

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,  
Complainant,

The Florida Bar File  
Nos.86-18559(11H) and  
87-24772(11H)

vs.

Supreme Court Case No. 70,295

BRET S. CLARK,  
Respondent.

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.5 of the Rules Regulating The Florida Bar (article XI, Rule 11.06 of the Integration Rule of the Florida Bar), a Final Hearing was held in chambers, on December 9, 1987. All of the pleadings, transcripts, notices, motions, orders and exhibits are forwarded with this report and the foregoing constitutes the record of the case.

The following attorneys acted as counsel for the parties:

For the Florida Bar: Randi Klayman Lazarus  
Suite 211, Rivergate Plaza  
444 Brickell Avenue  
Miami, Florida 33131

For the Respondent: Bret S. Clark, pro se  
P. O. Box 531131  
Miami Shores, Florida 33153-1131

II. FINDING OF FACT: I find the following facts to be true and correct:

COUNT I

1. That Respondent, Bret S. Clark, on or about January 20, 1984, was admitted to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

2. That on or about August 12, 1982 prior to Respondent's admittance to The Florida Bar, Respondent received a speeding ticket to which he pled not guilty.

3. That on or about October 11, 1982 Respondent was found guilty of such speeding ticket by the Lake County Court, Lake County, Florida and fined \$100.00.
4. That on or about November 22, 1982 Lake County Court stayed imposition of payment of such fine pending appeal to the Circuit Court, Fifth Judicial Circuit, in and for Lake County, Florida.
5. That on or about January 20, 1984, Respondent was admitted as a member of The Florida Bar and at all times hereinafter mentioned was a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.
6. That on or about September 4, 1984 the Circuit Court, Fifth Judicial Circuit, in and for Lake County, Florida, sitting in its appellate capacity, affirmed the Lake County Court decision, without opinion.
7. That on or about February 14, 1985 Respondent filed a petition for writ of certiorari with the Fifth District Court of Appeal of Florida to review such September 4, 1984 order of the Circuit Court.
8. That pursuant to Florida Rules of Appellate Procedure 9.100(c), such petition for writ of certiorari should have been filed within 30 days of the order sought to be reviewed, or by October 4, 1984 in the instant case.
9. That Respondent argued such petition was timely under an exception to the rule where denial of appellate review would be fundamentally unfair.
10. That Respondent contended such denial of appellate review would be fundamentally unfair since Respondent had not received notice of the Fifth Judicial Circuit's order of affirmance until January 14, 1985.
11. That Respondent's failure to receive such notice was due to his change of address and failure to inform the Court of such change.
12. That on or about April 15, 1985 the Fifth District Court of Appeal dismissed Respondent's petition for writ of certiorari due to lack of jurisdiction.
13. That on or about April 30, 1985 Respondent filed a motion for rehearing with the Fifth District Court of Appeal of Florida.
14. That on or about May 28, 1985 the fifth District Court of Appeal denied such motion as untimely.
15. That Respondent had erroneously assumed that all documents served by mail have an additional five days added to the time period whereas such procedure is not applicable to the filing notices of appeal or motions for rehearing.
16. That on or about July 8, 1985 Respondent filed a motion to recall mandate and a suggestion for reconsideration with the Fifth District Court of Appeal.

17. That such motion was attacked by the State as being frivolous and a sham pleading since the Court had no power to recall mandate and that no mandate had even issued.

18. That the State moved for attorneys fees under the provisions which provides for such fees where a losing party's position lacks any "justiciable issue" of law of fact.

19. That in support of Respondent's contention that his efforts were not frivolous, Respondent relied on a 1980 case that had been reversed by The Florida Supreme Court in 1981.

20. That on or about July 12, 1985 the Fifth District Court of Appeal denied Respondent's motion for recall of mandate.

21. That on or about July 25, 1985 the Fifth District Court of Appeal granted the State's Motion for Attorneys Fees in the amount of \$100.00.

22. That on or about August 23, 1985 Respondent filed an untimely motion with the Fifth District Court of Appeal to review such order granting attorney's fees.

23. That Respondent argued, for the first time, that such sanctions were in retaliation for Respondent's correspondence to the Fifth District Court of Appeal where Respondent complained of his denial of appellate review as violating his First Amendment right to petition for redress of grievances and that such fee sanction was repugnant to the Constitution.

24. That on or about September 12, 1985 the Fifth District Court of Appeal summarily denied Respondent's Motion to Review such fee award.

25. That on or about November 14, 1985 the Florida Supreme Court, answering an inquiry made by Respondent, informed Respondent that it lacked jurisdiction to review orders granting fee awards.

26. That on or about December 9, 1985 Respondent appealed the Fifth District Court of Appeal's final order awarding fees to the United States Supreme Court, arguing that such fee award was in violation of the First Amendment since such fee statute was based upon a vague concept of what constituted a justiciable issue.

27. That on or about April 28, 1986 the United States Supreme Court denied such appeal as being "so utterly frivolous as to not warrant any further discussion".

#### COUNT II

28. That on or about April 25, 1985 Respondent appeared before the Honorable Judge Spellman as plaintiff's attorney in a preliminary injunction hearing, in the case of Rose Merle v. Florida State Constructors Services, Inc., Case No. 85-0974-Civ-EPS, in the U. S. District Court, Southern District of Florida.

29. That at such hearing, Respondent alleged that Judge Barad, a Circuit Judge of the Eleventh

Judicial Circuit of Florida was an active participant in a RICO conspiracy with defendants.

30. That Respondent based such allegations on the premise that Judge Barad and the defendants in the case being tried had entered into a conspiracy which resulted in obstruction of justice and the inability of Respondent's client to get a fair hearing before such Judge.

31. That on or about April 21, 1986 Respondent filed a Second Amended Complaint-Class Action against the Honorable Frederick N. Barad and the entire Eleventh Circuit Court of Dade County, Florida, among other defendants.

32. That in such complaint, Respondent alleged that Judge Barad and other judges of the Eleventh Circuit Court were corruptly influenced in the due administration of justice in the state courts by the private defendants, thus engaging in a pattern of racketeering activity in violation of the RICO statute.

33. That Respondent based such allegations of racketeering activity on Judge Barad's rulings against Respondent's client and ex parte communications had between Judge Barad and opposing counsel.

III. RECOMMENDATIONS AS TO GUILT: I find Respondent guilty of all violations charged by The Florida Bar. I find that as to Count I, Respondent has violated Disciplinary Rules 1-102(A) (6) (conduct that adversely reflects on attorney's fitness to practice law) and 7-102(A) (2) (advancement of a claim or defense that is unwarranted under existing law). I find that as to Count II, Respondent has violated Disciplinary Rules 1-106(A) (6) (conduct that adversely reflects on attorney's fitness to practice law and 8-102(b) (a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer).

#### COUNT I

It is Respondent's position that he did not advance a claim or defense that is unwarranted under existing law. He further asserts that to find him guilty of any ethical violation in reference to this Count is tantamount to restricting his access to the court system. The chronology of the case which gave rise to former Chief Justice Burger's blistering opinion and Respondent's own exhibit belies that contention. In fact, from the onset of Respondent's trek through the legal system to fight a traffic ticket he has forged ahead despite failing to comply

with simple rules of procedure. To begin, he petitioned for certiorari to the Fifth District Court of Appeals five months subsequent to the date of the order. The Rules of Appellate Procedure unequivocally provide that the petition be filed within 30 days. Although Respondent changed his address and failed to advise the court of same, he persisted undeterred. Respondent then filed a Motion for Rehearing outside of the time limits prescribed, mistakenly believing he had extra time for mailing. Although Mr. Clark claims this mistake to be common among other attorneys he should have at that point ceased his efforts. He had failed to comply with mandatory rules which all attorneys and litigants are bound by. The Fifth District Court of Appeals recognized the foregoing and consequently awarded the Attorney General's office attorney's fees. I believe that such an action was extraordinary and certainly in the same vein as former Chief Justice Burger's act.

It is most certainly admirable to be a persistent, aggressive and innovative practitioner. It is not admirable, however, to advance frivolous claims where simple mandatory rules of procedure are disobeyed.

#### COUNT II

The Respondent is charged with knowingly accusing Judge Barad and the other Judges of the Eleventh Judicial Circuit of participating in a RICO conspiracy, where such allegations were without basis. Respondent complains that it is his ethical duty to advise the public of judicial impropriety and The Florida Bar is in essence preventing him from doing so. I cannot agree with Respondent. For instance, Mr. Clark based his accusation that Judge Barad engaged in ex parte communications with the defendant's attorney, since his client witnessed the two in conversation. He admits that she did not have any knowledge of the content of the conversation. Further, that Judge Barad engaged in mail fraud since the defendants presented pleadings containing false information which were ruled on by the court and placed in mail receptacles. I do not believe the mail fraud statute contemplates such an interpretation which stretches the

limits of credibility. Mr. Clark also asserts Judge Barad's involvement in the conspiracy since he ruled against his client on matters which were without question. Surely, adverse rulings can be attributed to mistakes of law and consequently remedied by the appellate court, as they were in this case. The list of accusations continued without any provable support from Mr. Clark.

It is therefore not my impression that Respondent is being sanctioned for exercising his right to criticize the judiciary. It is my impression that Respondent is being sanctioned for making false and unsubstantiated charges against the judiciary.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE IMPOSED:

The Referee asked both The Florida Bar and Mr. Clark to submit briefs and proposed reports. The Referee has adopted the report of The Florida Bar up to this point and wishes to conclude the matters with these comments and findings:

It goes without saying that it is not the purpose of these proceedings to act as the ultimate appellate review for either the matter that was presented in the United States District Court, Southern District of Florida, Case 85-974-CIV-Spellman (Rose Merle v. Joseph Weinstock, et al.) or Bret Clark v. Florida, 106 Supreme Court Reporter 1784 (1986) for obviously these are the cases which bring the Bar's complaint.

The Respondent feels as though he is being punished for using "imaginative pleadings" and that he is really doing nothing more than advancing that which his client told him.

There has never been any showing in these proceedings that the Plaintiff's in the foreclosure cases in Dade County were convicted of any crimes or were so charged, nor has there been any showing that the cases were reversed at the appellate level for any "wrongful orders" alleged to have been entered therein. A lawyer can't hide behind a bad pleadings by saying "I did it that way because that is what my client told me."

The Respondent's pleadings in both the traffic case and the allegations of false accusations against a judge appear to be

more of the nature of grasping at straws as opposed to reliance on the law and Rules of Procedure. The pleadings appear to go a bit beyond the normal imagination that lawyers sometimes inject into their claims.

For instance to say that a judge is an active participant in a RICO conspiracy because he ruled in favor of one party not the other, and that he furthers that conspiracy and commits mail fraud because he causes his secretary to mail out the signed orders on those hearings is substantially more than the statute involving RICO conspiracies purports. To base such an allegation or allegations in the Federal case on nothing more than his client's contention to the effect "that the judge must be in cahoots with the prevailing party because I lost..." isn't what the Rules had in mind. There's a difference between honestly advancing what a person knows to be true or even those things which turn out not to be true if honestly and with good faith advanced. The court believes those cases cited by The Florida Bar and set forth as follows:

Cerf v. State, 458 So.2d 1071 (Fla. 1984). The attorney accused a circuit court judge of ruling in particular ways because the judge had received political contributions. There was no proof of his allegations and the Respondent was publicly reprimanded.

The Florida Bar v. Weinberger, 397 So.2d 661 (Fla. 1981). The Respondent made unjustified statements denigrating the courts. Although he apologized to two judges Mr. Weinberger was publicly repimanded.

The Florida Bar v. Shimek, 284 So.2d 686 (Fla. 1973). The Respondent stated that the judge was not neutral because he needed political support from the prosecutorial system to be reelected. The allegations were unsubstantiated. The Florida Supreme Court held that the First Amendment does not bar disciplining an attorney for accusations against the judiciary.

Committee on Professional Ethics and Conduct of the Iowa State Bar Association v. Horak, 292 N.W. 2d. 129 (Iowa 1980). The attorney filed a counterclaim falsely alleging that the judge

had participated in a conspiracy to deprive his client of his civil rights. There was no truth to the charge. The attorney was publicly reprimanded.

Louisiana State Bar Association v. Karst, 428 So.2d 406 (La. 1983). The court held:

It is not the genuineness of an attorney's belief in the truth of his allegations, but the reasonableness of that belief and the good faith of the attorney in asserting it that determines whether or not one has "knowingly" made false accusations against a judge within the meaning of DR 8-102(B). Consequently, where it is shown that an attorney knew, or in good faith should have known, of the falsity of his accusations, that attorney's unsubstantiated, subjective belief in the truth of those accusations, however genuine, will not excuse his violation of DR-8-102(B).

Karst, at 409.

Mr. Karst was ordered suspended for one year.

correctly set forth the position in this case. There is a distinction between these cases and Respondent's reliance on Jim Garrison v. State of Louisiana (85 Supreme Court 209, 379 U. S. 64, (1964) for in Garrison the State of Louisiana wanted to punish any person using a true statement in the criticism of a public official just because he was mad at that official. Actually, the case isn't quite that casual, but it does stand for the principle that a government entity (in this case the State of Louisiana) cannot prohibit one from criticizing public officials just because they don't like what they are going to hear, especially if that criticism is based on a true or an honest belief.

This Referee also is of the opinion that "honest belief" has to be established by good faith effort and the application of certain exclusions. For Mr. Clark to rely on his pleadings in his Federal case simply because that is what his client told him and that is what his client believed the situation to be because how else would she have lost? An attorney has a duty to advance those things which he knows to be founded, but to simply plunge

ahead because the client is not happy is not enough. Pleadings that are going to become part of a public record deserve better than that.

The pleadings that Mr. Clark has filed in these two actions appear to suffer from an over extension of what is sometimes referred to as the "but judge..." level in the arguments. Hearing this matter reminded me of certain football games and hockey games that the Referee has observed where it was simply just a case of not knowing when to keep one's mouth shut. Many an athlete has had himself tossed from the game because he wouldn't accept the referee's call and just had to have "one more shot at it."

There are rules in every game in a civilized society, and to keep society civilized we all have to play by those rules. Clearly, in the traffic matter, Mr. Clark just didn't make the rule book and regardless of how justified he thought his position was, he was never in the ballgame.

As to the award of attorney's fees at the appellate level in the traffic case, there was clearly no justiciable issue upon which Mr. Clark could advance his appeal since, under the Rules, he was plainly out. The cases are somewhat clear and numerous that, while it may not seem fair, or it might create a hardship against one of the parties involved, the Rules are the Rules and if we are going to have Rules, they must be followed.

In sticking with the State of Louisiana, the court does believe that Louisiana State Bar Association v. Karst, 428 So.2d 406 (La. 1983) pretty much sums up the Referee's finding of false accusations against a judge in this case. Good practice simply requires that Mr. Clark should have investigated the allegations of Mrs. Merle to determine their applicability before setting them forth nakedly in his complaint.

The Florida Bar recommends public reprimand for Mr. Clark for these violations. The Referee finds that Mr. Clark has suffered a more than adequate public reprimand as far as his traffic case is concerned in the findings as reported in 106 Supreme Court Reporter 1784 for there certainly isn't anything

much more public than an opinion spread out not just in a state reporting system which has somewhat local limitations but rather is there for all the world to see because of the nature of the reporting system. The Referee feels that in that instance such publicity should be sufficient and adopts that as the public reprimand in Count I.

As to Count II, the Referee would like to see Mr. Clark attend some type of an educational program dealing with pleadings and practice and more specifically directed to the "but judge..." response to adverse rulings. Such probably not being available, the Referee recommends that Mr. Clark receive a public reprimand on Count II.

The Referee does not find Mr. Clark to be unfit to practice law but feels he should be more selective in the framing of his pleadings and the grounding of his allegations. Mr. Clark may be "unfit" by virtue of his having been found to have violated Disciplinary Rules 1-102(A) (6), the Referee finds that such "unfitness" is of a temporary nature and can be corrected.

V. RECOMMENDATION AS TO COSTS: The Referee finds the following costs have been reasonably incurred by The Florida Bar:

Grievance Level:

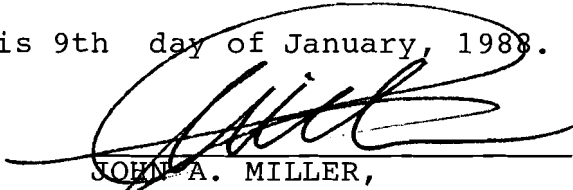
Administrative Cost [Rule 3-7.5(k) (5)] .....	\$ 150.00
Grievance Committee Hearing transcript of October 20, 1986 ...	376.50

Referee Level

Administrative Cost [Rule 3-7.5(k) (5)] .....	150.00
Final Hearing transcript of December 9, 1987 ...	<u>257.80</u>
TOTAL.....	\$ 934.30

The Referee would recommend that the Respondent be responsible for one-half (1/2) of these costs.

Respectfully submitted this 9th day of January, 1988.

  
JOHN A. MILLER,  
Referee

cc: Sid J. White, Clerk  
Supreme Court of Florida  
Randy Klayman Lazarus, Bar Counsel  
Bret S. Clark, pro se