IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Re: Petition for Reinstatement of

KEITH A. SELDIN.
______________________________/

Supreme Court
Case No. 75,212

The Florida Bar File #
90-50,791 (15E-FRE)

PETITIONER'S AMENDED ANSWER BRIEF

Nicholas R. Friedman, Esq.
FRIEDMAN, BAUR, MILLER & WEBNER, P.A.
New World Tower, 21st Floor
100 North Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 377-3561
Fla. Bar No. 199079

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STATEMENT OF CASE AND FACTS

This is a reinstatement proceeding, initiated by the Petitioner, Keith A. Seldin. Mr. Seldin has completed a two-year suspension, in which this Court enhanced a disciplinary recommendation of a one year suspension which had been made by the Referee. The Florida Bar v. Seldin, 526 So.2d 41 (Fla. 1988).

The Petitioner paid The Bar's costs in the initial proceeding, took and passed the Ethics portion of the Bar examination, and made restitution in compliance with the order of the Supreme Court in the initial case.

At the trial, the Respondent presented nine witnesses. Seven of them were character witnesses from the Respondent's community. These witnesses included a State representative, attorneys, businessmen and former clients. Each of them testified about different aspects of the Respondent's character, his remorse and standing in the community. The Florida Bar called no witnesses whatsoever. The unrebutted testimony of all of the witnesses was that the Respondent was a rehabilitated individual to whom this Court and the community could give its trust.

The Florida Bar took two approaches which were in the nature of cross examination. These were that a particular statement in Respondent's application showed lack of remorse and the other was the cross examination of witnesses. The Bar tried to present two factual arguments, although it presented no evidence to support its arguments. The two unsupported factual arguments made by Bar

Counsel were that the funds which Respondent had repaid to the Estate in compliance with the 1988 Order should in fact have been paid to brokers. The second argument was a vague allegation that the Respondent had failed to declare income on his income tax return in 1983 or 1984. The Bar presented absolutely no evidence with respect to these matters, but the Respondent gave his unrebutted testimony to the contrary.

The Referee believed all of the witnesses of the Respondent, and believed the testimony of the Respondent. The Referee specifically found in favor of the Respondent and against The Florida Bar on their arguments and their attempted factual arguments. The Florida Bar has appealed the order of Referee. This Answer Brief is in response to The Bar's Petition for Review and Brief.

SUMMARY OF ARGUMENT

The Report of the Referee is supported by substantial and competent evidence, and should be upheld. The Respondent provided unrebutted evidence which the Referee obviously believed. The Florida Bar failed to provide evidence, and its effort at cross-examination and creating factual issues without presenting any evidence to support them, were clearly not believed by the Referee. The Bar never directly addressed the findings of the Referee anywhere in its Brief, but has really sought to repeat its arguments that it made before the Referee. This does not meet The Bar's burden of proof in setting aside the findings of the Referee.

One of the arguments proposed by The Florida Bar at trial was that the Respondent should have paid back money to real estate brokers, which was precisely what the Respondent argued in his original suspension proceeding. The Florida Bar has in effect turned one-hundred and eighty degrees on a critical issue which it previously used to convince this Court to enhance a one year suspension to a suspension for two years. The Florida Bar's current appeal, without it having called any witnesses or having any factual support in the findings of the Report of the Referee is an unfair prolongation of a suspension that is already excessive, in light of The Florida Bar's own argument.

ARGUMENT

POINT I

THE FACTUAL FINDINGS OF THE REFEREE IN A BAR GRIEVANCE PROCEEDING COME TO THIS COURT WITH A PRESUMPTION OF CORRECTNESS.

The Report of the Referee in this matter is supported by competent, substantial evidence and should be upheld. Such findings of fact should not be set aside unless they are unsupported by any evidence. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). In fact, on review, the burden is on the party seeking review to demonstrate that the report is erroneous, unlawful or unjustified. The Florida Bar In Re: Inglis, 471 So.2d 38 (Fla. 1985). The findings of fact of the Referee have never been directly addressed by The Florida Bar in its Brief. In fact, the findings of the Referee with respect to the material issues raised by The Florida Bar are the following:

> This Referee finds that Mr. Seldin has strictly complied with the specific conditions of the prior disciplinary order.
>
> Based on the testimony adduced before this Referee at the final hearing, this Referee specifically finds that Mr. Seldin has complied with the requirements of Florida law and demonstrated clear and convincing evidence of the following:
>
> a) Unimpeachable character and moral standing in the community;
>
> b) Clear evidence of good reputation for professional ability;
>
> c) Evidence of lack of malice and ill-feeling by the Petitioner toward those who by duty were compelled to bring about the disciplinary proceeding;

d) Personal assurances supported by corroborating evidence revealing a sense of repentance and remorse as well as a desire and intention of the Petitioner to conduct himself in an exemplary fashion in the future.

6. This Referee finds that Mr. Seldin is morally equipped to resume a position of honor and trust among the ethical petitioners at Bar.

9. This Referee finds that by clear and convincing evidence, Mr. Seldin credibly and truthfully explained what he meant in his Petition of Reinstatement by stating that he had not felt morally guilty of the underlying charges. The Referee finds that these statements do not reflect a lack of remorse nor any failure to comply with the requisites for reinstatement. See The Florida Bar In Re: Vernell, 520 So.2d 564 (Fla. 1988).
See Report of Referee at pp. 1 - 2.

From the above, the Referee has clearly shown that the statements of the Respondent with respect to his feeling a lack of "moral guilt" have been properly explained. The Referee found that the Respondent was remorseful, just as was found by the Referee at the original disciplinary proceeding.

In addition, the Referee found that the Respondent had met the criteria for readmission to The Bar in accordance with the guidelines for readmission previously set forth by this Court. See The Florida Bar In Re: Sickman, 523 So.2d 154 (Fla. 1988), [and cases cited therein]; see also, Petition of Wolf, 257 So. 2d 597 (Fla. 1972). The Referee had before him the entire record of the proceedings and a full opportunity to hear and judge the witnesses presented by the Respondent. The Respondent presented seven character witnesses, representing a cross-section of the community. These witnesses included local business people, attorneys, former clients and a member of the State legislature. From this broad

cross-section of the community, the judge found clear and convincing evidence of the reputation of the Respondent in his community. (One witness testified specifically as to the reputation of the Respondent in his community.) However, all the witnesses provided evidence from which the Judge could properly conclude that the Respondent has an excellent character.

In comparison, The Florida Bar chose to call no witnesses whatsoever on its behalf and did not even attempt to introduce the deposition of Respondent's wife, which it had demanded be taken despite the wife's fragile health and over the objections of the Respondent and his counsel.

It is respectfully submitted that these seven unrebutted character witnesses from the Respondent's community constitute competent and substantial evidence to show that the Respondent is highly regarded in his community. See The Florida Bar, In Re: Sickman, supra at 155; see also The Florida Bar In Re: Berman, 372 So.2d 95 (Fla. 1979). The criterion of this Court for reinstatement to The Bar are clearly designed to allow the Referee and the Court to have a comprehensive view of the Respondent, and not designed to be so narrowly construed as it appears The Bar would so do in this case.

POINT 2

THE BRIEF OF THE FLORIDA BAR FAILS TO MEET ITS BURDEN OF SHOWING WHY THE RECOMMENDATION OF THE REFEREE SHOULD BE SET ASIDE.

The Florida Bar narrowly argues two points on appeal. The Brief of The Florida Bar, however, seems to ignore the actual

Report of the Referee and the statements of the Referee in support of his finding. The argument of The Florida Bar is, to an extent, merely a repeat of its closing argument. Where The Florida Bar called no witnesses on its behalf, and understanding that the argument of counsel is not evidence, the basis for The Florida Bar's opposition to the reinstatement of Mr. Seldin is not in keeping with the criterion set by this Court which would allow setting aside the factual findings and the recommendations of the Referee. See, The Florida Bar In Re: Sickman, supra 155, see also, The Florida Bar In Re: Berman, supra.

In prior argument, Mr. Seldin has attempted to show that sufficient facts were presented to support the findings of the Referee. Although this Court has a broad scope of review in regard to legal conclusions by the Referee, the factual findings resulting in the Referee's recommendations, should not be set aside unless it is erroneous, unlawful, or unjustified. The Florida Bar In Re: Inglis, 471 So.2d 38,40 (Fla. 1985). The Recommendations of the Referee, likewise, should be adhered to particularly where absolutely no facts were presented by The Florida Bar in support of its position. See, The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967).

POINT 3

BY THE FILING OF THIS APPEAL, THE FLORIDA BAR HAS, DE FACTO, LENGTHENED THE PERIOD OF SUSPENSION OF THE RESPONDENT, WHILE THIS COURT REVIEWS THIS BAR PETITION

Mr. Seldin was originally prosecuted in 1986 (The Supreme Court Case No. 69,956, The Florida Bar File No. 86-20,097 (15A)). After the Referee heard the argument of counsel and the witnesses, the Referee recommended a one year suspension. It was testimony of Mr. Seldin's argument at that time that his offenses were not intended to result in any loss to the client, but were related to transactions between non-client real estate brokers. The Florida Bar consistently and strenuously argued that the money did not belong to the brokers, but belonged to the client. This argument was made in order to support a greater discipline. (See Appendix A pp. 113, 114 of the Record of the original trial).

Furthermore, Bar counsel continuously argued the seriousness of the offense as an offense against the client (See Appendix A, pp. 115 of the Record of the original trial). Bar counsel was aware at that time that there was a civil lawsuit involving the questioned funds, and that the brokers involved were not seeking return of the money. (See pp. 123 and 124 of the Record of the original proceedings.) In fact, Bar Counsel assisted in leading this Court to the conclusion that those matters were being appropriately taken up in another forum (See Appendix A, pp. 123 and 124 of the Record of the original trial). Bar Counsel even argued that the disciplinary process should "never cross over to the civil proceeding, regardless of what occurs in that proceeding." Id. at 123, 124.

Yet, when this case came to this Honorable Supreme Court, Bar Counsel wrote a brief to The Supreme Court in which Bar Counsel

strenuously attacked as "a most remarkable defense" Respondent's argument that this matter did not involve client funds but rather the funds of brokers. (See page 2 of The Bar's Brief in the original proceedings). On page 6 of The Bar's Brief in the original proceedings, Bar Counsel argued that the funds were taken from a client, and at page 10 of that same argument, Bar Counsel argued that the claim of entitlement to brokerage money was a fabrication by the Respondent. At page 13 of The Bar's Brief in the original proceedings, Bar Counsel again argued that the admission of taking brokerage money was "concocted," and concluding therefrom, at page 17 of his Brief, Bar Counsel argued that from prior statements of Justice Erlich, the seriousness of the offense was enhanced because it was a client offense. In short, throughout the original argument and the argument to The Supreme Court to enhance the discipline and throughout the underlying proceedings, Bar Counsel consistently stated that in no way was the subject money due and owing to brokers. In fact, Bar Counsel argued that the Respondent's statements that the money was due to brokers, was a misrepresentation or concocted defense.

These arguments of Bar Counsel were apparently believed at that time by The Supreme Court of Florida, because it enhanced the original recommendations of the Referee for discipline. Now, Bar counsel argues to the court below, in an effort to prevent the readmission of Mr. Seldin, that in fact Mr. Seldin should have made his restitution to the brokers. In effect, Bar counsel has now

adopted precisely the position which Mr. Seldin maintained years ago, which at that time was called concocted and fabricated.

There is something patently unfair about changing one's argument so dramatically in this same case, and seeking twice to extract enhanced discipline with this change of argument. The Bar should not now be heard to deny reinstatement by arguing that in effect Mr. Seldin's original defense was correct. This is particularly unfair where The Florida Bar was ordered in the underlying proceedings to produce the record of the original case, and then failed to do so.

The Bar now has the unenviable position of arguing that by being consistent, the Respondent has somehow shown a lack of remorse. Nothing could be further from the truth. The truth is that The Florida Bar has now essentially adopted Respondent's original position, but only after having cost him a year of additional suspension by previously arguing the opposite. It is unfair to continue the suspension of the Respondent any further.

CONCLUSION

The Referee's Report was supported by competent substantial evidence, and The Bar produced no evidence to set aside the findings of the Referee. The suspension has already been unduly harsh, and should not be continued. The Respondent should be immediately reinstated, as was recommended by the Referee.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express to The Honorable Sid J. White, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399 and served by U. S. mail to John A. Boggs, Esq., The Florida Bar, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300 and by Certified Mail Return Receipt Requested to David M. Barnovitz, Assistant Staff Counsel, The Florida Bar, Cypress Financial Center, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309 this day of February, 1991.

FRIEDMAN, BAUR, MILLER & WEBNER, P.A.
New World Tower, 21st Floor
100 North Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 377-3561

BY: ______________________
Nicholas R. Friedman