

047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,
vs .

Case No. 73,211
TFB No. 88-00,179(06E)

GORDON B. SCOTT,
Respondent.

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COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

The Florida Bar, Complainant, files this Answer Brief in the case against GORDON B. SCOTT, hereinafter referred to as Respondent. References to the hearing transcript on April 25, 1989 will be designated (TR - page number). References to the hearing on June 23, 1989 will be designated (TR II and the appropriate page number). References to Bar exhibits introduced as evidence at the hearing will be designated (BE - number). References to the Report of the Referee will be designated (RR - page number). References to the Initial Brief of Respondent will be designated (RB - page number).

STATEMENT OF THE CASE AND OF THE FACTS

Respondent's misconduct arose from his association with Stanley A. Lowe, Sr. and the transfer of properties owned by Mr. Lowe.

Between 1977 and 1981, Respondent and Stanley A. Lowe, Sr. were close friends and occasional roommates. (TR-58). During the aforementioned time period, Mr. Lowe owned several pieces of property in Pinellas County, Florida.

Prior to November 3, 1978, Mr. Lowe and his former wife owned certain property as tenants in common. On November 3, 1978, Mr. Lowe conveyed his interest in this property to Respondent. Respondent gave no consideration to Mr. Lowe for the transfer of property. (TR-61, line 13). The transfer was for the purpose of Mr. Lowe avoiding creditors and the Respondent knew this was the purpose of the transfer. (RR-2). In addition, Respondent in his Initial Brief states that neither Janice Lowe nor Claire Schwartz were able to testify that Respondent was present when conversations concerning the transfers being made to defraud creditors were made. (RB-4,5). However, Mrs. Lowe testified that Respondent was present. (TR-16, line 6). While Claire Schwartz did testify that Respondent was present during these conversations with Mr. Lowe and Mr. White she could not recall what other persons were in the house. (TR-50, line 19, line 23).

On November 3, 1978, Mr. Lowe also transferred to Respondent Mr. Lowe's interest in a separate piece of property. (BE-2). This transaction was also for the purpose of Mr. Lowe avoiding creditors. Respondent paid no consideration to Mr. Lowe for this transfer and knew that this transfer was for the purpose of Mr. Lowe avoiding creditors. (TR-6).

At the time of the aforementioned transfers, Mr. Lowe prepared Quit Claim Deeds whereby Respondent was to transfer the properties back to Mr. Lowe at Mr. Lowe's request. The Respondent denied that any such Quit Claim Deeds were ever prepared. The Referee specifically found the Respondent was not being entirely truthful in regard to this matter. (RR-2).

On May 1, 1979, Respondent sold the second piece of property mentioned above and received a check in the amount of \$53,109.94 from the sale of the property. At the final hearing in this matter, Respondent testified that the money was never deposited in his bank account, that he received none of the proceeds and that the money went to Mr. Lowe. (TR-65). The check, however, was endorsed by Respondent and does not reveal that it was made payable to the order of Stanley Lowe. (BE-5). Respondent's Statement of the Facts incorrectly states that Respondent endorsed the check to Mr. Stanley Lowe. (RB-3).

On July 21, 1980, Mr. Lowe transferred a third piece of property to Respondent. At the time of this transfer, Mr. Lowe prepared a Quit Claim Deed whereby Respondent was to transfer the property back to Mr. Lowe at Mr. Lowe's request. Respondent again paid no consideration to Mr. Lowe for the transfer of this property. At the final hearing, Respondent testified that no Quit Claim Deed existed for this transfer. (TR-75, line 19). The Referee specifically found Respondent's testimony to be less than entirely truthful in regard to this issue. (RR-2).

After Mr. Lowe died on August 22, 1981, Respondent continued to claim ownership of the properties which had been transferred to him by Mr. Lowe. (TR-68). Subsequently, Respondent wrote Mr. Lowe's sons and told them that their father had left no assets with which to open an estate.

Eventually, Mr. Lowe's two (2) sons learned of the existence of the properties which had been transferred to Respondent by Mr. Lowe and they filed suit against Respondent to recover the properties. The suit was settled by Respondent paying Mr. Lowe's sons the proceeds realized from the sale of the properties which formerly belonged to Mr. Lowe. (RR-2).

SUMMARY OF ARGUMENT

The Report of Referee is to be viewed with a presumption of correctness. The Report of Referee sets forth facts found by the Referee that Respondent engaged in conduct that was dishonest and deceitful in obtaining Mr. Stanley Lowe, Sr.'s properties for the purpose of defrauding creditors of Mr. Lowe.

After receiving evidence from both the Bar and Respondent, the Referee made a finding that The Florida Bar had met its burden of proof after hearing the testimony, reviewing the exhibits, and observing the witnesses. Based upon the facts found by the Referee and the reasons stated in her report for finding the Respondent guilty of misconduct as charged, the Report of the Referee should be accepted and Respondent should be disciplined as recommended.

ARGUMENT

POINT 1: COMPETENT AND SUBSTANTIAL EVIDENCE
WAS PRESENTED SHOWING RESPONDENT
GUILTY OF MISCONDUCT BY CLEAR AND
CONVINCING EVIDENCE.

Following the final hearing, the Referee ruled that The Florida Bar had proven by clear and convincing evidence that Respondent was guilty of violating the following Disciplinary Rules: DR 1-102(A) (4), DR 1-102(A) (5), DR 1-102(A) (6), DR 7-102(A) (7), and DR 7-102(A) (8). The Referee recommended that Respondent be disciplined by a ninety-one (91) day suspension. (RR-2). The Referee based her findings and conclusions upon listening to the testimony and having observed the witnesses during the hearing. (RR-1).

Respondent contends that the Referee's findings of improper conduct as stated in her Report of Referee were not supported by clear and convincing evidence. (RB-9). The Bar has the burden of proving its accusations by clear and convincing evidence. The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). However, as this Court stated in The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987), review of a Referee's findings of fact is not in the nature of a trial ~~de novo~~ in which the Court must be satisfied that the evidence is clear and convincing. The responsibility

for finding facts and resolving conflicts in the evidence is placed with the Referee. The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). The Referee's findings "should not be overturned unless clearly erroneous or lacking in evidentiary support." The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968). Rule 3-7.5(k)(1), Rules of Discipline, provides that the Referee's findings of fact as to items of misconduct charged "shall enjoy the same presumption of correctness as the judgment by a trier of fact in a civil proceeding." The presumption of correctness of a judgment of a trier of fact prohibits an appellate court from reweighing the evidence and substituting its judgment for that of the trier of fact. Shaw v. Shaw, 334 So.2d 13 (Fla. 1976). Therefore, while the Referee must be presented with clear and convincing evidence in order to make a finding of misconduct, on review such a finding must be sustained if it is "supported by competent and substantial evidence". The Florida Bar v. Hirsh, 359 So.2d 856, 857 (Fla. 1978).

Respondent contends that he was unaware that the November 3, 1978, transfers of property were for the purpose of Mr. Lowe avoiding creditors. Yet Mr. Lowe and Respondent were extremely close friends and lived together during the period of such transfers. The Bar presented, as evidence of Respondent's knowledge of the dishonest motive behind the transfers, testimony

by Janice Lowe, Mr. Lowe's ex-wife. Respondent contends that such statements made by Mrs. Lowe were hearsay and motivated by prejudice, and thus unreliable. However disciplinary proceedings are neither civil nor criminal, but are quasi-judicial. In Bar discipline cases, hearsay is admissible. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). Furthermore, Respondent has not introduced any evidence to show that Mrs. Lowe's testimony or conclusions drawn by the Referee from Mrs. Lowe's testimony were clearly erroneous. Rather Respondent repetitively states why Mrs. Lowe's testimony was prejudiced. On review, the burden is on the party seeking review to demonstrate that the Report of Referee is erroneous, unlawful or unjust. The Florida Bar v. Inglis, 471 So.2d 38 (Fla. 1985). Respondent has failed to show why the conclusion, made by the Referee after hearing Mrs. Lowe's testimony and observing her demeanor were erroneous. The Referee heard all the testimony and observed the demeanor of the witnesses during the final hearing. She weighed the credibility of the evidence and found that, for the reasons cited in her report, Respondent was guilty of the misconduct charged.

Furthermore, the Respondent contests the finding of the Referee that Respondent "was not being entirely truthful in his testimony". Respondent does not offer any evidence to show that the Referee's conclusion as to Respondent's lack of credibility was clearly erroneous or without evidentiary support. Rather the

Respondent only states that he is offended by such a conclusion. It is not this Court's duty to review all statements made by Respondent and reweigh their credibility. Rather this Court must sustain the Referee's conclusions unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770,772 (Fla. 1968).

The record is replete with evidence showing Respondent's lack of credibility. For example, the Respondent during the final hearing specifically denied receiving any proceeds from the sale of the second piece of property transferred by Mr. Lowe to Respondent. The check, however, was endorsed by Respondent and does not reveal that it was made payable to the order of Mr. Lowe or anyone else. In addition, after Mr. Lowe's death, Respondent wrote to Mr. Lowe's sons and stated that their father had left no assets with which to open an estate. However the sons eventually learned of the properties which were transferred to Respondent without any consideration, and filed suit against Respondent to recover the properties. After suit was filed by Mr. Lowe's sons to recover their father's property, Respondent asserted as an affirmative defense that the property was transferred to him to avoid creditors. Respondent claimed that he asserted this affirmative defense so that Mr. Lowe's sons, who stood in their father's place, would be precluded from taking the property since they would have unclean hands as did their father,

and be prevented from asserting a constructive trust on Respondent's part. The suit was settled by Respondent paying Mr. Lowe's sons the proceeds realized from the sale of such properties.

Another inconsistency in Respondent's testimony during the final hearing developed when Respondent initially testified that he did not know Mr. Lowe was in financial trouble at the time of the transfer of properties in 1978. (TR-66, line 22). However, at the final hearing, Respondent was cross-examined as to the following testimony from a previous deposition:

"Question: So again back to my original question. Had he...were you familiar or did you know that he had considerable debts, he referring to Stanley Lowe, "Owing to other creditors before you acquired title to the property?"

"Answer: I didn't know what his financial situation. I knew that he was in over his head. I didn't know how much."

Respondent was then asked in light of his prior inconsistent statement:

- Q. Do you recall that question and answer.
- A. If that is what is there that is what I said, yes, sir. (TR-67, lines 5-18).

Such contradictions in Respondent's testimony and actions would place doubt in a reasonable person's mind as to the credibility of the Respondent.

In addition, Respondent contends that he did not violate Disciplinary Rule 7-102(A)(7) and (8) because no evidence was introduced to show that he and Mr. Lowe had an attorney/client relationship. (RB - 20,21). However, the Referee could conclude that from the totality of the circumstances that there was a legal and close personal relationship between Respondent and Mr. Lowe. The documents transferred between Respondent and Mr. Lowe were legal documents which transferred Mr. Lowe's property to the Respondent. The transfers also entailed the legal ramification of defrauding the creditors of Mr. Lowe. Furthermore, in other legal proceedings, the attorney/client privilege with Mr. Lowe had been asserted twice on behalf of the Respondent. (TR-70, line 21-71).

POINT 2: A NINETY-ONE (91) DAY SUSPENSION IS
THE APPROPRIATE DISCIPLINE IN LIGHT
OF RESPONDENT'S CONDUCT HEREIN.

When deciding what sanction is appropriate in a Bar discipline case, a number of interests are to be balanced. As stated in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970):

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time, not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time, encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone to become involved in like violations.

Respondent argues that a ninety-one (91) day suspension is inordinately harsh and unjustified by the facts before the Court. Respondent specifically argues that the three (3) aggravating factors listed by the Referee in her report are all invalid. The Referee specifically found as aggravating factors, that Respondent lacked credibility at the final hearing, that Respondent had a dishonest and selfish motive, and that Respondent refused to acknowledge the wrongful nature of his conduct. (RR-3). The Referee made such findings and conclusions after hearing the testimony of the witnesses, reviewing the exhibits, and observing the Respondent's demeanor throughout the disciplinary proceeding. (See supra Point 1).

The Respondent contends that he did not benefit from the transfer of the properties, thus the Referee should not have found a dishonest or selfish motive. However, the only reason the Respondent did not benefit is because Mr. Lowe's sons investigated the transfer of the property after the Respondent's

letter denying the existence of any assets in Mr. Lowe's estate. In fact, Respondent testified at the final hearing that if the sons had never brought suit, Respondent would still own the properties. (TR 11-24, line 12).

Rule 7.2 - Standards for Imposing Lawyer Sanctions, states that "suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system." The Referee found that the Respondent knew that the transfers of property were for the purpose of Mr. Lowe avoiding creditors. Such knowledge by Respondent evidences a direct violation of a lawyer's duty not to participate in fraudulent conduct.

The ninety-one (91) day suspension is not unduly harsh. The Respondent attempted to claim ownership of Mr. Lowe's properties without giving any consideration for such properties to Mr. Lowe. Furthermore, such transfers were made to defraud creditors.

In The Florida Bar v. Shupack, 523 So.2d 1139 (Fla. 1988), Shupack was given a ninety-one (91) day suspension for fraudulently recording the purchaser's mortgage before the vendor's mortgage. Shupack and the Respondent both violated their duty as professionals by assisting in a scheme to defraud the public; Shupack by recording the purchaser's mortgage before the vendors, and Respondent by allowing Mr. Lowe to transfer

property to him for the purpose of defrauding creditors.

In the instant matter, the Referee found that The Florida Bar met its burden of proof and found Respondent guilty of misconduct. There was clear and convincing evidence presented at the hearing to support the conclusions of the Referee. The findings of the Referee are supported by substantial and competent evidence and therefore the report should be accepted.

CONCLUSION

The record reflects competent and substantial evidence to support the findings and conclusions contained in the Referee's Report. A ninety-one (91) day suspension is a discipline which is fair to society, fair to Respondent, and severe enough to deter others who might be tempted to become involved in like violations.

Respondent fails to show that the Report of Referee was erroneous or lacking evidentiary support. Having failed to meet the required burden of proof to overturn the presumption of correctness of the Report of Referee, the Report of Referee herein should be accepted and the Respondent should be disciplined as recommended by the Referee.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Complainant's Answer Brief has been furnished by U. S. Regular Mail to John Weiss, Counsel for Respondent at 101 North Gadsden Street, Post Office Box 1167, Tallahassee, Florida 32303; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachian Parkway, Tallahassee, Florida, 32399-2300, this 22nd day of December, 1989.



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