IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN A. BARLEY,

Respondent.

_____/

CONFIDENTIAL

CASE NO. 66,701

RESPONDENT'S CORRECTED REPLY BRIEF

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ARGUMENT

I

VARIOUS FINDINGS OF FACT BY THE REFEREE ARE CLEARLY ERRONEOUS OR UNSUPPORTED BY THE EVIDENCE BEFORE THE COURT.

A. Respondent Did Not Make Withdrawals of His Attorney's Fees Without Ms. [redacted]'s Knowledge or Consent.

At the outset of this Reply it should be noted that Ms. [redacted] initially gave Respondent $5,991 as an initial retainer (R.ex.1). The difference between the $5,000 figure mentioned by the Bar in its brief and the correct sum is important. It shows that Ms. [redacted], testifying in 1987 about events that occurred in 1980, was confused about what happened. It is irrebuttable that Respondent received $5,991, not $5,000 as Ms. [redacted] testified.

Ms. [redacted]s vagueness as to the original transaction with Respondent is very significant because it belies the Referee's finding that she "assumed" that the second case would be handled like the first one. In fact, she did not pay Respondent at the conclusion of the initial divorce--her trust deposit was drawn down until it was used up and then bills were sent. In like manner, in the second case funds in trust were used to defray fees and expenses and statements were sent to Ms. [redacted] clearly indicating this fact.

The documentary evidence, not the testimony of the parties, clearly shows that Ms. [redacted] received periodic statements

plainly showing that fees and costs incurred in the second litigation were being paid. The only source of the payment was the trust that Respondent was administering.

Even if Ms. [redacted] "assumed" at the onset of the second case that Respondent would be paid at the end of the case, his statements to her clearly put her on notice that her initial assumption was not correct.

Ms. [redacted] was on notice throughout the litigation that Respondent's fees were being paid out of her trust account.

As Ms. [redacted] told the Referee, her only dissatisfaction with Respondent was his taking of the contingency fee (TR40).

The Bar's reliance on The Florida Bar v Bratton, 413 So.2d 754 (Fla. 1982) is misplaced. Mr. Bratton took as fees a lump sum of $10,000 which had been specifically entrusted to him for bond money. The $10,000 was applied without notice to fees in a different case. It did not even involve the same litigation. This is a far cry from the situation at Bar. In the instant case, the fees were taken from trust for ongoing litigation and the client was put on notice that such deductions were being made. Furthermore, Ms. [redacted] did not complain about the payment of Respondent's periodic fees from trust when she testified before the Referee. She merely contested the taking of the contingency fee.

The discipline imposed in Bratton bears absolutely no nexus to the discipline at issue before the Court in the instant case.

Mr. Bratton received an 18 month suspension in 1982. That 18 month suspension was not only for taking his client's $10,000, but was also for practicing while suspended from membership in good standing for failure to pay Bar dues. Admittedly, the latter offense is not of serious import. More significant is the fact that Mr. Bratton received a public reprimand in 1980 after being found guilty of two counts of engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Florida Bar v Bratton, 389 So.2d 637 (Fla. 1980). Clearly, Mr. Bratton's 1980 case was an aggravating factor in the decision to impose an 18 month suspension two years later.

B. Respondent Immediately Drafted Notes Evidencing His Indebtedness to Ms. [redacted]

In reply, Respondent would assert that it is not his burden to prove his innocence in disciplinary proceedings. The Florida Bar has the burden of proving misconduct by clear and convincing evidence. The Florida Bar v Rayman, 238 So.2d 594 (Fla. 1970). Respondent's testimony that he immediately had the notes typed up upon borrowing funds from Ms. [redacted] is the sole evidence before the Court, it is completely unrebutted and it must be accepted as true absent contrary evidence.

C. Respondent Did Not Name Himself Sole Trustee of Ms. [redacted]s Trust.

Respondent disagrees that it is irrelevant that Ms. [redacted] acquiesced in the naming of Respondent as sole trustee. The decision was made with her knowledge and consent and, as

the signatory to the property settlement agreement and the beneficiary of the trust, the decision was hers. The fact that she continues to maintain but one trustee on the trust after the benefit of new counsel proves that it was her decision.

D. The Settlement With the Estate Was For More Than $185,000.

Respondent agrees that the present value of retiring a $135,000 mortgage immediately rather than paying it off over a term of thirteen or fourteen years is hard to quantify. However, it is a real benefit.

Respondent's failure to list the present value of the retirement of that mortgage on his settlement statement shows that he was not grasping for every possible cent he could glean from Ms. Chenoweth's settlement. He was subtracting his fees in what he thought was a good faith, reasonable manner.

II

THE REFEREE IMPROPERLY FOUND RESPONDENT VIOLATED VARIOUS PROVISIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY.

A. Respondent Did Not Violate Disciplinary Rules 5-101(A) and 5-104(A).

Respondent did not violate either Disciplinary Rule 5-101(A) or Disciplinary Rule 5-104(A) because he obtained the consent of his client after full disclosure. Both rules permit a conflict (if a conflict did in fact exist in this case) if the client

consents after full disclosure. It is beyond dispute that Ms. [redacted] received full disclosure prior to lending Respondent any money.

Ms. [redacted] confirmed Respondent's testimony that he told her that he was having difficulty getting a loan from a bank and that was why he had to come to her for help (TR 18,67,267). What more disclosure could there be? There was no requirement under the rules in effect in 1982 (or now, for that matter) that a lawyer tell his client to seek independent legal advice prior to entering into a business transaction with that lawyer. While such advice is perhaps the best course of action to take, absent a specific requirement, a lawyer should not be disciplined for failure to take that step.

The Bar's reliance on Waldeck v Marks, 328 So.2d 490, 493 (Fla. 3rd DCA 1976) is misplaced. That case involved civil litigation unrelated to disciplinary proceedings. However, Respondent has met the heavy burden upon him to show the fairness of his transaction with Ms. [redacted] The interest rate that he paid her far exceeded the amounts that she would have received had the money been invested elsewhere. The two interest payments that Respondent missed were in the early stages of the relationship, were good faith lapses, and constituted but two omissions out of over 45 semi-monthly payments.

B. Respondent Did Not Charge a Clearly Excessive Fee in Violation of Rule 2-106(A).

Respondent did not charge Ms. [redacted] twice for the same services.

The ruling in The Florida Bar v Miller, Case No. 54,443 (Supreme Court of Florida March 15, 1979) is applicable to the case at Bar. There was no specific finding supporting the conclusion that Respondent violated that rule.

C. Respondent Did Not Violate Disciplinary Rule 2-106(C).

The purpose of this disciplinary rule is to keep lawyers from taking a percentage of alimony or child support, a figure that is based upon the minimum amount a former spouse and children need to maintain their standard of living. It is also designed to prevent a lawyer's fee standing in the way of reconciliation. Neither factor was involved in the case at Bar.

Furthermore, lawyers are sometimes specifically allowed to charge contingency fees to collect on arrearages in alimony and child support. See, for example, Professional Ethics Opinion 77-19 (Reconsideration), July 1, 1984.

But, more significantly, Respondent's contingency was not charged on Ms. [redacted]s divorce or her property settlement. It was based upon the fraud action that he filed and was to be applied only to amounts obtained above the original property settlement agreement. Clearly, it did not relate to any domestic matter.

D. Respondent Did Not Violate Disciplinary Rule 9-102(B) (4).

Respondent never refused to return Ms. [redacted]s money. There is no testimony in the record to that effect.

Respondent disagrees with the Bar's implication that it was Ms. [redacted]'s hiring new counsel that caused him to agree to return her funds. Ms. [redacted] hired new counsel almost immediately after her January, 1984 meeting with Respondent. But, even prior to her retaining a new lawyer, Respondent never refused a refund.

The Referee's specific finding in the last paragraph of Section IV of his report is inconsistent with the finding of the violation of DR 9-102(B) (4). The Referee found that Respondent's "misconduct did not involve misappropriation of funds" and that there was no intent to defraud.

E. The Referee's Finding That Respondent Violated DR 1-102(A) (6) Is Unsupported By the Evidence.

Respondent stands on his argument that absent a finding specifying which conduct violated DR 1-102(A) (6), there should be no finding that he is guilty of violating this rule.

There is no showing where Respondent failed to render the best legal advise possible to Ms. [redacted]. Such an argument should not influence this Court's decision in the instant case.

III

IF THIS COURT FINDS THAT RESPONDENT'S CONDUCT WARRANTS DISCIPLINE, IT SHOULD BE AT MOST, A PRIVATE REPRIMAND.

Respondent submits that he is guilty of no impropriety in this case and should not be disciplined. However, should this Court find that Respondent's conduct was lacking, the appropriate sanction is a private reprimand.

Were it not for the mitigating factors involved, a public reprimand like that handed down in The Florida Bar v Golden, 401 So.2d 1340 (Fla.1981) or in The Florida Bar v Staley, 457 So.2d 489 (Fla. 1984) would be appropriate. However, there is substantial mitigation in this case, not the least of which is the fact that probable cause was found on May 31, 1984--over four and one half years ago. Delay in disciplinary proceedings is a mitigating factor that can reduce the discipline to be imposed. The Florida Bar v Randolph, 238 So.2d 635 (Fla. 1970). There, the Supreme Court stated that:

> We have pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so even though the record shows that the conduct of the lawyer merits discipline. The Florida Bar v Wagner, 197 So.2d 823 (Fla. 1967).

This is consistent with the Florida Standards for Imposing Lawyer Sanctions. Rule 9.32 (j) of those standards lists interim

rehabilitation as a mitigating factor. The Referee specifically found that "it is unlikely that the Respondent will be guilty of misconduct in the future." Ref. Rpt. Par. IV. Clearly, Respondent has rehabilitated himself during the 5 to 7 years that have elapsed since he borrowed funds from Ms. [redacted] in January 1982 and since he deducted his fees from her second case in the fall of 1983. Such rehabilitation negates the necessity of a public discipline.

A second major mitigating factor is Ms. [redacted]'s interests--after all, the public's interest is the primary consideration in determining a discipline. Her divorce file was sealed. Clearly, she and her now deceased husband, a nationally famous figure as well as a prominent citizen in Tallahassee, wanted their private life kept out of the limelight. Making this case public would well result in exposing very personal aspects of Ms. [redacted]s life to open view. A good example, but not the only one, would be her treatment for alcoholism.

Ms. [redacted] did not initiate these proceedings. She did not ask the Bar to discipline Respondent. She did not ask the Bar to air her private life. Her interests should be a material concern in deciding on the sanction to be imposed. A private reprimand would punish Respondent and, at the same time, maintain Ms. [redacted]s privacy.

Respondent's offenses did not involve a violation of DR 102(A)(4). The Referee found no misappropriation or intent to defraud. That absence of dishonesty is a third mitigating factor obviating the necessity of a public discipline.

This Court's decision in The Florida Bar v Simonds, 376 So.2d 853 (Fla. 1979) is not germane to the case at Bar. Mr. Simonds resigned from The Florida Bar at a time during which he had six separate disciplinary actions pending and after the Bar filed a multi-count complaint against him. Two of the counts involved mishandling and improper business transactions with two different clients. There was not full disclosure in either case. Mr. Simonds induced the clients to invest in investment opportunities and he failed to advise the clients that he was a substantial owner of the business involved. (The other four cases involved a plethora of offenses mainly pertaining to neglect of various legal matters.)

Unlike Mr. Simonds, Respondent clearly advised Ms. [redacted] of the reasons for his needing a loan. A bank would not lend him the money.

The Florida Bar v Papy, 358 So.2d 4 (Fla. 1978) also involved a lack of disclosure. Mr. Papy, in essence, looted an estate. Likewise, The Florida Bar v Drizin, 435 So.2d 796 (Fla. 1983) is distinguishable. Mr. Drizin's offenses were myriad. And, most importantly, his conduct involved a violation of

DR 1Ø2(A)(4), conduct involving dishonesty, fraud, deceit, or misrepresentation. The Referee found the Respondent in the case at Bar not guilty of a violation of that Rule.

The facts in the Drizin decision are not set forth in the opinion. However, it should be noted that his disbarment was made concurrent with an earlier disbarment order rendered a year earlier in The Florida Bar v Drizin, 42Ø So.2d 878 (Fla. 1982). The 1982 disbarment involved three counts of misconduct involving fraud and criminal misconduct.

The Bar cites The Florida Bar v Mavrides, 442 So.2d 22Ø (Fla. 1983) and The Florida Bar v Abrams, 4Ø2 So.2d 115Ø (Fla. 1981) to argue that Respondent's discipline should be enhanced because of cumulative misconduct. Neither case supports that argument in the case at Bar.

Mr. Mavrides' decision lists no facts. The summation of the case indicates he had eight separate violations. Mr. Abrams' offenses ran the gamut of disciplinary rule violations from DR 1-1Ø2(A)(4), conduct involving fraud, dishonesty, deceit or misrepresentation to DR 7-1Ø2, lying to a Court. He, in essence, sold out some of his clients to benefit others. In the course of so doing, he advised several individuals who had received immunity from prosecution to spurn the immunity to keep them from testifying against another one of Mr. Abrams' clients.

Respondent would ask this Court to note that on page 32 of

the Bar's brief it is stated that Respondent charged Ms. [redacted] hourly fees totaling $50,105. The Court should keep in mind that $10,000 of those fees went to Barry Richard, a co-counsel hired with Ms. [redacted]s consent.

Respondent argues that his case is most closely analogous to the private reprimand matter published in The Florida Bar News and appended to Respondent's initial brief and discussed at page 38 of Respondent's initial brief.

Other decisions of this Court indicate that public reprimands are entirely appropriate, rather than suspensions, for business dealings with clients. In The Florida Bar v Tunsil, 513 So.2d 120 (Fla. 1987), The Florida Bar v Belleville, 529 So.2d 1109 (Fla. 1988) and The Florida Bar v Welden, 513 So.2d 125 (Fla. 1987), public reprimands were issued in analogous situations. The common theme on all three of these cases is the lack of full disclosure--a factor not involved in the case at Bar. Furthermore, in Mr. Tunsil's case, he received but a public reprimand despite the fact that he is serving a one year suspension for theft of trust funds. The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986). Respondent submits that his disclosure to Ms. [redacted] that he could not get a bank loan is full disclosure and reduces the appropriate penalty from a public to a private reprimand.

The Referee noted Respondent's "good attitude and genuine desire to rectify his wrongs". The Referee was convinced that a substantial part of Respondent's misconduct resulted from ignorance and that it was "unlikely" that Respondent would be guilty of misconduct in the future. He specifically found Respondent not guilty of violating DR 1-102(A)(4) and pointed out that the conduct did not involve misappropriation of funds or intent to defraud.

Those findings by the Referee obviate the necessity of public discipline. Ms. [redacted] sought no discipline from the Bar and, in fact, has retained Respondent to represent her on legal matters subsequent to the onset of these proceedings. There simply is no reason to publicly discipline this lawyer. He will never be before this Court again. The Referee so opined. If he engaged in misconduct, it was through no intent to commit wrongdoing.

Respondent has had to endure these disciplinary proceedings for almost five years. That coupled with a private reprimand will be sufficient punishment to ensure his never acting wrongfully again. This Court should impose as discipline, at most, a private reprimand.

CONCLUSION

Various factual findings made by the Referee, which he used to support his conclusion that certain disciplinary rules were

violated, were not supported by evidence in the record. Those findings should be reversed and Respondent should be found not guilty of any misconduct.

Even should the Referee's factual findings be upheld, Respondent has not violated any of the disciplinary rules involved. Accordingly, the Referee's conclusion that those rules were violated should be disregarded and Respondent should be found not guilty of misconduct warranting discipline.

Should this Court conclude that Respondent's conduct warrants a sanction, it should be a private reprimand. Such a discipline will punish the Respondent while at the same time encouraging reformation and rehabilitation. Should Respondent ever appear before the Court again, such prior reprimand can be used to enhance any future discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Corrected Reply Brief was mailed to James N. Watson, Jr., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 13th day of January, 1989.

John A. Weiss