8-4

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ROBERT V. PALMER,

Respondent.
_____/

Case No. 75,557

TFB File Nos. 89-00049-04C, 89-00857-04C, 90-00384-04C, 90-00501-04C, 90-00784-04C.

ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Complainant below, files this Answer Brief in the case against Robert V. Palmer, hereinafter referred to as Respondent. References to the hearing transcript will be designated (HT-page number), references to the Report of Referee will be designated (RR-page number), and references to the Initial Brief of Respondent will be designated (RB-page number).

STATEMENT OF THE CASE AND FACTS

On February 16, 1990, The Florida Bar filed its original Complaint and Request for Admissions in the above-styled cause. On March 19, 1990, The Referee scheduled a pre-trial conference for March 30, 1990 in order to expedite the proceedings. (RR-1) Both parties appeared and were instructed to file witness lists with the court within specified time periods. Complainant timely filed a witness list; Respondent did not file the required list. (RR-1) With leave of the Referee, Complainant filed an Amended Complaint and an Amended Request for Admissions. The Amended Complaint alleged, inter alia, that Respondent had neglected legal matters entrusted to him, had been convicted of grand theft for misusing client funds, and had been convicted of possession of cocaine. Respondent failed to file a timely answer to the Complaint or a timely response to the Request for Admissions. The Referee then scheduled the final hearing for June 25, 1990. Upon being advised by Bar Counsel that an irreconcilable conflict existed on her calendar for that date, the Referee rescheduled the final hearing for July 20, 1990 by order dated May 15, 1990. (RR-1, 2) After negotiation between the parties and at their request, a telephone conference was held among the Complainant, the Respondent, an attorney assisting Respondent, and the Referee on July 19, 1990. (RB-2) A court reporter was not present. At the outset of the telephone conference, and over Complainant's objection, Respondent made an oral motion for

continuance of the final hearing. The Referee, finding that this matter had been pending for five months and that the final hearing itself had been pending for two months, denied Respondent's motion for continuance. (RR-2) Respondent then orally agreed to a consent judgment with the following terms: five year disbarment, retroactive to the date of his temporary suspension; restitution, as applicable; and payment of costs of these proceedings. At that time, Respondent assured the Referee that he was in agreement with these terms and understood that the final hearing scheduled for the following day would be cancelled. (RR-2) Accordingly, the final hearing scheduled for July 20, 1990 was cancelled. On October 1, 1990, Complainant filed a Motion to Approve and Enforce Consent Judgment, representing that Respondent had refused to execute the consent judgment prepared by Complainant pursuant to the terms of the telephone conference held on July 19, 1990. On November 9, 1990, a hearing on the aforementioned motion was held before the Referee with both parties present. Based on the foregoing and on the arguments presented by the parties at the November 9th hearing, the Referee found that Respondent had failed to show good cause why the consent judgment should not be approved and enforced. (RR-3) Accordingly, the Referee recommended that the consent judgment agreed to by the parties in the conference call with the Referee on July 19, 1990 be approved and enforced without Respondent's signature. (RR-3)

SUMMARY OF ARGUMENT

Respondent has the burden of demonstrating that the findings and recommendations of the Referee should be overturned. The Referee found that Respondent voluntarily entered into a consent judgment as to guilt and discipline, a finding clearly supported by the record. Since Respondent has refused to execute a document memorializing the agreement announced to the court, the Referee recommends that the consent judgment be enforced without Respondent's signature. Case law and fairness dictate that the Referee's recommendation be followed by this Court.

ARGUMENT

ISSUE I

THE REFEREE'S FINDING THAT RESPONDENT VOLUNTARILY ENTERED INTO A CONSENT JUDGMENT AND HIS RECOMMENDATION THAT THE AGREEMENT BE ENFORCED SHOULD NOT BE OVERTURNED SINCE RESPONDENT HAS FAILED TO DEMONSTRATE THAT THEY ARE CLEARLY ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT.

While the ultimate judgment in Bar disciplinary proceedings rests with the Supreme Court of Florida, The Florida Bar v. Wagner, 212 So.2d 707, 772 (Fla. 1978), a referee's findings and recommendations come to the Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986). Thus, the burden here is on Respondent to demonstrate that the Report of the Referee should be overturned, a burden that Respondent has failed to meet.

A. During a telephone conference with the Referee, Respondent freely, voluntarily, and with full knowledge entered into a consent judgment in lieu of the final hearing.

In his Report, the Referee made the following findings with respect to the telephone conference: (RR-2)

1) The conference was the result of negotiations between the parties;
2) Respondent orally agreed to a consent judgment that included disbarment, restitution, and payment of costs;
3) Respondent understood that the final hearing would be cancelled in light of the consent judgment.

Respondent does not appear to dispute the fact that he entered into a consent judgment. Instead, Respondent argues that concern over his son's welfare rendered the consent judgment involuntary and unenforceable. However, at the hearing held on the Bar's motion to enforce the consent judgment, Respondent acknowledged that his son's alleged automobile injuries did not require hospitalization. (HT-13) Additionally, no independent evidence has been presented by Respondent to corroborate his claims of duress.

Further, Respondent was assisted by counsel during the telephone conference held at the parties' request after negotiations. (RB-2) The presence of counsel and Respondent's participation in settlement negotiations negate any inference that Respondent was not fully informed at the time of the oral agreement or that he was incapable of giving voluntary assent to its terms. The Referee, having presided over the telephone conference and having heard Respondent's testimony at the hearing on the Bar's motion to enforce, indeed found that Respondent failed to demonstrate good cause why the consent judgment should not be enforced. (RR-3)

Respondent's assertion regarding lack of notice of the hearing on the Bar's Motion to Enforce Consent Judgment is

likewise without merit. The Referee's Order Setting Hearing was sent to the parties on October 8, 1990, a full month prior to the hearing date.

B. The consent judgment, announced to the Referee with the understanding of its finality, is enforceable.

While there appears to be no Bar discipline case on point, at least one District Court of Appeal has repeatedly held that oral, pre-trial settlement agreements are favored and generally enforceable. In Silva v. Silva, 467 So.2d 1065 (Fla. 3d DCA 1985), for example, the Third District Court of Appeal enforced an agreement entered into at a pre-trial conference by the parties to a dissolution action. In the order under review in Silva, the trial judge found that the parties had orally agreed to a property settlement agreement though the terms of the agreement had not been dictated into the record at the time the agreement was announced. The DCA affirmed the lower court's order of enforcement, finding that there was "no cognizable basis upon which an agreement entered into under these circumstances may or should be refused." Id.

Four years later, in Roskind v. Roskind, 552 So.2d 1155 (Fla. 3d DCA 1989), the Third District Court of Appeal again held that where a clear understanding exists as to the finality of a settlement agreement, it is effective and enforceable notwithstanding the fact that it has not yet been reduced to

writing. Unlike Respondent here, the recalcitrant parties in Silva and Roskind did not claim duress in refusing to sign their respective agreements. However, since the Referee implicitly found Respondent's claim of duress without merit in the instant matter, the holdings of the two DCA cases are clearly relevant to the issue presented by this appeal.

Respondent's Brief attempts to make much of the fact that an evidentiary hearing has not been held on the Bar allegations against him. However, it is well-established that any contractual, statutory, or constitutional right can generally be waived. Miami Dolphins v. Genden & Bach, 545 So.2d 294, 296 (Fla. 3d DCA 1989). Thus, in Dolphins the court found that where a party waived, by in-court stipulation, its right to answer a civil complaint and to engage in discovery, the party could not thereafter claim lack of due process when it was not afforded the opportunity to engage in the pre-trial practices prior to judgment being entered. Id. Similarly, Respondent waived his right to an evidentiary hearing by freely and voluntarily entering into a consent judgment as to guilt and discipline.

In some circumstances, parties have been permitted to withdraw from pre-trial agreements. In U.S. Fire Insurance Company v. Roberts, 541 So.2d 1297 (Fla. 1st DCA 1989), for example, the appellate court found that the lower court did not abuse its discretion in allowing withdrawal from a stipulation,

where the withdrawing party had filed a timely motion supported by affidavit and where the opposing party had not theretofore relied to its detriment upon the stipulation. The Florida Bar would respectfully submit that none of the controlling factors in Roberts is present here: Respondent did not file a motion or any affidavits, and Complainant, relying on Respondent's representations during the telephone conference, agreed that the final hearing should be cancelled and the subpoenaed witnesses recalled. Thus, both case law and fairness dictate that the unexecuted consent judgment be enforced according to its terms.

CONCLUSION

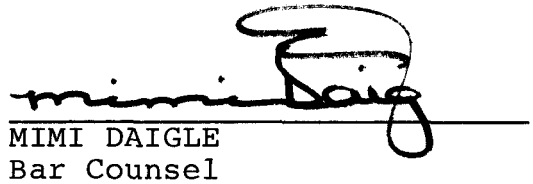
For the reasons cited herein, this Court should sustain the Referee's findings of fact and approve his recommendation that the consent judgment be enforced without Respondent's signature.

Respectfully submitted,

MIMI DAIGLE, Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 75,557 has been forwarded by regular U.S. mail to ROBERT V. PALMER, Respondent, at his alternate record bar address of 7044 San Sebastian Avenue, Jacksonville, Florida 32217, on this 10th day of July, 1991.



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