IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

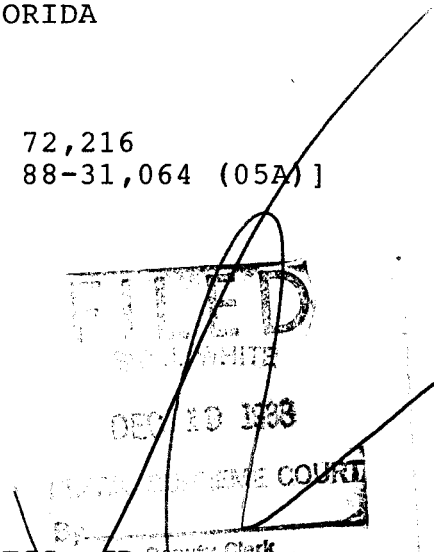
Complainant,

v.

ROBERT S. RYDER,

Respondent.
_____/

Case No. 72,216
[TFB No. 88-31,064 (05A)]



REPLY BRIEF

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ARGUMENT

At the outset, The Florida Bar reiterates the arguments made in its Initial Brief. The respondent argues in his Answer Brief that the referee failed to properly consider the evidence offered in mitigation and that if the respondent were disbarred, the three year rule should be applied.

In a lucid and well considered report, the referee clearly set forth his reasons for recommending the respondent's disbarment. He specifically stated that

> The crime of perjury involves an intentional interference with the very system and process we at the Bar are sworn to serve and uphold. Such an offense must be sternly and positively denounced in every instance, but when committed by a member of the Bar the crime is greater, and the punishment must be greater. We must avoid in every instance the impression that "we protect our own" when dealing with such intrinsic threats to our courts and our system of justice. R p.6

A review of the transcript of the final hearing held on July 21, 1988, reveals that the referee actively participated in the proceedings. See T pp. 97-105 for an example. The referee indicated that he wished for counsel, in his closing argument, to relate the circumstances surrounding the respondent's conviction that could be considered in mitigation. (T p. 98). The referee further reviewed the lengthy four volume transcript of the respondent's criminal trial. (T p. 128) He indicated that he

felt it necessary to study all the material provided in evidence. (T p. 131) If, after his review of the record he felt that the respondent should not have been convicted, he would consider that in mitigation. (T p. 128)

Considerable testimony was given at the final hearing concerning the respondent's good works in the community throughout his years of practice, especially in the area of providing assistance to a rape crisis/spouse abuse center. Although it appears the referee considered these contributions, good works alone should not be determinant of the level of an attorney's discipline. The nature of the misconduct is certainly more important.

In his report, the referee indicated that he did in fact study all the evidence presented, including the character witnesses presented by the respondent. (R pp. 6,7) He did consider the character and reputation of the respondent as testified to by the numerous witnesses to be mitigating factors. (R p. 6) However, given the serious nature of the respondent's crime, he did not find that they were sufficiently mitigating to justify any discipline less than a disbarment. (R p. 6) Therefore, given the record, the Bar finds the respondent's argument that the referee somehow failed to give adequate

consideration to the evidence offered in mitigation to be without merit.

An extensive analysis of an attorney's general character as a mitigating circumstance can be found in C. Wolfram, Modern Legal Ethics, at pp. 121-126 (1986). The author called into question the relevance of the use of "character testimonials" provided by friends of a respondent as to his "former, reflected glory." Furthermore, similar mitigating factors can be found in the arguments of almost every respondent.

For instance, the disciplinary process and the attendant publicity is emotionally taxing. There will always be members of the community who hold most accuseds in high esteem, and many attorneys can lay claim to having performed good works for the community. The attorney and his family usually depend upon his income and the threat of losing his license to practice law is stressful. Because these and other elements can be found in most any disciplinary case, the author found it difficult to characterize them as particularly relevant mitigating factors. Yet the respondent in the instant case argues that many of these same circumstances should act to mitigate his discipline.

It is ironic that the respondent emphasizes his honesty and yet he stands convicted of three counts of perjury. It is

immaterial whether or not he had anything to gain from lying to the grand jury and the court. Respondent's former career for several years as a prosecutor should have made him more attuned to the nature of his offense and its gravity. This court most recently found in The Florida Bar v. O'Malley, No. 70,495 (Fla. Dec. 8, 1988), that because our system of justice is dependent upon the truthfulness of its officers, an attorney may commit no greater professional wrong than to lie under oath in a legal proceeding. Normally, such conduct warrants disbarment. The Florida Bar v. Manspeaker, 428 So.2d 241 (Fla. 1983). This court chose to suspend the attorney in O'Malley, supra, solely due to a number of mitigating circumstances including alcoholism, marital problems, restitution of the collateral the attorney had misappropriated, inexperience in the practice of law, remorse, lack of injury to his client and his reputation for honesty.

In a separate opinion, concurring in part and dissenting in part, Justice Ehrlich found the attorney's commission of perjury to be more disurbing than his misuse of the collateral entrusted to his care.

> Our system for the administration of justice depends upon a witness's testifying truthfully in a judicial proceeding....Mr. O'Malley's conduct undermines the very foundation of our profession. I see no circumstance that will mitigate the enormity of his transgression to a case where a three-year suspension is adequate to operate as a deterrent to other members of the Bar. The message should be loud

> and clear that a lawyer who lies under oath during the course of a judicial proceeding forfeits his standing to be a member of The Florida Bar. O'Malley, supra at pp. 8-9.

In his brief, respondent argues that the Bar has abandoned protection of the public in favor of the punative aspect of discipline to emphasize deterrence. The respondent appears to believe that a disbarment would be unduly punitive and unfair despite his conviction of three counts of perjury committed on three separate occasions. This court addressed a similar position in The Florida Bar v. Wilson, 425 so.2d 2 (Fla. 1983). The accused attorney had been adjudicated guilty of two felony counts for soliciting to traffic in cocaine and attempted trafficking in cocaine. This court found that disbarment was not unfair given the absence of mitigating circumstances. Due to the nature of the profession, an attorney should at least be expected not to violate criminal laws. This court also found that a mere suspension would not protect the best interest of the public. Disbarment was determined to be an appropriate penalty where an attorney was convicted of engaging in illegal conduct involving moral turpitude. One who "breached the confidence reposed in him as an officer of the court" should no longer be allowed to enjoy the privilege of being a member of The Florida Bar. Only disbarment could insure that an attorney was capable of fully understanding and complying with the rules and regulations

governing admittance to the Bar. He must prove his rehabilitation not to a referee, but to the Board of Bar Examiners. This court went on to specifically state that "[i]n the case of a felony conviction, this additional requirement is significant, as it would better encourage reformation and rehabilitation." Wilson, supra at 3.

The court further wrote:

> Finally, if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it. Disbarment as a result of the conviction of felonies is a message loud and clear to the members of The Florida Bar that this Court will not countenance or permit the conduct for which respondent was convicted. In our view, a suspension does not have the deterrent effect of disbarment. Wilson, supra, at p. 4.

The Bar concurs completely in this case. In sum the public clearly needs protection from attorneys convicted of perjury. They should not be members of the Bar.

In his brief the respondent cites the quote from Henry S. Drinker's book, Legal Ethics as contained in The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977), to support his contention that his misconduct does not justify disbarment. The Florida Bar submits that Mr. Drinker spoke of disbarment as the ultimate discipline in that it was likely then to be permanent in many states.

The Bar acknowledges that disbarment is the ultimate penalty available. However, it is not permanent in nature in this state. Therefore, the Bar maintains that the respondent's argument that it should not be applied to those attorneys who have potential for rehabilitation may not be the correct analysis. Most disbarred attorneys have at least some potential for rehabilitation. The Bar submits that perhaps the sole question should be whether an attorney should be rewarded with an opportunity to seek reinstatement or be accorded the stigma of disbarment and be forced to prove rehabilitation to the Board of Bar Examiners rather than a referee.

The respondent's final argument is that the three year period of disbarment should apply rather than the five year minimum period prescribed by the current rules. The Florida Bar stands on its argument in the initial brief. However, it must be cautioned, that The Florida Bar v. Greenberg, 13 F.L.W. 625 (Fla. Oct. 20, 1988), is presently pending before this court on a motion for rehearing regarding the application of Rule 3-5.1(f) to misconduct that occurred prior to the rule change as happened here.

In his answer brief, the respondent cites three cases in support of his position. In The Florida Bar v. Nahoom, 523 So.2d 1137 (Fla. 1988), an attorney was disbarred for three years, nunc

pro tunc to his prior felony conviction suspension, after being convicted for drug trafficking. However, it is important to note in this case that not only did the offense and felony conviction occur prior to Jan. 1, 1987, but all the Bar proceedings as well. The sole exception was the filing of the referee's report on October 1, 1987. (See appendix)

Had the report been timely filed, it would have been before the rule change. Presumably, this court's reasoning in Nahoom, supra, was to not impose a more severe discipline upon the attorney for circumstances beyond his control caused by the late filing of the referee's report. Clearly, this is unlike the present case where all the Bar proceedings commenced after January 1, 1987.

In The Florida Bar v. Newman, 513 So.2d 656, (Fla. 1987), an attorney was disbarred for a period of three years for his misappropriation of client funds. Although this court's opinion was rendered in September, 1987, the Bar disciplinary proceedings were commenced prior to the rule change and the case was processed under the former rules. Again, the present case clearly does not fit this mold.

In The Florida Bar v. Margadonna, 511 So.2d 985 (Fla. 1987), an attorney was disbarred for a period of three years, nunc pro

tunc to his felony conviction suspension, or until his civil rights were restored. According to the Bar's file, the Bar filed its complaint on July 31, 1986. The referee did not hear the matter until January 26, 1987, after the rule change. Furthermore, the attorney presented a significant mitigating factor to explain his conviction for conversion. He admitted to having a serious gambling problem. This has been considered as a mitigating factor in the same vein as alcoholism, psychiatric problems and health problems. The attorney's gambling compulsion contributed directly to his theft of the funds.

In the present case, although the respondent inarguably does suffer from serious health problems, these in no way contributed to his commission of perjury. With his reputation in the community for honesty and trustworthiness, the respondent obviously does not suffer from any condition that would lead him to become a compulsive liar.

CONCLUSION

Wherefore, The Florida Bar respectfully prays that this Honorable Court will review the referee's findings of fact and recommendations of guilt, and approve those findings and further order a minimum five year period of disbarment and payment of costs of these proceedings which currently total $1,709.60.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief and Appendix have been furnished by United Parcel Service Overnight Express to the Clerk of the Supreme Court, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to counsel for respondent, John A. Weiss, Post Office Box 1167, Tallahassee, Florida, 32302-1167; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 15th day of December, 1988.

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Bar Counsel