

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case No. 69,956

Appellant/Cross-Appellee,

TFB File No. 86-20,097 (15E)

v.

KEITH A. SELDIN,

Appellee/Cross-Appellant.

---

REPLY BRIEF OF APPELLANT, THE FLORIDA BAR

DAVID M. BARNOVITZ  
Assistant Staff Counsel  
The Florida Bar  
915 Middle River Drive, Suite 602  
Ft. Lauderdale, FL 33304  
(305) 564-3944

JOHN T. BERRY  
Staff Counsel  
The Florida Bar  
Tallahassee, FL 32301-8226  
(904) 222-5286

JOHN F. HARKNESS, JR.  
Executive Director  
The Florida Bar  
Tallahassee, FL 32301-8226  
(904) 222-5286

TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents -----	i
Table of Cases -----	ii
Argument	
I    THE EVIDENCE WAS CLEAR AND CONVINCING TO SUSTAIN THE REFEREE'S FINDINGS REGARDING APPELLEE'S THEFT -----	1
II   THE REFEREE'S FINDINGS THAT APPELLEE WAS GUILTY OF THEFT AND FRAUD ARE CONSISTENT AND NOT MUTUALLY EXCLUSIVE ----	3
III  IF CHARACTER IS RELEVANT IN THE DETERMINATION OF A DISCIPLINARY PROCEEDING THEN THE BAR MUST HAVE THE OPPORTUNITY TO CONFRONT CHARACTER WITNESSES -----	4
Conclusion -----	6
Certificate of Service -----	6

TABLE OF CASES

	<u>PAGE</u>
<u>Hathaway v. The Florida Bar,</u> 184 So.2d 426 (Fla. 1966) -----	5
<u>The Florida Bar v. Randolph,</u> 238 So.2d 635 (Fla. 1970) -----	5

## ARGUMENT

### **THE EVIDENCE WAS CLEAR AND CONVINCING TO SUSTAIN THE REFEREE'S FINDINGS REGARDING APPELLEE'S THEFT.**

Appellee acknowledges that the referee's findings are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The distillate of appellee's argument appears at page 13 of his brief where he urges that his and his wife's "testimony stands uncontradicted and should have been relied upon by the special referee." Nothing could be further from the truth. In fact, the evidence of appellee's theft is overwhelming and in the bar's view would sustain a burden even heavier than clear and convincing.

Thomas E. Lee, Jr.'s testimony is entitled to great weight. As a former Circuit Court Judge in and for the Eleventh Judicial Circuit for approximately twelve (12) years, State Beverage Director for over two (2) years and a practicing attorney for approximately thirty-six (36) years (27)\*, Mr. Lee's credentials are impeccable and his credibility appears beyond reproach. Mr. Lee had no bias or prejudice concerning appellee regarding him, prior to appellee's misdeeds, as a "very attractive young fellow" (29).

Appellee would have the court believe that Mr. Lee's testimony was equivocal concerning Betty Boneparth's role in the sale. It was not. Not only did Mr. Lee testify that Ms. Boneparth's only participation was to show the property at appellee's request (32) but was even more positive and assertive in his unequivocal testimony when explaining that

---

\* All references are to trial transcript

the sales contract expressly negated the participation by any broker in the sale. He testified:

Q. I ask you to refer again to the bar's Exhibit 3 and to the provision entitled, "Commission to broker"?

A. Yes, sir.

Q. And ask you if you have a recollection concerning that provision in that contract.

A. Yes, sir.

Q. What is your recollection as to that provision?

A. I think my secretary prepared this contract. I had dealt with Mr. Seldin and there was no broker involved and I didn't want anybody claiming a commission against me either (30, 31).

Thus, on the one side of the ledger the referee had the benefit of a totally objective participant in the subject transaction, a witness of impeccable credentials who testified that there was no broker involved together with documentary evidence totally corroborating his testimony. The contract, itself, expressly provides that no broker commission was involved and even appellee had to admit that such language certainly expressed Mr. Lee's understanding of the extent of broker participation (68, 69).

On the other side of the ledger was appellee's version of the events and that of his wife, a confessed misdemeanant, neither of whom could offer any reason why the contract (bar's Exhibit 3 in evidence) vitiated a claim of broker participation nor why neither questioned the clause, even between themselves, or brought it to Mr. Lee's attention.

This is hardly the unequivocal testimony made reference to in appellee's brief. The referee had the advantage of assessing those witnesses appearing in front of him. He heard from an objective, disinterested, credible witness whose testimony was corroborated by documentary evidence. It is respectfully submitted that the referee's finding based upon the quantum and quality of evidence presented to him must be presumed correct.

**THE REFEREE'S FINDINGS THAT APPELLEE WAS GUILTY OF THEFT AND FRAUD ARE CONSISTENT AND NOT MUTUALLY EXCLUSIVE.**

At page 19 of his brief, appellee urges that it is illogical for the bar to urge a theft while at the same time urging that the various real estate brokers were defrauded. There is no inconsistency.

The bar's exhibits 1 and 2 in evidence are two (2) exclusive brokerage listing contracts. Each provides in the first paragraph thereof, identical language, to wit:

The undersigned agrees to pay the named realtor a professional fee of \_\_\_\_\_%\* of the sales price, provided the property is sold during the existence of this contract...

As a result, regardless of the lack of broker participation, a commission was due and owing to one or both brokers.

Paragraph 3 of the bar's complaint admitted to by appellee

---

\* Each contract provided its own percentage.

acknowledged the existence of the first listing contract (bar's Exhibit 1 in evidence). Paragraph 4, admitted to by appellee, acknowledged that the transaction was effected while the subject broker's agreement was in full force and effect. Thus, a commission was due to the named broker and respondent admitted that he knowingly and intentionally withheld that information. A clear and admitted fraud was perpetrated on the broker. The fact that appellee and his wife stole from appellee's client does not vitiate the fraud. According to the listing contracts a commission was due regardless of broker participation.

Likewise, appellee conceded that he purposely joined in the conspiracy to insure that Fidelity Properties, Inc. was deprived of its exclusive entitlement to a commission "provided the property is sold during the existence of this contract" by knowingly and intentionally eliminating the Lees from the listing agreement. This, it is respectfully submitted, is certainly a fraud. It, like the fraud perpetrated upon Town and Country, remained a fraud regardless of the fact that appellee and his wife stole money from appellee's client.

**IF CHARACTER IS RELEVANT IN THE DETERMINATION OF A  
DISCIPLINARY PROCEEDING THEN THE BAR MUST HAVE THE  
OPPORTUNITY TO CONFRONT CHARACTER WITNESSES.**

Appellee has attached to his brief as "Exhibit B" character letters which were specifically excluded by the referee. The bar has moved to strike such letters. As authority for the proposition that character

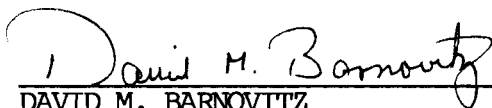
letters are appropriate for submission to and consideration by a referee, appellee cites The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970) concluding that by such decision this court "appeared to sanction the use of that very form of written evidence in a disciplinary proceeding" (appellee's brief, page 23). This characterization of Randolph, is misleading. In fact, the court, citing Hathaway v. The Florida Bar, 184 So.2d 426 (Fla. 1966) was careful to emphasize that the letters involved in Randolph were filed "without objection from the bar." It would seem that had the bar objected, the result would have been different. The bar has addressed the issue of character letters received in evidence over objection in its initial brief and relies upon and incorporates by reference its argument advanced therein.



CONCLUSION

The theft committed by appellee, alone, warrants his disbarment. His fraud, coupled with his inducement and advice to his client to join in such fraud together with the notatorial misdemeanor and conflict of interest, even absent the theft mandate appellee's disbarment.

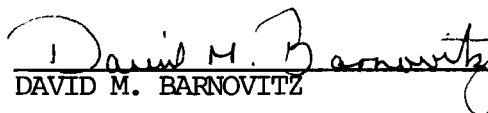
Respectfully submitted,



DAVID M. BARNOVITZ  
Assistant Staff Counsel  
The Florida Bar  
915 Middle River Drive, Suite 602  
Ft. Lauderdale, FL 33304  
(305) 564-3944

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing answer brief of The Florida Bar was furnished to Barry Richard, Esquire, attorney for appellee, 101 East College Avenue, Post Office Drawer 1838, Tallahassee, FL 32302, by regular mail on this 28<sup>th</sup> day of January, 1988.

  
DAVID M. BARNOVITZ