**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR,

Complainant,

Case No. 94,861

v.

TFB File No. 99-00772-02

BERNARD MARC MOGIL,

Respondent.

_____________________________/

# ANSWER BRIEF
# OF COMPLAINANT, THE FLORIDA BAR


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

Undersigned counsel does hereby certify that the Answer Brief of Complainant is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus.

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## PRELIMINARY STATEMENT

Appellant, **Bernard Marc Mogil**, will be referred to as Respondent, or as Mr. Mogil throughout this brief. The appellee, **The Florida Bar**, will be referred to as such, or as the Bar.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate page number.

References to the transcript of the hearing on Motion for Summary Judgment before the Referee on May 17, 1999, shall be by the symbol **SJ,** followed by the appropriate page number.

References to specific pleadings will be made by title.

## STATEMENT OF THE CASE

The Florida Bar adopts the Statement of the Case set forth in Respondent's Initial Brief, supplemented as follows:

The New York disciplinary order, attached to the complaint as Exhibit A., sets forth in detail the nature of the misconduct found to have occurred, and which formed the basis of Respondent's disbarment in New York. (Complaint) Additionally, at the time of filing his Answer and Responses to Requests for Admissions, Respondent filed a document entitled Respondent's Submittals which contained a letter dated March 8, 1999 addressed to the referee, together with documents filed in the New York removal and disciplinary proceedings consisting of a thirty-one page "Brief by Appellant Judge", Respondent's "Answer to Petition", Respondent's "Memorandum of Law", "Respondent's Proposed Findings and Conclusions", Respondent's "Motion to Confirm Report of Judicial Hearing Officer", a letter dated October 21, 1997 from Judge Andrew J. DiPaola and a copy of a subpoena directed to Judge DiPaola (Respondent's Submittals). Respondent appeared for the hearing on the Motion for Summary Judgment and consented to summary judgment being entered (SJ11) The matters contained in the Respondent's supplement to the record were not before the referee prior to his having submitted his report to the Court.

## STATEMENT OF THE FACTS

The Florida Bar adopts the Statement of the Case set forth in Respondent's Initial Brief.

## SUMMARY OF ARGUMENT

The Respondent appeared at the hearing on Motion for Summary Judgment, at which time he consented to entry of summary judgment as to the issue of guilt. He did not appear for the final hearing as regards the recommended level of discipline, but he now urges the Court to disregard the referee's recommendations as to both guilt and discipline, in part because he claims not to have had the opportunity to be heard. Respondent did not meet his burden of showing that the New York disciplinary proceeding was flawed and therefore should not be given conclusive effect. Further, there is competent substantial evidence in the record which was before the referee at the time of his determinations to support the recommendations he included in his report.

## ARGUMENT

ISSUE I

THE ADJUDICATION OF GUILT BY THE NEW YORK BAR IS CONCLUSIVE AS TO THE ISSUE OF GUILT IN THE FLORIDA DISCIPLINARY PROCEEDING.

The issue of guilt in the proceeding below was resolved by summary judgment at a hearing before the referee, attended by the Respondent, *pro se*. Those matters of record and considered by the referee at that time consisted of the Complaint, Requests for Admissions directed to Respondent, Respondent's Answer and Admissions and attachments thereto consisting of Respondent's March 8, 1999 letter addressed to the referee, together with documents filed in the New York removal and disciplinary proceedings consisting of a thirty-one page "Brief by Appellant Judge", Respondent's "Answer to Petition", Respondent's "Memorandum of Law", "Respondent's Proposed Findings and Conclusions", Respondent's "Motion to Confirm Report of Judicial Hearing Officer", a letter dated October 21, 1997 from Judge Andrew J. DiPaola and a copy of a subpoena directed to Judge DiPaola. Respondent did not see fit to file the transcripts of the New York proceedings until after the final hearing and rendering of the report of referee, when he retained counsel who then moved to supplement the record with the New York transcripts.

It is important to note that, while the transcripts themselves were not available to or considered by the referee, the New York documents enumerated above were a matter of record at the time summary judgment was entered.

Respondent appeared for the hearing on the Motion for Summary Judgment, but rather than argue that the New York proceeding was flawed, he consented to the entry of summary judgment. **SJ11**

It is well established law that, as provided by Rule 3-4.6, R.Regulating Fla.Bar, a final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule. The effect of this rule has been decided in *The Florida Bar v. Wilkes,* 179 So2d 193 (Fla.1965) [construing identical language in the predecessor Rule 11.02(6), Integration Rule of The Florida Bar] and *The Florida Bar v. Friedman,* 646 So2d 188 (Fla.1994), both cases involving discipline imposed by the New York bar, as is the case here.

Under the holdings of both *Wilkes* and *Friedman*, *supra*, if the respondent means to attack the conclusive effect of the foreign disciplinary adjudication, he must accept the burden of proving that the foreign adjudication

". . . (W)as so deficient or lacking in notice or opportunity to be heard, that there was such a paucity of proof, or that there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof of guilt of the misconduct involved . . ." (*Wilkes, supra*, page 198)

In *Friedman*, this Court observed that, as is the case here,

". . .(T)he burden was on Friedman to demonstrate that New York's proceedings were deficient. . . . Friedman was given ample opportunity before and during his disciplinary proceedings to demonstrate any inadequacies in the New York forum. For instance, he could have made the New York transcript available to the reviewing referee, but failed to do so." (*Friedman, supra*, page 190)

Respondent below had the same opportunity to prepare the record as did Friedman, and in fact, did so, to the extent noted previously, yet failed to make available the New York transcripts until after the referee had filed his report.

**ISSUE II**

THE NEW YORK ADJUDICATION IS CONCLUSIVE PROOF OF MISCONDUCT DESPITE THE VARYING STANDARD OF PROOF REQUIRED.

It should be noted that, while Respondent argues that the New York adjudication should not be conclusive because it was based on a preponderance of

evidence standard, as opposed to clear and convincing evidence, this Court found no difficulty in giving conclusive effect to the New York adjudications in both *Wilkes* and *Friedman*, *supra*, both decided by a preponderance of evidence. In fact, the referee in Friedman voiced exactly this concern, which this Court laid to rest by reference to the language of Standard 1.3, Fla. Stds.Imposing Law.Sancs.,

> "These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Rules Regulating The Florida Bar (*or applicable standard under the laws of the jurisdiction where the proceeding is brought*)." (Emphasis added.)

thus recognizing that foreign jurisdictions may employ different standards than those applicable in Florida proceedings, yet declining to find the foreign adjudication deficient based on that argument.

## ISSUE III

RESPONDENT SHOULD BE PRECLUDED FROM RAISING FOR THE FIRST TIME ON APPEAL THAT WHICH WAS NOT PRESENTED TO THE TRIER OF FACT, BELOW.

While Respondent appeared *pro se* below until he secured counsel following the final hearing, it should be remembered that he was admitted to The Florida Bar on December 19, 1974 (**RR3**) more than twenty-four years prior to these

proceedings. Of those twenty-four years, ten have been as a sitting judge in New York. His decision to handle the proceedings below *pro se,* and the strategies he adopted in doing so, could hardly have been made out of naivete. The record clearly shows that he had notice and an opportunity to be heard at every stage of the proceeding. The record of the summary judgment hearing contains a colloquy in which he is clearly invited by the referee to either appear in person for the final hearing, or by affidavit (**SJ10**), yet he declined to do so, for reasons known only to him. He now seeks, through belatedly retained counsel, to have this Court consider matters that were not part of the record available to the referee below, and based upon the supplemented record, to find that the referee erred by his failure to consider matters that the Respondent had the burden of proving before the trier of fact. Respondent thus appears to be seeking a trial *de novo* as to this issue.

Had the referee below been provided with an opportunity to weigh and evaluate the New York transcripts Respondent now seeks to have this Court weigh, and had the referee made an inappropriate recommendation based upon that evidence before him, Respondent would be correct in his efforts to have this Court reconsider that evidence, since this Court is not bound by the referee's conclusions as to the level of discipline to be imposed. *The Florida Bar v. Weaver,* 356 So2d 797 (Fla.1978). Such was not the case here, however, where the referee was not

given the opportunity to weigh the evidence with which the Respondent belatedly supplemented the record.

It is well settled law that a party cannot raise on appeal for the first time that which he did not raise before the trier of fact below. An appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal, based on the record before that tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of an appellate court is to determine whether the lower tribunal committed error on the issues and evidence before it. *Thornber vs. City of Fort Walton Beach*, 534 So 2d 754 (Fla 1st DCA, 1988).

## ISSUE IV

THE REFEREE'S FINDINGS OF RULE VIOLATIONS ARE SUPPORTED BY THE EVIDENCE OF RECORD.

Exhibit A of The Florida Bar's complaint, which Respondent admitted below was genuine and admissible, and which was a part of the record at the time the referee made his determinations as reflected in his report to the Court, is the seven page Opinion and Order of the New York court which disbarred Respondent. Six of the seven pages, which the referee considered, detail a laundry list of the conduct of which the New York court found the Respondent guilty, and upon which it based its

discipline. In his brief, Respondent seeks to excuse that conduct on the argument that the offensive acts the New York court found to have occurred were not committed as a lawyer engaged in the practice of law, but as a sitting judge. Respondent relies upon the language of comments provided to explain Rule 4-8.4(d), R.Regulating Fla.Bar, but overlooks the language appearing in the next paragraph of the comment following the language relied upon, which states that "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney." It is difficult to reconcile an argument to the effect that conduct that would subject a lawyer to discipline would not also subject a judge to discipline. The referee was entitled to find that a judge who referred to counsel as "Donkey-turd", "defensive superstar", a "traffic court jerk" and a "laughing stock", could not have been using anything other than disparaging language, or engaging in anything other than conduct prejudicial to the administration of justice.

The respondent in *The Florida Bar v. Vining,* 707 So2d 670 (Fla.1998) argued that the referee did not make specific findings of fact, or make independent findings, just as is argued here. In *Vining*, however, the Court found that argument to be without merit, and instructed that the referee is authorized to consider any relevant evidence, including the trial transcript or judgment from a civil proceeding.

To the extent that the New York proceedings were before him at the time of the final hearing, the referee was authorized to rely upon them in arriving at his determinations of both guilt and the level of discipline to be recommended.

Respondent also attacks the referee's finding that there were violations of Rule 4-8.4(c), R.Regulating Fla.Bar, but if we look to the New York record that was before the referee, we once again see that Respondent was found to have falsely testified before the Commission on Judicial Conduct as to the sending of an e-mail message to the White House, as to the sending of a facsimile to Liotti's secretary and as to having caught Liotti in the act of searching his personal belongings in chambers and learning thereby that Respondent was taking the prescription drug Prozac. The referee was entitled to rely upon those findings, as was held in *Vining, supra*, and absent any rebuttal offered by Respondent, to find that those facts established conduct involving deceit or misrepresentation and, therefore, a violation of Rule 4-8.4(c), R.Regulating Fla.Bar.

## CONCLUSION

The referee's recommendation of disbarment form the practice of law in the state of Florida, with leave to reapply in five years, should be adopted by the Court.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer regarding Supreme Court Case No. 94,861, TFB File No. 99-00772-02 has been mailed by first class mail to Patricia S. Etkin, 8181 West Broward Boulevard, Suite 262, Plantation, Florida 33324, Co- Counsel for Respondent, and to John A. Weiss, 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida 32308, Co- Counsel for Respondent, on this ________ day of November, 1999.

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