IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROBERT K. HAYDEN,

Respondent.

_____/

Case No. 75,351
(TFB #89-10,262(06C)
(TFB #89-10,308(06C)

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent's Initial Brief may be referred to as "Initial Brief."

The Answer Brief of The Florida Bar is referred to as "Answer Brief".

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT ARE ERRONEOUS, UNLAWFUL, OR UNJUSTIFIED

Complainant concedes in its Summary of Argument, (Answer Brief, p.4), that the Referee made a clearly erroneous finding in regard to when the hearing on the Motion for Contempt was cancelled by Respondent. The testimony on this matter was not in conflict. Complainant then never addresses this crucial concession in the Argument section of Complainant's Answer Brief. (Answer Brief, pp. 6-9). Instead, Complainant argues the Referee's findings of fact on matters where there was conflicting testimony should be upheld.

As noted in Respondent's Initial Brief on pages 11, 12 and 13, the Referee's clearly erroneous finding as to when the hearing on the Motion for Contempt was cancelled colored the Referee's entire view of Respondent's conduct. Respondent submits that if, as Complainant concedes, the Referee was clearly wrong about this uncontested fact, then the Referee's findings on contested matters are extremely suspect.

Complainant's argument places a great deal of weight on the fact that Mrs. Ferreri still owed Respondent attorney's fees at the time the Motion for Contempt was filed. The point is then made that Respondent recognized the $2,500.00 lump sum alimony award as a source for payment of his fees.

The above argument of Complainant was addressed and rebutted in Respondent's Initial Brief on pages 8 and 9. Respondent simply had no means available by which to collect his outstanding attorney's fees from Mrs. Ferreri merely by

collecting the lump sum alimony obligation owed to her by Mr. Ferreri. The outstanding fees were almost entirely for the dissolution of marriage and only Mrs. Ferreri had any obligation to pay them. Since Respondent had absolutely no guarantee he would be paid even if he recovered the $2,500.00, why would he pursue it unless he believed he had been authorized to do so by his client?

Complainant next attempts to paint a picture of Respondent as a runaway lawyer continuing to do work for a client after the representation ended. (Answer Brief, pp. 8-9). Clearly, Mrs. Ferreri authorized Respondent to take steps after July 11, 1988, to attempt to recover the $2,500.00 lump sum alimony award. (Tr. p.27, line 24 - p.28, line 8). More importantly, Respondent had a duty to continue to represent Mrs. Ferreri after July 11, 1988. Who else would have prepared the Final Judgment of Dissolution of Marriage? (Bar Ex. 2).

Finally, Complainant argues Respondent only agreed to cancel the hearing on the Motion for Contempt because Mr. Ferreri was going to settle the bill. (Tr. p.22, line 18). No money was paid to Respondent by Mr. Ferreri, yet Respondent still withdrew the Motion for Contempt. This shows the whole matter was due to a lack of clear communication between Respondent and Mrs. Ferreri.

II. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING RULE 4-1.2(a) AND RULE 4-3.1, RULES REGULATING THE FLORIDA BAR, IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

A. The Referee's Recommendation That Respondent Be Found Guilty of Violating Rule 4-1.2(a), Rules Regulating The Florida Bar, Is Not Supported by Clear and Convincing Evidence.

Complainant concedes, as it must, that the record contains conflicting testimony as to whether Mrs. Ferreri authorized Respondent to file the Motion for Contempt. In spite of its previous acknowledgement that the Referee made a clearly erroneous finding on a critical point, Complainant proceeds to argue that the Referee's findings on this issue should be accepted.

This Court should be seriously troubled by the glaring inconsistencies and omissions pointed out in Respondent's Initial Brief on pages 14-15. Complainant has simply failed to carry its burden of proof.

The record reveals numerous instances in which Mrs. Ferreri had an opportunity to reveal the existence of her secret agreement with Mr. Ferreri and forestall Respondent's efforts. Complainant argues Mrs. Ferreri had no obligation to reveal this information to either Respondent or Mr. Winecker. While it is true Mrs. Ferreri perhaps had no <u>legal</u> obligation to do so, common sense dictates she would have said, "look, I've settled with my ex-husband and we've signed an agreement."

On several occasions in its Answer Brief, Complainant refers to Mrs. Ferreri as Respondent's former client or asserts

Respondent's representation ended as of the dissolution of marriage. This position is based upon pure conjecture. As noted above and in Respondent's Initial Brief, Mrs. Ferreri had numerous contacts with Respondent after both the final hearing and the entry of the final judgment of dissolution of marriage. Not once did she tell Respondent he was no longer her attorney. Again, common sense dictates she would have told Respondent his services were no longer required if that was, in fact, the case.

Complainant attacks Respondent's characterization of the settlement agreement between Mr. and Mrs. Ferreri, (Bar Ex. 12), as a "secret" agreement. Clearly, the settlement was not revealed to Respondent by Mrs. Ferreri until September 26, 1988. (Tr. p.89, lines 16-19). Respondent also denies Mr. Ferreri told him about the $300.00 settlement prior to September 26, 1988. (Tr. p.83, line 17). Even assuming Mr. Ferreri may have done so, Respondent had no reason to rely upon the word of a pro-se adversary. Mr. Ferreri never delivered a copy of the settlement agreement to Respondent, Mrs. Ferreri did not deliver a copy, and Mrs. Ferreri failed to mention the settlement agreement to Respondent until the day before the scheduled hearing on the Motion for Contempt.

B. The Referee's Recommendation That Respondent Be Found Guilty of Violating Rule 4-3.1, Rules Regulating The Florida Bar, Is Contrary To the Provisions of The Rule.

Respondent's Initial Brief argued a Rule 4-3.1, Rules Regulating The Florida Bar, violation could not be based upon whether or not the client authorized the lawyer's acts. (Initial

Brief, p.16). Complainant attempts to refute this argument by stating the finding of guilt is supported "for reasons other than those explicitly stated in the Report of Referee". In other words, Complainant is asking this Court to substitute Complainant's reasoning for that of the Referee.

The Report of Referee must stand on its own merits. The finding that initiating contempt proceedings without authority from the client violates Rule 4-3.1, Rules Regulating The Florida Bar, simply flies in the face of the language of the rule.

Complainant next chastises Respondent for not asking Mrs. Ferreri about Mr. Ferreri's assertion concerning the settlement agreement. Evidently it is permissible for Mrs. Ferreri to remain silent for two months about the settlement agreement, but it is not acceptable for Respondent to ignore the self-serving statement of the opposing party.

Finally, Complainant argues the Motion for Contempt was frivolous as a matter of law because the lump sum alimony award was clearly not in the nature of support. As noted in Respondent's Initial Brief, (pp. 16-17), the Final Judgment of Dissolution of Marriage refers to the award of alimony in lieu of a special equity in the home. Since there was no settlement agreement incorporated into a judgment, Riley v. Riley, 509 So.2d 1366, 1368 (Fla. 5th DCA 1987), it is far from clear as to whether the award was for support or otherwise. As such, Respondent had a good faith argument for filing the motion for contempt.

III. A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW, REQUIRING PROOF OF REHABILITATION, IS NOT WARRANTED IN THIS CASE.

Complainant argues Respondent is guilty of causing intentional interference with a legal proceeding. (Answer Brief, p.18). This assertion is totally unsupported by the record. Respondent was not charged with interfering with a legal proceeding and the Referee made no findings of this nature. Filing a frivolous motion, assuming that occurred in this case, is not the equivalent of interference with a legal proceeding. There is absolutely no evidence in the record that Respondent's filing, and almost immediate withdrawal, of the Motion for Contempt caused any interference with a legal proceeding.

Since Complainant has set forth in detail Respondent's prior disciplinary cases, one point must be made clear. In each case which resulted in discipline, Respondent admitted his misconduct and/or consented to the imposition of sanctions. Obviously, Respondent is willing to stand accountable when he has done wrong.

As noted in Respondent's Initial Brief on page 18, Respondent will concede he failed to communicate clearly with his client. Respondent vigorously denies any other charges.

In Respondent's Initial Brief, it was made clear that a six-month suspension in this case is not supported by prior cases of this Court or by the Florida Standards for Imposing Lawyer Sanctions (Standards). Complainant attempts to support the Referee's recommended discipline by noting the Report of Referee "is devoid of any mention of mitigating factors." (Answer Brief, p.21). Likewise, the Report of Referee fails to explicitly

delineate those aggravating factors found in Section 9.22, Standards, other than Respondent's prior disciplinary offenses. As such, this Court should consider Respondent's argument on pages 21-22 of the Initial Brief as to which mitigating factors apply in this case.

Complainant also attempts to distinguish the Greer and McKenzie cases. (Answer Brief, p.21). Respondent again submits The Florida Bar v. Greer, 541 So.2d 1149 (Fla. 1989), is an example of a less severe sanction than the one recommended in this case for greater misconduct. Greer involved four separate clients and the respondent had previously been disciplined for violating many of the same rules. Id., at 1152. While it is true The Florida Bar v. McKenzie, 557 So.2d 31 (Fla. 1990), did not involve greed or self-interest, the respondent in McKenzie certainly engaged in outrageous intentional conduct, i.e. threatening opposing counsel and filing a suit to harass a judge. Id.

This Court is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797, 799 (Fla. 1978). By carefully weighing all the facts and circumstances in this case and applying a broad scope of review, The Florida Bar v. Langston, 540 So.2d 118, 121 (Fla. 1989), this Court will see that a public reprimand is the appropriate discipline in this case.

CONCLUSION

The Referee's findings and recommendations are not supported by clear and convincing evidence. If any misconduct is found to exist, a public reprimand is the appropriate sanction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Reply Brief has been furnished by U.S. Mail to Susan V. Bloemendaal, Esquire, The Florida Bar, Tampa Airport Marriott, #C-49, Tampa, Florida, 33607, this 19th day of December, 1990.

R. A. Bm

RICHARD A. GREENBERG