4-17

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

JOE G. HOSNER,

Respondent.
_____/

CASE NO: 68,645

(TFB File No: 01-83102)

RESPONDENT'S REPLY BRIEF

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ARGUMENT

I.

DISCIPLINARY PROCEEDINGS AGAINST RESPONDENT SHOULD BE DISMISSED FOR THE BAR'S VIOLATIONS OF THE CLEAR REQUIREMENTS OF THE INTEGRATION RULE

The Bar excuses its failures to abide by this Court's orders in the Integration Rule as merely technical errors which warrant no remedial action by this court. In essence, The Florida Bar asserts to this Court that it is free to ignore the provisions of the Integration Rule whenever it chooses and that there is nothing that can be done about it.

Would that lawyers facing disciplinary proceedings could make the same argument.

The Bar's failure to impanel a grievance committee composed of "at least one-third non-lawyers" is inexcusable. It was either a gross disregard for its responsibilities or it was a conscious decision not to abide by the Integration Rule. In either case, such a blatant violation of this Court's instructions warrant remedial action. The only such action available is dismissal of this cause.

Until this Court sends a clear message to the Board of Governors of The Florida Bar, by dismissing this case and others of similar ilk, that it demands compliance with its rules of procedure, the Board will have no incentive to comply with the Rules of Discipline.

The Bar's argument that its error was technical and that it

was waived by Respondent's failure to object at hearing should not excuse the Bar's conduct.

A Respondent walking into a grievance committee hearing should have the right to assume that The Florida Bar has complied with all procedural rules. He should not have to scrutinize the Rules of Discipline to make sure that the Bar is complying with this Court's dictates. The burden should not be placed upon a Respondent to police The Florida Bar and to ensure that it is exercising its power to revoke his property interest in his license in accordance with the rules promulgated by the Supreme Court for governing such procedures.

When the Bar's blatant disregard for its responsibility to impanel a grievance committee is coupled with its delinquent prosecution of this case, it becomes apparent that dismissal of this cause is the only remedy available to Respondent. As outlined in Respondent's Initial Brief, for 27 years lawyers have been complaining, and this court has been noting, the Bar's failure to expeditiously carry out its obligations to the public to prosecute errant lawyers. As long as this court allows The Florida Bar to weasel out of their responsibility by arguing that there should be no no dismissal absent prejudice, the Bar will continue such tardy prosecution.

As pointed out in Respondent's Initial Brief, lawyers have been disciplined for delays while representing their clients that are shorter than the Bar's delay in this case.

Until The Florida Bar is shown by this Court that

irresponsible prosecution in disciplinary proceedings will result in dismissal, the Bar will continue its delay. What is the incentive to act responsibly? If the Bar elects to "back burner" a case, they know it will not get dismissed.

Respondent further avows to this court that there is prejudice to the Respondent lawyer in every case that the Bar delays. That prejudice is the concern and the worry about the ultimate outcome of the case.

Respondent argues that his case should be dismissed for the Bar's failure to abide by the Integration Rule. He also argues that every case involving substantial violations of the Integration Rule should also be dismissed. Only then will this Court know that the Bar will responsibly carry out its obligation to abide by the procedures promulgated by the Court.

II.

THE BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT MISCONDUCT OCCURRED.

A Referee's findings of fact is distinct from her recommendations as to discipline. In the case at bar, there is nothing in the record to support the Referee's recommendation that Respondent be found guilty of violating DR-1Ø2 (A)(4). There is no finding that any of Respondent's acts involved dishonesty, fraud, deceit or misrepresentation.

The record is unrebutted that Respondent's deposit of Ms. Lewis' payoff into the West Florida Bank would not have resulted

in the release of her title. (TR 127). The bank was insisting on payoff of all titles under its blanket lien before releasing any of them.

There is no evidence showing that Ms. Spence passed on to Respondent the messages she received from Mr. Findley. The Bar has the burden of proving that such messages were passed on. There failure to do so is fatal. They cannot argue that it can be assumed that Respondent got them.

The Referee found that Respondent demanded that Ms. Lewis comply with the terms of her agreement by making her final payment when he knew that he could not produce the title. There is no evidence in the record to support that finding. Mr. Findley, not Respondent, wrote the demand letters. Furthermore, the record is unclear as to exactly when Respondent learned that West Florida Bank was demanding payoff of all titles before it would release its blanket lien. The Referee made assumptions not supported by the evidence before her. Such assumptions should not form the basis for a finding by "clear and convincing evidence" that misconduct has occurred.

The Bar's argument on page 21 of its brief that "Clearly, Ms. Lewis was deceived by Respondent. . . . " is not supported by the evidence either. The only evidence in this regard was Respondent's testimony that he explained to Ms. Lewis the reasons for the delay in delivering title to her (TR 72). Ms. Lewis certainly did not testify that she was deceived -- she did not appear at trial.

The Bar's assertion that Ms. Lewis fulfilled her part of the bargain under the contract is also contrary to the evidence. The record indicates that she was late in making at least two payments under the contract and that she was late making the final payoff. She breached the contract prior to any alleged breach by Respondent.

Finally, the Referee specifically found that Ms. Lewis was not prejudiced by Respondent's actions.

III.

RESPONDENT'S CONDUCT, EVEN IF IMPROPER, SHOULD NOT RESULT IN DISCIPLINE BECAUSE IT WAS UNRELATED TO HIS PRACTICE.

Respondent urges this Court to dismiss these disciplinary proceedings because The Florida Bar has expanded its power to discipline attorneys for acts outside their practice too far. A line must be drawn. The line must be drawn in this case.

There are now over 40,000 lawyers in The Florida Bar. The numbers are growing daily. Is The Florida Bar going to have power to discipline them for any act that anybody might find to involve some semblance of dishonesty? What is the logical end? Will a lawyer be subject to discipline when she comes home after a Bar meeting in the wee hours of the morning and falsely tells her husband that she and another lawyer were discussing one of their cases? Of course not.

Should the Bar have the disciplinary power to punish a lawyer who falsely tells a prospective buyer for his car that it

gets 24 miles per gallon instead of the 22 miles per gallon that it actually gets? Of course not.

Where will the line be drawn? Respondent urges that the line limiting the Bar's disciplinary powers should be drawn before it gets to the case at bar. Respondent did nothing dishonest. He should not be disciplined by this Court.

IV.

RESPONDENT'S CONDUCT WARRANTS AT MOST A PRIVATE REPRIMAND.

If a discipline is warranted in this case, it should be no more than a private reprimand.

Respondent has cited cases in its initial brief indicating that, even absent mitigation, his conduct does not warrant a public reprimand.

Even if this Court feels that Respondent is guilty of misconduct warranting discipline, and even if this Court feels a public reprimand would normally be appropriate, the mitigating factors involved in this case should reduce that discipline one notch from a public reprimand to a private one.

The primary mitigating factor in this case is the Bar's three year delay from the time the Bar received the Ms. Lewis' complaint until it filed its formal complaint in this Court. Even in those cases where the Court has refused to dismiss cases for tardy prosecution, it has reduced the discipline. Such action should be taken in the case at bar.

The second reason for Respondent's discipline being

mitigated is the substantial, and material, health difficulties incurred by his family during the period involved in this case. Two open heart surgeries on Respondent's teenage son, and his wife's heart attack in between those two operations, are not mere "excuses" as the Bar repeatedly characterized them.

Respondent's concern for his son's and his wife's health clearly contributed to the entire scenario surrounding the Lewis transaction. Obviously, his concern for them resulted in his spending time caring for them to the exclusion of his business. That is a mitigating factor. It is not an excuse.

As further mitigating factors, the Court should note that Respondent has never previously been disciplined by this Court, that the misconduct took place outside Respondent's practice of law and that the complainant in these proceedings was not prejudiced by Respondent's delay.

CONCLUSION

Respondent urges this Court to dismiss these disciplinary proceedings.

Should the Court elect to impose discipline, Respondent urges that it be no more than a private reprimand.

RESPECTFULLY SUBMITTED,

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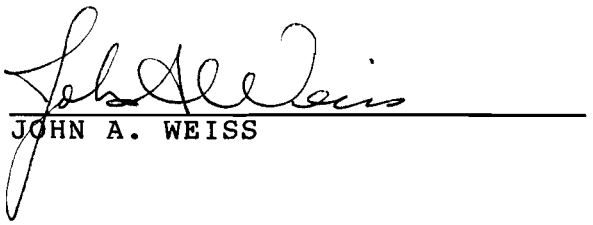
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been furnished this 23rd day of March, 1987, to Susan V. Bloemendaal, Bar Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.



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