SUPREME COURT OF FLORIDA

Case No: SC09-1953
TFB NO.: 2007-11274 (13D)

THE FLORIDA BAR

Complainant/Petitioner

vs.

MICHAEL VINCENT LAURATO

Respondent/Cross-Petitioner

CROSS-PETITIONER'S CROSS-REPLY BRIEF

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ARGUMENT

I. THE BAR MISAPPREHENDS RULE 4-8.4(D) "IN CONNECTION WITH THE PRACTICE OF LAW" PRONG AND EQUATES IT WITH THE "PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE" PRONG; THE BAR MISCONSTRUES ESTABLISHED CASE AUTHORITY INTERPRETING RULE 4-8.4(D); THE RECORD UNEQUIVOCALLY ESTABLISHES NO CONDUCT REMOTELY MEETING THE "IN CONNECTION WITH THE PRACTICE OF LAW" REQUIREMENT; THE REFEREE'S FINDING ON THIS POINT CANNOT BE SUSTAINED.

The record below overwhelming demonstrates that the respondent was not employed in a legal capacity at any point during the alleged misconduct (T., 3/16/2010 Transcript of Proceedings, p. 47); therefore, the referee's finding of guilt under Rule 4-8.4(d), Rules Regulating the Florida Bar (hereinafter Rule 4-8.4(d)) cannot be sustained. *Florida Bar v. Brake*, 767 So.2d 1163, 1168 (Fla. 2000). Rule 4-8.4(d) clearly states: "[a] lawyer shall not . . . engage in conduct *in connection with the practice of law* that is prejudicial to the administration of justice…" (emphasis added). Accordingly, Rule 4-8.4(d) is operative "only when a lawyer engages in misconduct while employed in a legal capacity." *Brake* at 1168.

The Bar asserts that this Court has "already rejected," in prior cases, the respondent's argument that Rule 4-8.4(d) is limited in its application to situations involving the practice of law by the attorney. (Cross Answer/Reply Brief of the Florida Bar, p. 3). However, as stated above, the Supreme Court explicitly rejected

the exact argument propounded by the Bar over a decade ago in *Brake*. In *Brake*, an attorney who was appointed personal representative of her deceased mother's estate was charged with Rule 4-8.4(d) violations after breaching her fiduciary duties to the other beneficiaries. *Brake* at 1166. The Court overturned the violations and held that Rule 4-8.4(d) "represents an exception to the general rule [that an attorney is an attorney is an attorney] and applies only when a lawyer engages in misconduct while *employed in a legal capacity*." *Id.* (emphasis added). Thus, in direct opposition to the Bar's assertions, the Supreme Court held that Rule 4-8.4(d) is, by virtue of its clear language, limited in its application to situations involving the practice of law and has subsequently refused to extend the reach of Rule 4-8.4(d) to a lawyers conduct which occurs while she is not engaged in a legal capacity. *Id.*

The Bar failed to distinguish *Brake* from the instant proceedings, and in fact, *Brake* is indistinguishable. The Bar posits that "[t]he Rule 4-8.4(d) conduct in *Brake* related only to breaches of her fiduciary duties as personal representative, not dishonesty, and certainly no dishonesty to a court." (Cross Answer/Reply Brief of the Florida Bar, p. 6). However, *Brake* renders the Bar's position completely untenable. The rule clearly established in *Brake* is that "rule 4-8.4(d) . . . applies *only when a lawyer engages in misconduct while employed in a legal capacity*." *Brake* at 1168. The Court applied the rule as follows: "Because Mrs.

Brake was not employed in a legal capacity when appointed to serve as personal representative, the referee erred in finding that Mrs. Brake violated rule 4-8.4(d) by failing to negotiate in good faith with the Deganis." Importantly, in a footnote note to the preceding sentence, the Court held as follows: "For the same reason, we conclude in respect to Mrs. Brake's second issue, that the referee erred in finding that she violated rule 4-8.4(d) by filing the mortgage foreclosure action." Thus, the Court found that Mrs. Brake did not violate Rule 4-8.4(d) even though she dishonestly filed a court document.

Moreover, The Bar attempts to rebut the Respondent's argument as to the "in connection with the practice of law" prong by misconstruing the "prejudicial to the administration of justice" prong. There is absolutely no indication in the *Brake* opinion that the Court's ruling hinged on a distinction between "breaches of fiduciary" and "dishonesty," as asserted by the Bar. *See Brake*; (Cross Answer/Reply Brief of the Florida Bar, p. 6). Further, the Bar conflates the different types of conduct prohibited by Rule 4-8.4(c) and Rule 4-8.4(d), respectively. "[C]onduct involving dishonesty" is prohibited by Rule 4-8.4(c), whereas Rule 4-8.4(d) bars "conduct . . . that is prejudicial to the administration of justice." The Bar's attempt to distinguish *Brake* is nonresponsive to the explicit holding of *Brake*. The *Brake* opinion simply did not address the character of the misconduct at issue; instead, the Court overturned a finding of guilt under Rule 4-

8.4(d) because, like the instant circumstances, the respondent's misconduct did not occur while she was "employed in a legal capacity."

The Bar cites two cases to support its argument that the Respondent's conduct occurred "in connection with the practice of law" as required by Rule 4-8.4(d), both of which are wholly inapposite to the case at bar. (*See* Cross-Answer/Reply Brief of the Florida Bar at 3-6). In *Florida Bar v. Mogil*, 763 So.2d 303 (Fla. 2000), the first case cited by the Bar, a judge engaged in prejudicial conduct during judicial removal proceedings occurring in New York. *Id.* at 311. The Court held that "insofar as Mogil was required to be an attorney in order to be a judge in New York (see N.Y. Const. art. VI, § 20(a)), we find that his misconduct during his judicial removal proceedings was necessarily 'conduct in connection with the practice of law' under rule 4-8.4(d)." *Id.* Thus, *Mogil* is readily distinguishable from the case at bar because, unlike the alleged misconduct of the Respondent, the judge's misconduct took place while he was acting in his capacity as an attorney.

While it is true that, like Mogil, the Respondent "had no First Amendment right to be dishonest," Rule 4-8.4(d) only applies to dishonest conduct "in connection with the practice of law." *Id.* Quite simply, Mogil's conduct was found to be "in connection with the practice of law," because it occurred during judicial removal proceedings and Mogil, as a judge, necessarily had to be a lawyer. *Id.*

Whereas Mogil necessarily had to be lawyer under New York law to be a judge, the respondent did not have to be a lawyer to be a deponent in a civil case. In addition, there is no allegation that the misconduct in this case occurred while the respondent was attempting to defend his ethical standing as a lawyer during Bar proceedings, such that the nature of the proceedings where the alleged misconduct occurred necessitated that the respondent's conduct was "in connection with the practice of law."

The second case cited by the Petitioner, *Florida Bar v. Von Zamft, 814 So.2d 385 (Fla. 2002)*, does not expressly address the "in connection with the practice of law" prong of Rule 4-8.4(d). Rather, *Von Zamft* addressed the "prejudicial to the administration of justice" prong of the rule. The issue, there, was not the "in connection with the practice of law" element, but the "prejudicial to the administration of justice" element. *See generally id.*

Von Zamft did not claim that his conduct in seeking a continuance for a colleague over lunch with the judge was not conduct in connection with the practice of law; rather, it was his contention that since the judge did not grant the continuance, his conduct was not "prejudicial to the administration of justice." *Id.* at 389. Moreover, the facts of that case reveal that Von Zamft's misconduct was, in fact, connected to the "practice of law" as Von Zamft was requesting a continuance on a case before the judge presiding over that case—conduct clearly

"in connection with the practice of law." There is no plausible analogy between a lawyer seeking a continuance from a judge presiding over a case and a deponent providing testimony in a private dispute. Any attempt by Bar counsel to equate the conduct in the two cases cannot be supported by any reasonable argument.

Throughout its analysis of *Mogil* and *Von Zamft*, two other arguments emerge from the Bar's Answer/Reply Brief that require comment and, ultimately, rejection. In its discussion of *Mogil*, the Bar asserts that the referee's finding as to the Rule 4-8.4(d) violation should be sustained, because the respondent "had no First Amendment right to give dishonest deposition testimony in his civil case and is therefore not protected by the [in connection with the practice of law] language" of Rule 4-8.4(d). (Cross Answer/Reply Brief of the Florida Bar, p. 4). This argument is fallacious and completely misses the mark as nothing other than a truism, when considered in a Rule 4-8.4(d) analysis. While an attorney has no right to be dishonest either in court or in a deposition, for purposes of Rule 4-8.4(d), the honesty or dishonesty of the conduct is a secondary consideration, because, as a threshold issue, the conduct must, in addition to being dishonest, be "in connection with the practice of law."

In its discussion of *Von Zamft*, the Bar also asserts that *Von Zamft* is significant because the Court "held that conduct need not have actually caused prejudice to the administration of justice to be sanctionable." (Cross

Answer/Reply Brief of the Florida Bar, p. 5). The Bar goes on to conclude its argument on this point by asserting that, because the respondent's "testimony was not credible does not excuse Respondent's dishonest testimony." (Cross Answer/Reply Brief of the Florida Bar, p. 5). Again, this argument, like the one before it, is fallacious and completely misses the mark in any Rule 4-8.4(d) "in connection with the practice of law" analysis. For purposes of Rule 4-8.4(d), conduct can be both dishonest and prejudicial to the administration of justice, but if it is not also done by the attorney "in connection with the practice of law," a Rule 4-8.4(d) violation cannot be sustained.

The referee's findings, clearly in error, cannot be sustained on this point and the Bar's after-the-fact attempt to justify the inappropriate charge cannot be countenanced or justified by application of the rule or precedent interpreting the rule. The record below reveals overwhelming evidence that the respondent was not employed as an attorney or in any other legal capacity. (T., 3/16/2010 Transcript of Proceedings, p. 47).

II. THE RECORD IS COMPLETELY DEVOID OF ANY EVIDENCE IN SUPPORT OF THE REFEREE'S FINDING OF GUILT UNDER RULE 4-8.4(c); NEITHER THE SPECIFIC QUESTION NOR THE SPECIFIC ANSWER WHICH ARE THE BASIS OF THE VIOLATION EVER OCCURRED; CIRCUMSTANTIAL EVIDENCE CANNOT BE THE BASIS OF THE REFEREE'S FINDINGS.

The Referee's findings must be overturned because they are not supported by any competent evidence on the record whatsoever. *See The Florida Bar v.*

Shoureas, 892 So.2d 1002, 1005 (Fla. 2004). The referee's finding of an intentional misrepresentation hinged on his erroneous conclusion that "[s]pecifically, with regard to the question posed at deposition as to whether or not respondent had ever been sued for breach of contract, I find respondent's statement to be unresponsive and puffery." (Referee's Recommendation as to Guilt). *No such question was posed to the Respondent during the deposition.* Despite this fact, the referee goes on to find that the respondent failed to respond to a non-existent question in the deposition. The record simply does not reveal any such question or answer in the entire deposition, and the Bar fails to address this glaring lapse in the record and clearly erroneous statement by the referee. Therefore, the Referee's recommendations are not supported by substantial competent evidence and must be vacated. *See The Florida Bar v. Shoureas,* 892 So.2d 1002, 1005 (Fla. 2004).

Furthermore, the Referee's finding of guilt as to Rule 4-8.4(c) must be overturned because there is uncontroverted evidence on the record which gives rise to a reasonable hypothesis of innocence. *See The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).* Where a referee's reliance on circumstantial evidence of intent is not supported by competent substantial evidence in the record and where there is direct testimony that constitutes a reasonable hypothesis of innocence, a Rule 4-8.4(c) violation will not be sustained. *Id.* The Bar argues that the

"deposition transcript itself provides the best evidence that the context of Respondent's testimony was not limited to construction contracts." (Cross Answer/Reply Brief of the Florida Bar, p. 7). However, in the absence of the specific question and answer cited by the referee from the record, the Referree's findings had to necessarily turn on a finding of circumstantial evidence of intent of the Respondent, a fact the Bar fails to address. Together with its concession in its Answer Brief that the colloquy at issue "did refer to construction contracts" and that there was direct evidence in the form of testimony at the final hearing from the respondent and Mr. Levine that the referee choose to discredit, requires overturning the finding of a Rule 4-8.4(c) violation, as a matter of law. It is not enough for the referee to find that a particular respondent's version of events is unworthy of belief, or the testimony of another witness more credible or logical. *Inquiry Concerning a Judge, Davey, 645 So.2d 398 (Fla. 1994).* There must be substantial competent evidence in the record showing more than an inaccurate or false statement; there must be an affirmative showing that the respondent made a statement he or she did not believe to be true. *Id.*

And, while both the referee and the Bar, may wish to focus on what was perceived as sarcasm or flippancy during the relevant deposition, the respondent was not charged with either sarcasm, flippancy, or disruptive conduct during the deposition, (*See* R, Complaint), and the record, nevertheless, revealed that the

deposition was not disrupted. For the Bar to focus on the sarcastic manner in which the answers were perceived is to distort these disciplinary proceedings, because the respondent was not charged with excessive sarcasm or flippancy that disrupted the deposition. While the sarcasm or flippancy may have been intentional, there was simply no charge for sarcasm before the referee and intent to be sarcastic, defeats a finding of intentional dishonesty.

In fact, the Supreme Court has previously held that conduct of much greater severity does not rise to a sanctionable level under Rules 4-8.4(c) & (d), Rules Regulating the Florida Bar. *See The Florida Bar v. Martocci*, 699 So.2d 1357 (Fla. 1997). In *Martocci*, the alleged misconduct occurred directly after a deposition at which the respondent was representing a client. *Id.* at 1359. The respondent approached opposing counsel, put his hand on opposing counsel's shoulder, said "F___ you," and called opposing counsel "A__hole, " twice. *Id.* Then, in the parking lot, the respondent said "Hey looney, when did you send the subpoena?" to opposing counsel. *Id.* At a subsequent deposition, the respondent pointed to the adverse party and said to his client, "I'm going to get that woman if it's the last thing I do." Under these facts, the Court upheld the referee's finding that the respondents conduct did not violate Rules 4-8.4(c) & (d), Rules Regulating the Florida Bar. In light of *Martocci*, it is clear that any sarcasm, flippancy or other

alleged deposition conduct of the Respondent, here, was not violative of those rules either.

Likewise, the respondent was not charged with dishonesty during the Bar proceedings or discovery process of the Bar proceedings. Accordingly, the Bar's is incorrect in its assertion in its answer brief that the referee was free to conclude from the respondent's alleged "lack of forthrightness" or alleged "evasive" answers at the final hearing that he was intentionally dishonest in the prior deposition. Intent, for purposes of Rule 4-8.4(c), is required to be shown *at the time* the alleged misconduct occurred. *The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).* A referee's finding of intent will not be sustained, based on any finding of intent in subsequent conduct. *Id.*

In addition to these arguments, the Bar fails to address the crux of the issues raised in the respondent's initial brief, including the fact that the only record evidence of intent was provided by the respondent and Mr. Levine. The Bar failed to call to other witnesses present at the deposition to contradict the respondent and Mr. Levine, although those witnesses were available and listed as witnesses. The failure to present any conflicting evidence on the matter of intent and, specifically, the undisputed record evidence that the import of the respondent's statements was "evident" to all present and that the Bar's interpretation of the respondent's words was "unthinkable" to all present at the deposition.

Finally, the Bar failed to address or distinguish the controlling precedent of the two controlling cases: *In Re Frank, 753 So.2d 1128 (Fla. 2000)* and *The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).* It is suggested that the Bar cannot prevail in sustaining the referee's findings without addressing or factually distinguishing these two cases.

III. THE BAR'S STATEMENT OF COSTS IS COMPLETELY UNAUTHENTICATED.

On the matter of costs, the Bar has completely failed to address the respondent's arguments. The express rule on costs provides that the referee has discretion to not tax costs that are unauthentic, unnecessary, or excessive. R. Regulating Fla. Bar 3-7.6(q)(3). The Bar undisputedly did not authenticate its costs in any fashion recognized by the law. It submitted no invoices, receipts, or even something as simple as a sworn breakdown of the costs. (R., Motion to Assess Costs and Statements of Costs). Rather, it simply blocked all the costs together and submitted them in an unsworn document. (R., Motion to Assess Costs and Statements of Costs). On the mileage, there was no method to calculate the mileage, no method to extrapolate the mileage rate charged, the mileage traveled, the date the mileage was incurred, or the reason the mileage was incurred. (R., Motion to Assess Costs and Statements of Costs). As for the hearing transcripts, there was no description whatsoever as to the hearing, deposition, or breakdown. (R., Motion to Assess Costs and Statements of Costs). Costs simply

are not authenticated in this fashion and there is recognized authority that permits any party to authenticate costs in such a fashion. *See, e.g., Sims v. Barnes*, 289 so.2d 753 (Fla. 1st DCA 1974). Therefore, the Referee had no competent basis on the record to support an award of costs because the Bar provided no invoices and no sworn cost affidavit.

IV. NO FURTHER DISCIPLINE IS WARRANTED UNDER THE FLORIDA BAR V. RANDOLPH AND STANDARD 5.0, FLORIDA STANDARDS IMPOSING LAWYER SANCTIONS.

On the matter of discipline, the Bar completely ignores *The Florida Bar v. Randolph*, 238 So.2d 635 (Fla. 1970), *Special Commission on Lawyer Regulation Report and Recommendation, 2006*, and the Preamble to the Rules Regulating the Florida Bar, all of which, when read in *pari materia*, clearly establish that the imposition of any further discipline beyond that imposed by the proceedings up to this point would be repugnant to this authority. Under *Randolph*, in exceptional cases, certain factors in a Bar proceeding have been held to exact a punishment which supplants formal discipline. This is one such case. As the undisputed record evidence establishes, the complainant initiated these proceedings for an improper purpose, the Bar picked up the torch using the same improper tactics, and the proceedings were improperly delayed for some four hundred (400) days, on one Count for which the respondent was ultimately acquitted. Therefore, even if the Referee's findings of guilt are upheld, this is exactly one of the extraordinary

cases in which the proceeding, itself, has subjected the Respondent to sufficient discipline under *Randolph*. The Bar misapprehends the Respondent's argument to be that under Standard 9.32(i), Florida Standards for Imposing Lawyer Sanctions provides for mitigation where there is unreasonable delay in a Bar proceeding. The respondent is not attempting to establish another mitigating factor, but demonstrating factors, including the inordinate delay, that place this case squarely within the holding of *Randolph.* The Bar fails to address *Randolph.*

Furthermore, as explained above, the alleged misconduct occurred in a private setting and does not reflect adversely upon the Respondent's fitness to practice law; therefore, Standard 5.0, Florida Standards for Imposing Lawyer Sanctions, governs to the exclusion of Standard 6.0, Florida Standards for Imposing Lawyer Sanctions. *See Florida Bar v. Hall*, 2010 WL 3339168; *Florida Bar v. Corbin*, 540 So.2d 105 (Fla. 1989); *Florida Bar v. Baker*, 810 So.2d 876 (Fla. 2002). The Bar argues that Standard 5.0, Florida Standards for Imposing Lawyer Sanctions, applies only when an attorney is found guilty of criminal conduct; however, this interpretation has been expressly rejected in *The Florida Bar v. Hall*, 2010 WL 3339168 (Fla. 2010).

A plain reading of Standards 5.0 shows that the standard is applicable when "in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation." Consequently, under Standard 5.13, the public reprimand recommended by the

Referee is not an available discipline because there is no evidence on the record to suggest that the Respondent's conduct "adversely reflects on the lawyer's fitness to practice law." Even if the referee had found such an adverse reflection, under *Martocci, supra* Section II, the conduct of the Respondent does not rise to a sanctionable level. The Bar is unable to cite to any authority whatever which disciplines conduct which is remotely similar to the alleged misconduct of the Respondent. The record is devoid of any evidence that the respondent's conduct adversely affected his fitness to practice law, which is a prerequisite for imposing discipline under any category of Standard 5.0.

The Bar's application of Standard 6.0 is unfounded. Standard 6.0 explicitly applies to "cases involving conduct . . . that involves dishonesty, fraud, deceit, or misrepresentation to a court…" Standard 6.0 applies when the lawyer misconduct is in connection with the practice of law as an advocate before a court. As explained above, the Respondent's alleged misconduct was clearly not "in connection with the practice of law" and did not involve a representation to a court. Thus, the Bar is incorrect in its position that "the relevant section for dishonest conduct by attorneys is Section 6.1," and the suspension requested by the Bar is not supported by the Standards nor any pertinent case law. As this Court in *Hall* noted, Standard 5.0, not 6.0, applies to conduct involving cases of lawyer dishonesty in matters unrelated to the practice of law.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT the foregoing Cross-Petitions Cross-Reply Brief has been furnished via regular U.S. mail to Troy Matthew Lovell, Bar Counsel, The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607-1496; and via regular U.S. mail to Kenneth Lawrence Marvin, Staff Counsel, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, this ___ day of November, 2010.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY THAT this brief complies with the font requirements of Rule 9.100 (1), Florida Rules of Appellate Procedure, and uses Times New Roman 14-point font, a font that is proportionately spaced.

_____

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