IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GORDON B. SCOTT,

Respondent.

Case No. 73,211

RESPONDENT'S EXTRAORDINARY BRIEF

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SUMMARY OF ARGUMENT

Respondent and The Florida Bar have thoroughly briefed this Court on the sufficiency of the discipline to be imposed in this matter. Bar Counsel at final hearing recommended a ninety-one day suspension and the Referee accepted that recommendation. The Board of Governors of The Florida Bar and Staff Counsel have reviewed those recommendations and elected not to appeal.

This matter has been reviewed by three tiers of this Court's arm to impose discipline (Bar Counsel, Staff Counsel, and the Board of Governors, a body composed of approximately forty individuals with responsibility to oversee discipline) and the Bar elected not to seek more than ninety-one days' discipline.

Respondent in his two briefs to this Court has argued that the evidence before the Referee was insufficient to find him guilty of any misconduct. However, should this Court uphold the Referee's findings, Respondent has argued that the appropriate discipline is a public reprimand. At most, because there is no need to show rehabilitation, Respondent should be suspended for ninety days.

ARGUMENT

Respondent is at somewhat of a loss as to how to reply to this Court's March 1, 1990 order directing The Florida Bar and Respondent to file simultaneous briefs on the suitability of the recommended discipline. That issue was addressed by Point II in Respondent's brief and was briefed by both sides. In essence, The Florida Bar argued that the Referee's recommended ninety-one day suspension, the discipline recommended by Bar Counsel, should be approved. Staff Counsel and the Board of Governors of The Florida Bar (which is not adverse to appealing Referee decisions, as this Court well knows) reviewed this matter and determined that the most appropriate sanction is, in fact, ninety-one days.

As of this writing, Respondent does not know what new discipline, if any, The Florida Bar is going to ask this Court to impose. Respondent has argued in his Initial and Reply Briefs that there is insufficient evidence in the record to show that Respondent committed any misconduct. However, if this Court finds that a disciplinary sanction is appropriate, Respondent submits that the most appropriate discipline would be in the range of a public reprimand to, at most, a ninety-day suspension.

Respondent argues that a suspension requiring proof of rehabilitation is unnecessary. There has been no harm to clients in any way and there is no necessity of protecting the public from Respondent. Furthermore, the misconduct in this

matter occurred so long ago that Respondent has proved rehabilitation through exemplary conduct. Finally, suspending Respondent now to protect the public for misconduct that occurred many years ago is nothing more than a punitive measure. Respondent's twenty-two year history of practicing without blemish (other than this case which arose out of a personal matter) belies the necessity of a suspension showing rehabilitation.

This Court has stated that disciplinary proceedings are not penal in nature, but rather are remedial. DeBock v. State, 512 So.2d 164 (Fla. 1987). If such an assertion is something more than lip-service to avoid constitutional protections normally afforded individuals facing penal proceedings, then the sanctions imposed by this Court should be directed towards protection of the public. The public does not need any protection from Gordon Scott. For twenty-two years his actions have only benefited the public.

To argue that harsh punishment is necessary to deter other lawyers from like conduct is really an end run around DeBock. Respondent submits that virtually no lawyers guilty of misconduct sat down and reviewed disciplinary case law before determining the course of conduct upon which they were going to embark. Respondent submits that there is little deterrence to be gained from harsh disciplinary sanctions.

Respondent has addressed the areas of misconduct found by the Referee in Point I of his briefs. In the Initial Brief,

under Point I, Section A (page 10), Respondent argued that the November 3, 1978 transfers were not for the purpose of defrauding Mr. Lowe's creditors and that, even if they were, Respondent did not know about it. Section B (page 17) completely refuted the Referee's findings that quit-claim deeds were prepared simultaneously with the November 3, 1978 and July 21, 1980 conveyances. Furthermore, there is absolutely no evidence that, as the Referee found, Respondent prepared them or even knew of their existence.

A corollary to the Referee's findings relating to the simultaneous preparation of quit-claim deeds is her opinion that Respondent was not testifying in an entirely truthful manner when he denied their existence. A8 argued in Point I, Section C (page 19), if there is no evidence showing the simultaneous preparation of deeds, then Respondent's denial of his knowledge of their existence is unrebutted and, therefore, must be accepted as true.

Section D (page 20) of Point I pointed out the Respondent had no attorney/client relationship with Mr. Lowe and that the Referee's conclusion that Disciplinary Rules 7-102(A)(7) and (8) were violated is totally lacking in evidentiary support.

Finally, Respondent argued in his Reply Brief that there was no attempt to defraud Mr. Lowe's sons. As was testified to by both the former Mrs. Lowe (TR 35) and one of Mr. Lowe's former business associates (TR 54), Mr. Lowe did not intend for his sons to receive anything from his estate. There has

been no communication with either of the sons for over ten years. They wanted nothing to do with their father and, apparently, the feeling was mutual. Respondent, on the other hand, was Mr. Lowe's best friend. In July, 1980, Respondent even co-signed a note to secure a loan to Mr. Lowe. (It was at this time that Respondent first learned of Mr. Lowe's financial difficulties).

There can be no doubt that Respondent wrote the sons and told them there was nothing in their father's estate to probate. However, that was a true statement.

It takes no long stretch of the imagination to conclude that Mr. Lowe's best friend, roommate, advisor, and financial benefactor was a more appropriate person to receive Mr. Lowe's interests in his property than the sons who shunned him.

That Mr. Lowe's trust was well-placed is evidenced by the fact that it was Respondent who took care of Mr. Lowe's funeral, took of Mr. Lowe's surviving mother, and financially assisted Mr. Lowe's girlfriend. The sons did nothing except, perhaps, to rejoice when some months later they learned that their father's death may have resulted in their getting an unwarranted windfall.

Perhaps it can be argued that Respondent, too, garnered a windfall. If so, the appropriate discipline would be more in the nature of that imposed in The Florida Bar v. Miller, 555 So.2d 854 (Fla. 1990). There, after a blatant conflict of interest, a lawyer received $200,000 when a ninety-nine year

old died with a will naming Mr. Miller as a contingent beneficiary. (The primary beneficiary, the client's wife, predeceased the client by one year).

Certainly, Respondent's misconduct is no more egregious than that engaged in by Christopher Fertig, who wandered throughout the Caribbean carrying large sums of money out of the United States and depositing it in foreign banks to launder the illicit proceeds of drug smuggling. Mr. Fertig received but a ninety-day suspension for engaging in actions that materially contribute to the furtherance of one of the most serious problems facing the United States today: drug abuse. The Florida Bar v. Fertig, 551 So.2d 1213 (Fla. 1989).

The Referee was not bound to accept Bar Counsel's recommendation of a ninety-one day suspension. She chose to do so.

The Board of Governors of The Florida Bar certainly was not bound by the Referee's recommended discipline. They chose, after review of the file and appropriate deliberations, not to appeal the ninety-one day suspension. There have been three tiers of review already, and nobody has opined that a suspension of more than ninety-one days is appropriate. Respondent respectfully suggests that those opinions should be respected by this Court.

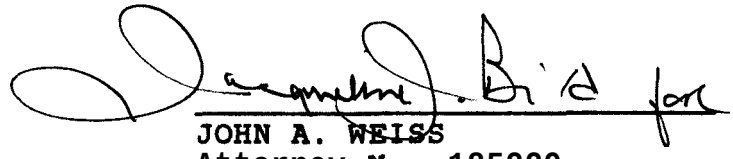
The Board's review was premised upon the fact that the Referee's findings of fact were valid. As argued in Point II of Respondent's briefs, the Referee's findings, particularly

as to the simultaneous preparation of quit-claim deeds and Respondent's denial of impropriety in that regard, are without basis. Therefore, the invalidity of those findings alone removes this case from the ninety-one day suspension category and puts it that category of offenses warranting suspensions without proof of rehabilitation.

CONCLUSION

Respondent and The Florida Bar have briefed this Court on the appropriate discipline to be imposed. The appropriate sanction for any misconduct that might be found by this Court is certainly no more than a ninety-day suspension. However, Bar Counsel, the Referee, and the Board of Governors of The Florida Bar have all determined that the maximum ceiling for a discipline should be ninety-one days.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed to David R. Ristoff, Bar Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607 on this 29th day of March, 1990.

JOHN A. WEISS
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