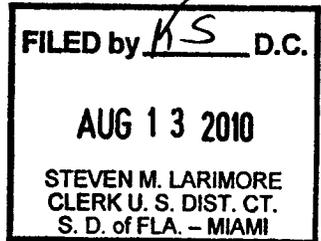


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ADMINISTRATIVE ORDER 2010-108

IN RE: MITCHELL JAY ZIDEL
FLORIDA BAR # 999288



ORDER OF RECIPROCAL SUSPENSION

This matter is before the Court concerning the status of Mitchell J. Zidel as a member of the bar of the Southern District of Florida. On February 22, 2010, Mr. Zidel was suspended by the Florida Supreme Court from the practice of law for one year. *The Florida Bar v. Zidel*, 30 So.3d 494 (Fla. 2010). The Court likewise precludes Mr. Zidel from practicing law in the Southern District of Florida and he is hereby suspended.

The Florida Supreme Court approved the findings of fact and recommendations of guilt and restitution in the Report of the Referee, but instead of the recommended ninety-day suspension, suspended Mr. Zidel for one year “[d]ue to the extensive aggravating factors found.” *Id.*

“[A] federal court has the power to control admission to its bar and to discipline attorneys who appear before it.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see also Theard v. United States*, 354 U.S. 278, 282 (1957) (“[D]isbarment by federal courts does not automatically flow from disbarment by state courts.”). State court disciplinary actions should be accorded federal effect, unless it appears from an “intrinsic consideration” of the state record that: (1) the state disciplinary proceeding lacked due process; (2) the proof supporting the discipline by the state court was so infirm as to give a federal court the “clear conviction” that a reciprocal disciplinary order is inappropriate; or (3) another grave reason convinces the federal court that the state court discipline should not give rise to federal court discipline, under the principles of right and justice. *Matter of*

Calvo, 88 F.3d 962, 966-67 (11th Cir. 1996) (citing *Selling v. Radford*, 243 U.S. 46, 51 (1917); see also Rule 5(e), S.D. Fla. Rules Governing Attorney Discipline (requiring *Selling*-based analysis in disciplinary actions).

As a result of the state court suspension, this Court issued an Order to Show Cause for Mr. Zidel to state why the imposition of identical discipline would be unwarranted and the reasons thereof. Mr. Zidel filed a response to the Order to Show Cause, claiming in Ground I that he was deprived of due process and an opportunity to be heard as the result of the application of the Rules of the Florida Bar generally to his case and in Ground II he argues specific examples of deviations of the Rules as applied to his case. None of these claims have merit.

In Mr. Zidel's first ground, he claims that The Florida Bar's "Guide for Referees in Disciplinary Cases," the resource provided to assist a referee in conducting a disciplinary hearing, is a demonstrative example of the departures of law that support a denial of reciprocal discipline. Mr. Zidel provides both general criticisms of the Guide and more specific arguments as to his case. The general criticisms are not applicable as Mr. Zidel has not demonstrated how these allegations affected his rights in the disciplinary proceedings. Furthermore, as acknowledged in the Guide itself, it is merely an informational tool to help referees perform their duties and "is not all-inclusive and should not serve as a substitute for an understanding of the basic rules and law concerning grievance proceedings." As for the specific allegations, each is analyzed in turn.

Mr. Zidel claims that he received late notice of the report and recommendation but does not allege that he did not receive notice or was prevented from an opportunity to be heard. The due process concerns under a reciprocal discipline analysis are limited to the "want of notice or opportunity to be heard." *Selling*, 243 U.S. at 51. Mr. Zidel also claims that he was not given proper notice of the disciplinary charges against him. In disciplinary matters, the "absence of fair notice .

. . . [of] the precise nature of the charges . . . [violate an accused attorney's] procedural due process.” *In re Ruffalo*, 390 U.S. 544, 552 (1968). According to Rule 3-7.6(h)(1)(B) of the Rules Regulating the Florida Bar, “[p]leadings may be informal and . . . The Complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined.” However, “[t]here is no requirement for the Bar to connect every alleged item of misconduct to a specific rule violation.” *The Florida Bar v. Committe*, 916 So.2d 741, 745 (Fla. 2005). Furthermore, in a Florida disciplinary case, the referee is not restrained by the particular rule violations alleged in a complaint and may find uncharged violations of the Rules as long as they are within the scope of the Bar’s accusation. *The Florida Bar v. Fredericks*, 731 So.2d 1249, 1253 (Fla. 1999). Nevertheless, The Florida Bar complaint did provide a factual background on the violations and specifically noted the rules being violated.

Next, Mr. Zidel claims that it was improper for the Florida Supreme Court to impose greater discipline than that originally offered in a consent judgment or which was recommended by the referee. First, the Florida Supreme Court is free to disagree with the recommendation by the referee because they “have the ultimate responsibility to determine the appropriateness of a recommended sanction.” *The Florida Bar v. Cox*, 794 So.2d 1278, 1281 (Fla. 2001). Second, pursuant to Rule 3-7.9(b) of the Rules Regulating the Florida Bar, if a respondent desires to submit to a consent judgment, it is up to the staff counsel or the designated reviewer to accept it, there is no obligation to accept it outright and if they do reject it, it will not be filed with the referee. The consent judgment was never accepted.

Finally, Mr. Zidel raises claims concerning the procedure for reinstatement and order of restitution, but these arguments have no bearing on this Court’s decision to impose reciprocal discipline and will not be discussed.

Many of the arguments raised in the first ground have also been raised in the second ground or are without legal basis and do not warrant further discussion. The remaining claims are discussed below.

Mr. Zidel argues that because an earlier complaint against him was dismissed by The Florida Bar, it should have a binding effect on subsequent disciplinary actions based on the same subject matter. However, Rule 3-7.3(d) of the Rules Regulating the Florida Bar discusses dismissals of disciplinary cases by bar counsel. The Rule states that “[d]ismissal by bar counsel shall not preclude further action or review under the Rules Regulating The Florida Bar.” Therefore, the dismissal of an earlier case by The Florida Bar is not binding on a subsequent proceeding.

Mr. Zidel next argues that the subpoena used to audit his trust account was illegal as not being requested by the grievance committee. Florida Bar Rule 5-1.2(e)(7) of the Rules Regulating Trust accounts provides that an audit of an attorney’s trust account is allowable “when requested by a grievance committee or the board of governors.” Zidel has not presented any evidence that this audit was not first requested by the grievance committee or the board of governors and the record provides that it “was predicated upon the complaint of Marie J. Garcia.”

Mr. Zidel claims that the bar complaints against him were based on perjured testimony. The record indicates that Mr. Zidel was given a forum at the final hearing to present his arguments on this subject and there is no evidence that the actual grounds for the discipline were not supported by the facts or based on false testimony.

Mr. Zidel argues that the use of parol evidence in the proceedings to determine excessive fees was improper. However, in Florida, the parol evidence rule does not apply to bar disciplinary proceedings or in the determination of an excessive fee. *See The Florida Bar v. Fredrick*, 756 So.2d 79, 85 n.2 (Fla. 2000); Rule 3-7.6(1), Rules Regulating The Florida Bar.

Finally, Mr. Zidel argues that the Florida Supreme Court erred in considering the referee's finding of aggravating factors to impose greater discipline because they were unsupported and he was not notified of these factors before discipline was imposed. Standard 9.21 of the Florida Standards for Imposing Lawyer Sanctions, defines aggravation or aggravating circumstances as being "any considerations or factors that may justify an increase in the degree of discipline to be imposed." *See also The Florida Bar v. Ratiner*, 2010 WL 2517995, *4 (Fla. June 24, 2010) ("[I]t is not necessary for misconduct to have been a basis for discipline in order for it to be considered an aggravation."). An attorney's due process rights are not infringed where a referee considers an action by the attorney as an aggravating factor and not as a new violation. *In re Cook*, 551 F.3d 542, 551 (6th Cir. 2009).

Rule 5(d) of the Rules Governing Attorney Discipline, Local Rules for the United States District Court for the Southern District of Florida, provides that "[a]fter consideration of the response called for by . . . [an order to show cause,] the Court may impose the identical discipline or may impose any other sanction the Court may deem appropriate."

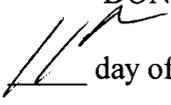
Having been suspended and having failed to present any ground to prevent reciprocal suspension, it is ORDERED that Mr. Zidel is hereby suspended from the practice of law in the United States District Court for the Southern District of Florida.

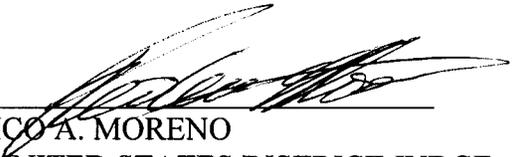
IT IS FURTHER ORDERED that the Clerk of Court shall immediately strike this attorney from the roll of attorneys eligible to practice in the United States District Court for the Southern District of Florida, and shall also revoke the attorney's CM/ECF password.

IT IS FURTHER ORDERED by this Court that said attorney advise the Clerk of Court of all pending cases before this Court in which he is counsel or co-counsel of record.

IT IS FURTHER ORDERED by this Court that the Clerk of Court shall serve by certified

mail a copy of this Order of Reciprocal Suspension upon the attorney at his court record address.

 DONE AND ORDERED in Chambers at Miami, Miami-Dade County, Florida, this
day of August, 2010.


FEDERICO A. MORENO
CHIEF UNITED STATES DISTRICT JUDGE

c: Honorable Joel F. Dubina, Chief Judge, Eleventh Circuit
All Miami Eleventh Circuit Court of Appeals Judges
All Southern District Judges
All Southern District Magistrate Judges
United States Attorney
Circuit Executive
Federal Public Defender
Clerk of Court
Clerk of Court, 11th Circuit
National Lawyer Regulatory Data Bank
Florida Bar
Attorney Admissions Clerk
Library
Mitchell Jay Zidel