O/a 2-6-89

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT STEPHEN RYDER,

Respondent.
_____/

Case No. 72,216

RESPONDENT'S REPLY BRIEF ON CROSS-PETITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

THE SUBSTANTIAL MITIGATION PRESENTED TO THE REFEREE PRECLUDES AN ORDER OF DISBARMENT FOR THE CONDUCT FOR WHICH RESPONDENT WAS CONVICTED

Respondent's argument on his cross-appeal is that the Referee chose to ignore numerous factors which should mitigate the discipline to be imposed in this case. That mitigation reduces the appropriate discipline from disbarment to an eighteen month suspension.

The Referee's recommendations as to discipline do not come before this court carrying the same weight as do his findings of fact. In The Florida Bar v McCain, 361 So.2nd 700 (Fla. 1978) at page 708, in a concurring opinion, former Justice Sundberg stated that "the discipline appropriate to ethical misconduct is the sole province and responsibility of this Court."

The cases are legion in which this Court has considered mitigation in determining discipline. In fact, the Florida Standards for Imposing Lawyer Sanctions specifically acknowledges that mitigating factors may reduce the discipline to be imposed. Rule 9.32 of those standards list mitigating factors to be considered. Foremost among those rules are (b) absence of a dishonest or selfish motive; and (g) character or reputation. Respondent argues to this Court that his lack of a dishonest motive and his superlative character and reputation in the community, coupled with his legal aid contributions, warrant the reduction of the punishment imposed in this case to a suspension.

Bar Counsel candidly acknowledges in his reply brief that this Court's most recent decision involving a lawyer lying under oath resulted in suspension, not disbarment. In The Florida Bar v O'Malley, 13 FLW 715 (Case No. 70,495, 12/8/88) a lawyer received a three year suspension for, among other things, "deliberately and unequivocably" lying under oath during deposition. Id., p.717. In its decision, the Court noted that "O'Malley directly benefited from his wrongful acts". Id., p.716.

Despite the fact that O'Malley was guilty of mishandling trust funds and lying under oath to protect himself, an act that was to his direct benefit, this Court considered the mitigating circumstances involved and suspended him for three years.

Respondent acknowledges that O'Malley's conduct did not involve a criminal conviction. However, the seriousness of the offense is exactly the same--lying under oath. The material distinction between the two cases is that O'Malley deliberately lied for a dishonest and selfish reason. His personal gain. There is no showing of such motive in the case at Bar.

Respondent's misrepresentation did not in any way directly benefit him. This is a substantial mitigating factor that was not present in the O'Malley case. Furthermore, unlike O'Malley, Respondent had a seventeen year history of a superlative law practice in Ocala. During that time, his contributions to legal

aid were substantial and he built an impeccable reputation for truth and honesty. His character and reputation should mitigate the discipline to be imposed.

Respondent understands that there is a visceral reaction against lawyers convicted of perjury. The obvious conclusion is that any such conviction should result in disbarment. Respondent asks this Court, however, to go beyond the mere conviction and to examine the circumstances attendant to his misconduct together with his past history in deciding on a sanction to be imposed.

Obviously, felony convictions, or, in cases where adjudication is withheld, felonious misconduct, do not automatically result in disbarment. Even felonies involving perjurious conduct can result in suspensions. For example, in The Florida Bar v Chosid, 500 So.2d 150 (Fla. 1987), the accused received a three year suspension for his conviction for one count of filing a false income tax return.

The accused lawyer in Chosid had been indicted on five felony charges surrounding the importation of marijuana and the laundering of funds derived from the smuggling operation. A plea bargain was arranged wherein Mr. Chosid pled guilty to one felony count of filing a false income tax return. In his dissent, Justice Erlich noted that Chosid's crime was "an act of perjury" and was a crime motivated by pecuniary gain. Furthermore, Mr. Chosid had a prior, albeit minor, prior disciplinary history.

Respondent's offense in the case at Bar was certainly less serious than that involved in Chosid. There is no showing that his offense was predicated upon a desire to profit. Furthermore, Respondent certainly was not involved in the importation of illicit drugs--perhaps the worst crisis facing this country at this time.

Under no circumstances should Respondent receive a more severe punishment than that meted out in Chosid.

In The Florida Bar v Giordano, 500 So.2d 1343 (Fla. 1987), a lawyer convicted of drug dealing received but a three year suspension. Mr. Giordano was convicted of one count of possession with intent to distribute cocaine, a felony, and three counts of distribution of marijuana.

There are instances where felonious conduct does not even result in a suspension requiring proof of rehabilitation. In The Florida Bar v Weintraub, 528 So.2d 367 (Fla. 1988), a lawyer was suspended for 90 days after he pled nolo contendere to delivery of cocaine. Adjudication of guilt was withheld.

Even felonious misconduct involving the theft of trust funds--certainly "one of the most serious offenses a lawyer can commit", The Florida Bar v Breed, 378 So.2d 783 (Fla. 1980)--does not always result in the imposition of the ultimate sanction. In The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986), a lawyer received but a one year suspension for theft of over $10,000 in trust funds. Although he was not adjudicated guilty of a felony, Mr. Tunsil did plead guilty to the felony of grand theft.

Respondent avers to this Court that despite the fact that he has been convicted of a felony, the previously cited cases show there is ample precedent for this Court imposing a suspension for his misconduct instead of disbarment.

Just as the conviction of a felony does not automatically result in disbarment, lying under oath does not automatically result in disbarment. O'Malley, supra, is a case in point. There are even instances where lawyers have testified falsely and not even been suspended. The Florida Bar v Batman, 511 So.2d 558 (Fla. 1987). Although the facts and the Court's opinion are sketchy, the opinion states that the Referee found that Mr. Batman "testified falsely" about his legal practice while suspended for nonpayment of Bar dues. Obviously, Mr. Batman's testimony was for personal gain, yet he received but a public reprimand. Mr. Batman showed a lack of integrity, he lied, and he was not even suspended from practice.

In The Florida Bar v Siegel and Canter, 511 So.2d 995 (Fla. 1987), two lawyers received a 90 day suspension for engaging in a "deliberate scheme to misrepresent facts to" a bank in an attempt to obtain full financing for the purchase of their law office. Once again, these lawyers lied to financially benefit themselves. Their suspension did not even require proof of rehabilitation before reinstatement.

As was true in Siegel and Canter, supra, the accused lawyer in The Florida Bar v Nuckolls, 521 So.2d 1120 (Fla. 1988)

received but a 90 day suspension. Mr. Nuckolls was found guilty of three counts of professional misconduct. This Court, on page 1121 of its decision described Mr. Nuckolls' offense as follows:

> The first two counts involved a scheme to fraudulently obtain 100% financing by misrepresenting the purchase price of condominium units. The third count involves respondent's violation of his obligations as a land trustee.

Mr. Nuckolls' offenses involved a basic lack of honesty and devotion to his client's affairs. However, his transgressions did not merit a suspension requiring proof of rehabilitation before reinstatement.

Respondent submits that lying is lying, be it under oath, on mortgage applications (Nuckolls and Siegel) during deposition (O'Malley) or while testifying regarding conduct while suspended (Batman). The misrepresentation is the offense for which the lawyer should be disciplined, not the forum in which it took place. Respondent submits that he is no more dishonest than the lawyers in the previously mentioned cases. The public is no more in need of protection from Respondent than it is from Messrs. Canter, Nuckolls and Batman and from Ms. Siegel. Yet the discipline imposed against each of those four lawyers did not even require proof of rehabilitation before reinstatement. In fact, because Respondent's misstatements were not made in an effort to advance himself financially, the argument can be made that his offense is not as egregious as that involved in the cases just cited.

Respondent is not so naive, however, as to believe that the fact that he has been convicted of a felony does not mandate this Court's imposition of a sterner sanction than given out in Batman, Siegel and Nuckolls. His misconduct is more analogous to that meted out in The Florida Bar v Tunsil, supra. Clearly Tunsil's offense was felonious and involved dishonest conduct. Furthermore, Tunsil's misconduct not only was designed to advance himself financially but it was to the direct detriment of a client. Mr. Tunsil received a one year suspension. Respondent asks this Court to impose a sanction against him similar to that imposed in Tunsil and to suspend him for eighteen months.

Respondent submits that his prior excellent reputation and the fact that there is no showing that his misstatements to the grand jury were motivated by personal gain, alone, should reduce his discipline. However, there is an even more compelling reason to reduce his sanction from disbarment. His outstanding record of pro bono work.

Respondent outlined in detail his pro bono work in his initial brief on cross appeal. In The Florida Bar v Rosen, 495 So.2d 180 (Fla. 1986) this Court specifically acknowledged Respondent's past contributions to the bench and Bar as a mitigating factor in determining discipline. Although he was guilty of dealing in illegal drugs, this Court suspended Mr. Rosen rather than disbar him. Substantial mitigating factors were his drug dependency and his past contributions to the Bar.

Respondent asks that the same considerations be given to him in determining discipline.

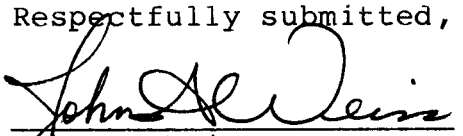
Were this a case involving conviction of the felony of perjury for lying to a grand jury to protect oneself or for profit, and were this a case without any mitigating factors whatsoever, Respondent acknowledges that disbarment would be appropriate. In The Florida Bar v Wilson, 425 So.2d 2 (Fla. 1983), this Court specifically declared that had any mitigating factors appeared in the record, a different result might have been obtained. There are numerous and substantial mitigating factors appearing in the case at Bar. Most importantly, they include no selfish and dishonest motive, excellent character and reputation and substantial and long-standing community service.

Respondent is not one who should never have appeared before the Bar. His sanction should be an eighteen month suspension with proof of rehabilitation before reinstatement.

CONCLUSION

Respondent asks this Court to substitute for the Referee's recommended disbarment the sanction of an 18 month suspension, nunc pro tunc May 31, 1988, the date of his automatic suspension upon felony conviction, with no reinstatement until his civil rights are restored.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Reply was mailed to David G. McGunegle, The Florida Bar, 605 Robinson St., Suite 610, Orlando, Florida 32801 this 3rd day of January, 1989.

John A. Weiss