IN THE SUPREME COURT OF FLORIDA

PETITION FOR REINSTATEMENT OF KEITH A. SELDIN,

Petitioner-Appellee,

THE FLORIDA BAR,

Respondent-Appellant.
_____/

Supreme Court Case No. 75,212

The Florida Bar File No. 90-50,791 (15E-FRE)

REPLY BRIEF OF APPELLANT, THE FLORIDA BAR

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ARGUMENT

I. APPELLEE'S ANSWER BRIEF ADDRESSES NO ISSUES RAISED UPON THIS APPEAL.

Appellee has chosen to disregard the bar's brief upon the basis of an axiom which holds that a referee's findings are presumed correct. While the bar acknowledges the axiom, it suggests and respectfully submits that it has demonstrated, by its initial brief, that the referee's findings are clearly erroneous and lacking in evidentiary support.

It would appear from appellee's brief that he has directed his attack to two (2) areas, one that has no basis in law and the other which is absolutely irrelevant to the appeal. Thus, appellee makes repeated reference to the absence of a presentation of a case in chief by the bar. This wasn't the bar's proceeding. It had no obligation to present a case. It was up to appellee to establish, by requisite evidence, that he met or surpassed all the criteria established by Petition of Wolf, 257 So.2d 547 (Fla. 1972). If he fell short, as the bar urges he did, then appellee should not be reinstated regardless of whether the bar presented a case, or even participated in the reinstatement process.

Appellee's sole argument is that he produced "seven character witnesses, representing a cross-section of the community" (appellee's brief, page 4). The fact is, that numbers alone do not a reinstatement make. Joseph L. Wolf produced even more witnesses, including judges, lawyers, former clients and representatives from various organizations.

Like appellee, Wolf's witnesses were not aware of the circumstances which resulted in the bar sanction imposed. Petition of Wolf, supra. Wolf's petition was denied. Appellee's should likewise be denied. Appellee totally failed to establish a sense of repentance and produced no corroborating evidence of the same. The one witness who testified regarding appellee's reputation in his community, had virtually no basis upon which to predicate his opinion.

II. APPELLEE HAS INCLUDED ARGUMENT IN HIS ANSWER BRIEF WHICH CAN ONLY BE FOR THE PURPOSE OF DIVERSION, OBFUSCATION OR CONFABULATION.

It is always difficult for a litigant to know what to do with red herrings flung into the arena by an adversary. One approach is to ignore, assuming that the court will recognize the extraneous matter for what it is. Another is for the actual removal of the extraneous matter. In this case the bar will attempt the latter approach.

At page four of his answer brief, appellee makes reference to the bar's decision not to introduce the deposition of appellee's wife which the bar had taken upon pre-hearing discovery. Reference is made to "fragile health" presumably to establish some ulterior or evil motive on the part of the bar. Such simply was not the case. In that appellee was found to have stolen $10,000.00 from his client/estate, the bar, upon the reinstatement investigation, determined to discover whether or not the stolen funds were reported by appellee and his wife on their federal income tax return. Appellee had testified, upon deposition, that he did not know whether or not a joint return was filed for the

year that the stolen funds were paid by him to his then fiancee (now wife). The bar, by letter, put appellee's counsel on notice of its intention to depose appellee's wife, requesting that she be produced voluntarily. In response, the bar received a letter from appellee's counsel and an application for protective order both of which set forth the fact that appellee's wife was in an advanced stage of pregnancy, had suffered a previous miscarriage, and that a deposition would be deleterious to her health. Immediately upon learning of such fact, which was absolutely unknown to bar counsel, bar counsel wrote appellee's attorney a letter stating as follows:

> I had absolutely no knowledge regarding Mrs. Seldin's delicate condition and would, under no circumstances, want to take any action to place her in jeopardy. It may be that Mr. Seldin's deposition will dispense with the necessity of Mrs. Seldin's deposition. If not, I will certainly be amenable to setting her deposition at the end of June or first week of July assuming that her medical condition permits.
>
> . . .
>
> If it becomes necessary to depose Mrs. Seldin, I will first attempt to make suitable arrangements by writing to you. If, for whatever reason, arrangements cannot be made, I will definitely adopt your suggestion and proceed via Judge Johnson.

Mrs. Seldin was deposed after she gave birth. The deposition was with the express consent of appellee's counsel. There were no objections by appellee or his counsel to that deposition. Mrs. Seldin testified that she reported all income received by her.* The bar obviously had no reason to present Mrs. Seldin's testimony or to introduce her deposition.

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* This material, dehors the record, is necessitated by the inference that the bar acted in any way deleterious to the health of appellee's wife.

The second red herring appellee introduces is discussed in his Point 3. Once again, appellee has determined to confabulate concerning issues not addressed by the bar in its initial brief nor in any way relevant to the proof adduced by appellee upon the reinstatement hearing. Through tortured logic, appellee attempts to persuade the court that bar counsel successfully convinced the referee and court upon the original bar disciplinary proceeding that appellant stole monies from his client while abandoning such theory upon the reinstatement proceeding arguing, instead, that appellee defrauded real estate brokers. This demonstrates that appellee never has, and perhaps, never will, appreciate and understand what were the ramifications of his misconduct.

The evidence adduced in the original bar disciplinary proceeding was that at least one and possibly two real estate brokers held listings with exclusive rights to sell at the time of appellee's theft. Such listings, with the exclusive right to sell, entitled one or both brokers to receive a commission upon the sale of the premises which generated the funds that appellee stole, regardless of how the property was sold, by whom the property was sold, whether appellee stole money from the sale proceeds, or not. The sale, itself, triggered the brokers' entitlements. This court specifically found both violations in its May 12, 1988 order. Thus, in its review of the evidence, this court stated: "A review of the record indicates that there was substantial, competent evidence on which the referee could have found that Betty Boneparth did not procure the purchaser of the property." The Florida Bar v. Seldin, 526 So.2d 41, 43 (Fla. 1988). Later in the same opinion, this

court, in finding respondent guilty regarding his fraud on the brokers, in addition to having found his payment to have constituted a misappropriation, stated: "On the other hand, the fact remains that Seldin was seeking to exclude at least one real estate broker who had an exclusive listing on the property so that he could pay his soon-to-be wife a $10,000.00 finder's fee, even though she had not procured the seller." The Florida Bar v. Seldin, supra at page 44.

The bar regarded it as only logical then, upon the reinstatement process, to question appellee regarding whether or not, in light of the express misconduct for which he was found guilty, including defrauding brokers from what was rightfully theirs, appellee had made any attempt, in an effort to establish a propensity for ethical propriety, to reimburse either or both of the brokers for what he had denied to them. Appellee testified:

> Q. So there was some possibility that a commission might have been owed to one or both brokers as a result of the transaction of the sale itself---
> A. Yes, might have been.
> Q. And from the date of your suspension to the present time, have you approached either of the brokers to discuss the matter with them?
> A. No (111).*

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* Page reference to transcript of final hearing.

CONCLUSION

If the reinstatement process is viewed as a ministerial act with pro forma proceedings, then appellee should be reinstated. If, as the bar understands to be the import of the rules pertaining to reinstatement, the process is designed to insure that an attorney seeking reinstatement must show clearly and convincingly, through substantive evidence, that his privileges and immunities should be restored, then, for the reasons advanced by the bar in its initial brief, it is respectfully submitted that appellee should be denied reinstatement.

All of which is respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing reply brief has been furnished to Nicholas R. Friedman, Esquire, attorney for respondent, 21st Floor, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132-2306 by certified mail #P 236 541 359, return receipt requested, on this 29th day of January, 1991.

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