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FILED 6/29
SID J. WHITE
JUN 11 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 77,910
[TFB Case No. 90-70,897 (19A)]

GUILLERMO JOSE FARINAS,

Respondent.

ANSWERING BRIEF

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SYMBOLS AND REFERENCES

In this Brief The Florida Bar shall be referred to as The Bar.

The Transcript of the final hearing shall be refered to as T.

STATEMENT OF THE CASE

The Respondent accepts and incorporates herein the Statement Of The Case contained in the Amended Initial Brief submitted by The Bar.

STATEMENT OF THE FACTS

The Respondent accepts Paragraphs no.1 and 2 of the Bar's Statement of The Facts and incorporates the same herein without changes.

A serious misstatement is contained in Paragraph 3 of The Bar's Statement Of The Facts and in the 3rd page of the Report Of Referee. The notary public who notarized the answers to the Plaintiffs First Set of Interrogatories is incorrectly referred to as the Respondent's "secretary". The notary public was not the Respondent's employee at any time nor was she ever controlled or supervised in any way by the Respondent.

Another misstatement is in the first Paragraph of page 4 which states that the Respondent was unaware that the signatures had to be witnessed by the notary when she notarized the documents. The Respondent cannot recall that he ever testified relative to his knowledge of the notary regulations.

SUMMARY OF THE ARGUMENT

The Bar incorrectly states that the facts in the instant case are not in dispute. It is not the Respondent's defense that he engaged in any conduct through ignorance of the Law. It is the position of the Respondent that his conduct was lawful and reasonable under the particular facts and circumstances herein.

The Bar's Argument that the Respondent engaged in conduct violative of Rules 3-4.3, 4-8.4(a), 4-8.4(c) and 4-8.4(d) is without merit, as will be discussed below.

The Respondent believes that the Referee's recommendation of not guilty should be upheld by this Honorable Court in light of the facts and circumstances herein and the supporting case law.

ARGUMENT

THE RESPONDENT'S CONDUCT IN REQUESTING THE NOTARIZATION OF HIS CLIENTS' SIGNATURES ON A PLEADING, EVEN THOUGH THE CLIENTS WERE NOT PRESENT BEFORE THE NOTARY WHEN THEY EXECUTED THE SUBJECT PLEADING, WAS ALLOWABLE UNDER ALL OF THE FACTS & CIRCUMSTANCES HEREIN AND THE RESPONDENT DID NOT VIOLATE THE RULES REGULATING THE FLORIDA BAR.

The Respondent agrees with The Bar that he requested that the notary public notarize the subject Interrogatories even though the Blakleys were not present when they executed same. However, the Respondent does not agree that the documents were notarized "for the convenience of his clients who were then living in North Carolina and to expedite the filing of the pleadings" as incorrectly asserted in the first paragraph of page 8 of the Amended Initial Brief. A review of the Respondent's testimony (T pp.81-100) will show that he attempted to contact his clients repeatedly by calling their daughter's home at Jensen Beach, FL. This telephone number was the only one ever given to the Respondent by the Blakleys.

The Respondent had requested that the notary public notarize the subject Interrogatories after he received them from the Blakleys as he believed that they had executed same.

As the Respondent had given the Interrogatories to his clients in person he believed that they were being sent back by these same persons.

The Respondent is aware of the normal procedure to be followed in a similar situation. This is indicated by Florida Statute 117.09(1). However, exceptions to this rule exist under the appropriate circumstances. In other words, if a notary public has satisfactory proof of the identity of the person(s) whose execution is acknowledged, then it is not necessary to the validity of the notary's acknowledgment that the signator sign in the notary's presence.

An important First District case exists on this point and on related matters. This Honorable Court should make reference to Walker v. City of Jacksonville, 360 So.2d 52 (Fla. 1st DCA, 1978). Please note that in 1978 Florida Statute 117.09(1) was enacted and should have been known to the First District Court of Appeal.

That above case involved the execution of a warranty deed from the Appellants (Walkers) to the appellee Glover and the construction to be given to the defective deed. The First District construed the purported deed to be a mortgage because of the absence of one witness as required.

In Walker the appellee argued that the acknowledgment of

the purported deed by the notary public made the notary a witness thus providing the two necessary witnesses required by F.S. 689.01. The Court did not agree with Glover on this point citing an identical contention rejected by the Third District Court of Appeal in Santos v. Bogh, 334 So.2d 833 (Fla. 3rd DCA 1976).

In Walker the Court found that a notary could certainly be a witness. But it stated in clear terms as follows:

> However, it is not necessary to the validity of an acknowledgment that the acknowledged instrument be signed in the presence of the notary. It is only necessary that the person whose execution is acknowledged be known by the notary to be the person described in and who executed the instrument (or that the notary have satisfactory proof thereof) (emphasis added)...(p.53)

The Court having had knowledge of Florida Statute 117.09(1) in 1978 found that it is "not necessary" that the signator be present in front of a notary public but only "that the notary have satisfactory proof thereof" of the signator's identity.

Furthermore, the Court went on to state on page 53:

> The mere existence of an acknowledgment on an instrument can therefore raise no presumption that the notary was a witness, nor is the mere existence of the acknowledgment proof thereof.

The Court is clearly stating that the notary does not

have to witness the execution of an instrument to affix his or her acknowledgment thereon. In other words, the notary may acknowledge an instrument without the necessity of having the signator present.

This Honorable Court should remain cognizant of the fact that Florida Statute 117.09(1) existed when the Walker opinion was rendered. This statute should have been known to the First District Court of Appeal. However, all of the facts and circumstances in a specific situation may allow for an acknowledged instrument not signed in the presence of a notary.

In the present situation the signators could not be present before the notary public as the Respondent did not know their whereabouts nor did he have their North Carolina address. However, as the Interrogatories had been given to the signators by the Respondent and they had been returned to his office he was certain of their execution by the above.

The First District has revisited Walker but it has left undisturbed its statement concerning the necessity of signing an acknowledged instrument before or in the presence of a notary. Walker v. C. Glover, 389 So.2d 1202 (Fla. 1st DCA, 1980). The better practice is to follow the procedure in the Florida Statutes whenever practicable and possible under

the circumstances. In this case the notary had satisfactory proof that the signators were the persons whose executions were acknowledged after the Respondent spoke with her and provided a complete history of the Interrogatories.

Relative to the charges made by The Bar that the Respondent engaged in conduct violative of Rules 3-4.3, 4-8.4(a), 4-8.4(c) and 4-8.4(d), no merit exists in these accusations. A review of the Rules as follows is warranted.

Rule 3-4.3 basically prohibits an attorney from commiting any act which is unlawful or contrary to honesty and justice. The Respondent does not believe that, under all of the facts and circumstances in light of the Walker decision, he acted in an unlawful or dishonest way. Furthermore, his acts were not unlawful; it was the act performed by the notary, who was neither his employee nor his agent, that is prohibited by the Florida Statutes.

Rule 4-8.4 is entitled Misconduct. Subsection (a) prohibits a lawyer from violating the Rules of Professional Conduct. The Respondent has not violated said Rules nor has he ever encouraged anyone to violate same.

Subsection (c) prohibits a lawyer from engaging in conduct involving dishonesty and fraud. Why the Bar has even alleged a violation of this Rule is unknown to the Respondent

when they have not presented any evidence of same.

Finally, Subsection (d) prohibits conduct that is prejudicial to the administration of justice. The Respondent does not believe that his conduct has prejudiced the administration of justice. The Interrogatories are only a discovery tool. They were never proferred or admitted into evidence in the subject collection suit. In other words, the procedures followed in getting the instruments notarized have not hampered justice in any appreciable way.

CONCLUSION

WHEREFORE, the Respondent prays that this Honorable Court will accept the Referee's findings in their entirety including the not guilty recommendation; uphold the First District Court of Appeal in Walker; order that the Respondent be found not guilty of violating the Rules of Professional Conduct; and order The Bar to pay the Respondent $3,000.00, the amount of attorney fees expended by him and paid to Mr. Donald E. Mason, Esq..

Respectfully submitted,

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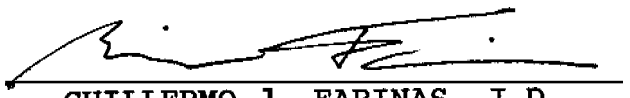
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this Answering Brief have been sent by Federal Express to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 23299-1927, and a copy of same has been sent by regular U.S. Mail to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Talla-hassee, FL 32399-2300, and to DAVID G. McGUNEGLE, Bar Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, FL 32801-1085 on this 9th of June, 1992.



GUILLERMO J. FARINAS, J.D.