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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

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

v.

GUILLERMO JOSE FARINAS,

Respondent.

AMENDED INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Bar".

The transcript of the final hearing shall be referred to as "T".

The Report of Referee shall be referred to as "RR".

STATEMENT OF THE CASE

The Nineteenth Judicial Circuit Grievance Committee "A" voted to find probable cause in The Florida Bar case number 90-70,897 (19A) on March 20, 1991, for violating Rule of Discipline 3-4.3 and the following Rules of Professional Conduct: 4-1.1; 4-1.3; 4-1.4(b); 4-3.2; 4-8.4(a); 4-8.4(c); and 4-8.4(d). The Bar filed its two count Complaint on May 14, 1991, and the respondent filed his Answer and Affirmative Defenses on June 4, 1991. On June 20, 1991, the Bar served its Requests for Admission on the respondent and on July 10, 1991, the respondent served his reply to the Requests. In his reply, the respondent did not answer the requests citing that the requests were stated in a manner which made it impossible for him to reasonably respond. Thus, on August 1, 1991, the Bar served its Amended Requests for Admission on the respondent. On August 15, 1991, the respondent served his reply to the Amended Requests for Admission in which he answered all the requests.

The final hearing was held on October 24, 1991, and the Referee submitted his Report on December 3, 1991. In Count I of the Bar's Complaint, the Referee found the respondent not guilty of violating Rules of Professional Conduct 4-1.1; 4-1.3; 4-1.4(b); 4-3.2; and 4-8.4(a). In Count 11, the Referee found the respondent not guilty of violating Rule of Discipline 3-4.3;

and Rules of Professional Conduct 4-8.4(a); 4-8.4(c); and 4-8.4(d) after entering a directed verdict against the Bar based upon the respondent's oral motion during the final hearing on October 24, 1991.

The Referee's report was considered by the Board of Governors of The Florida Bar at its January, 1992, meeting. The Board voted to appeal the Referee's recommendation of a not guilty finding with respect to Count 11. The Board chose not to appeal the Referee's recommendation of a not guilty finding in Count I. The Board recommends a sixty day suspension given the act which constituted the misconduct in Count II of the Bar's Complaint.

The Bar filed its Petition for Review on February 6, 1992, and the Bar filed its Initial Brief on March 6, 1992.

On April 24, 1992, the respondent filed a Petition for Peremptory Writ of Mandamus with respect to certain portions of the Bar's Initial Brief. On May 8, 1992, the Court issued an Order indicating the respondent's Petition would be treated as a Motion To Strike Non-Record Material from the Bar's Initial Brief. The respondent's Petition/Motion was granted and the Bar was directed to file an amended brief on or before May 18, 1992.

This Amended Brief is filed pursuant to the Court's Order of May 8, 1992.

STATEMENT OF THE FACTS

On March 8, 1989, the respondent was retained by Larry and Deanna Blakely concerning their purchase of a business. The Blakelys were to make monthly payments to the sellers. However, after making approximately seven of the required payments, the Blakelys stopped making payments on the business. The sellers filed suit against the Blakelys for their failure to make the monthly payments and the Blakelys wanted to countersue the sellers for alleged fraud and misrepresentation. (RR p. 2).

Sometime later during the course of the representation, the Blakelys moved to North Carolina. The respondent had given Mr. and Mrs. Blakely copies of Plaintiff's First Set of Interrogatories, Plaintiff's First Request for Production of Documents, and Plaintiff's First Requests For Admission. (RR p. 3; T pgs. 14, 60-62). The respondent instructed the Blakelys to complete the answers to the pleadings and return the documents to his office. The Blakelys sent the documents from North Carolina to the respondent's office which was then located in Miami, Florida. However, when the respondent received the answers to the documents that the Blakelys had completed, he discovered the documents were signed, but had not been notarized as required by R. Civ. P. 1.340(a).

The respondent then requested his secretary, who was a

notary public, to notarize the documents. The respondent's secretary notarized the documents even though the Blakelys were not present before the respondent or his secretary when they signed the documents and she notarized the documents even though she had not witnessed the Blakelys' signatures. (RR p. 3).

The conduct of the respondent's secretary in notarizing documents without witnessing the signatures of the signees violated Florida Statute 117.09(1) (1989), being a second-degree misdemeanor. The Bar charged the respondent with soliciting his secretary to improperly and illegally notarize the Blakelys' answers to the pleadings and that, as an attorney, he knew, or should have known, of the impropriety of his conduct. However, it was the respondent's assertion that he recognized the signatures of the Blakelys as being genuine and he was unaware that even though he recognized their signatures, that the signatures had to be witnessed by the notary when she notarized the documents. (RR p. 3).

The Referee, in finding the respondent not guilty in Count 11, indicated that he believed it was a common practice for members of The Florida Bar to notarize documents without having their clients present before the notary and without witnessing the clients' signatures. Since it appeared to the Referee that this misconduct was routinely engaged in by other attorneys, he

did not hold the respondent accountable for his similar misconduct.

SUMMARY OF THE ARGUMENT

The facts in this case are not in dispute. The respondent has never denied that he had his secretary notarize documents without having the clients present before the notary when they signed the documents. It is the respondent's defense that he engaged in the conduct through ignorance of the Florida Statute which governs notaries. This has been compounded by the Referee's recommendation that the respondent be found not guilty of having a client's document improperly notarized because "everybody does it".

It is the Bar position that the respondent engaged in serious misconduct which violated the rules which govern attorney conduct and which also caused illegal behavior on the part of his non-lawyer employee. Attorneys, as officers of the court, are duty-bound to uphold the laws and not cause others to violate those laws. Ignorance is not an excuse for engaging in unethical and improper behavior. Further, the Referee has, in effect, told the other members of The Florida Bar that is permissible to engage in improper conduct so long as the other members of the Bar are engaging in similar misconduct. The Referee's recommendation of not guilty is clearly inappropriate given the circumstances of this case and under Rules 3-4.3; 4-8.4(a); 4-8.4(c); and 4-8.4(d) of the Rules Regulating The Florida.

Finally, a public reprimand would ordinarily suffice as discipline. However, in this case, a sixty day suspension is called for given the act which constituted the misconduct.

ARGUMENT

POINT I

THE RESPONDENT'S CONDUCT IN SOLICITING HIS SECRETARY, A NOTARY PUBLIC, TO NOTARIZE CLIENTS' SIGNATURES ON A PLEADING EVEN THOUGH THE CLIENTS WERE NOT PRESENT BEFORE THE NOTARY WHEN THEY EXECUTED THEIR SIGNATURES, WAS IMPROPER AND A VIOLATION OF THE RULES REGULATING THE FLORIDA BAR.

The respondent, by his own admission, requested his secretary notarize the Blakelys' answers to the pleadings even though the Blakelys were in North Carolina and were not present before the notary at the time the documents were to be notarized, nor did the respondent or his secretary witness the Blakelys sign the documents. The respondent has claimed that he requested his Secretary notarize the documents for the convenience of his clients who were living in North Carolina and to expedite the filing of the pleadings. Thus, there was no attempt to engage in fraudulent conduct against his clients as the respondent was acting in their favor. (Tp. 79).

However, Florida Statute 117.09(1)(1989) states:

> Every notary public in the state shall require reasonable proof of the identity of the person whose signature is being notarized and such person must be in the presence of the notary public at the time the signature is notarized. Any notary public violating the above provision shall be guilty of a misdemeanor of the second-degree, punishable as provided in S. 775.082 or S. 775.083. It shall be no defense under this section that the notary public acted without intent to defraud. (Emphasis added.)

Additionally, in DeCamp v. Allen, 156 So.2d 661 (1st DCA, 1963), a notary was held liable for civil damages for notarizing and acknowledging the plaintiffs' signatures on a purported mortgage. The plaintiffs claimed that they had only signed a contract with a construction company for work to be done on a building they owned and had not signed any documents before a notary. The notary claimed that as a secretary for the construction company, she was often called upon to notarize legal documents and that was apparently how the mortgage was notarized. The notary further stated that she had no malice toward the plaintiffs and had not participated in any conspiracy against them. The appellate court stated:

> It should no longer be necessary to remind those persons authorized to take acknowledgments that they are derelict in their duty if they notarize an acknowledgment without the signatories personally appearing before them. (At p. 662).

The court also held that by her illegal conduct, the notary made herself part of a conspiracy against the plaintiffs.

Based upon the above, there can be no question that the respondent's secretary's conduct was illegal. The respondent, as an officer of the court, should have known, at the very least, that such conduct was improper. The respondent's claim that he recognized the Blakelys' signatures is not a valid defense

because the notary could not have been that familiar with their signatures and she could not attest that the signatures were genuine absent some form of legally recognized proof. The notary could not, under current law, notarize any document based upon the respondent's word oK assertions. [The Bar notes that the Statute governing notaries was amended on January 1, 1992, and has become more stringent in its requirements than in previous years. Notaries are now required to indicate with their attestations the type of identification produced by the signee.]

At the very least, it would have been better practice for the respondent to return the documents to the Blakelys and have them sign the documents before a notary in North Carolina. Such an act would not have caused that much inconvenience for the clients. Even under the best circumstances, the respondent left himself open to possible charges by the clients that he or his employees altered the documents prior to the time they were notarized.

The respondent also claimed in his initial response to the Bar's inquiry into this matter that because his secretary consented to notarize the documents upon his request, he did not believe there was anything improper about it. Conversely, if the secretary knew such a request was improper and illegal, she most probably and hopefully would have refused to notarize the

documents. This argument is also invalid because the secretary should not have to make the respondent aware of what conduct is proper and lawful. The respondent's secretary is an employee whereas the respondent is the attorney with the supposed acquired knowledge of the rules of procedure and the established laws.

POINT II

THE REFEREE'S RECOMMENDATION OF A NOT GUILTY FINDING AS TO COUNT 11 OF THE BAR'S COMPLAINT IS ERRONEOUS AND A SHORT-TERM SUSPENSION IS WARRANTED GIVEN THE FINDINGS OF FACT IN COUNT II.

A referee's findings of facts at a disciplinary hearing are presumed to be correct and will be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Colclough, 561 So.2d 1147, 1148 (Fla. 1990). The Bar does not argue with the Referee's findings of fact in this case. It is the Referee's recommendation of not guilty for Count II and his reasoning behind that finding with which the Bar takes issue, At the final hearing on October 24, 1991, the Referee stated:

> I'm not saying that its ethical, but it seems to be fairly common in the Bar to accommodate clients and not make them take the documents, find a -- maybe we need to address a little more seriously, making them find a notary public in North Carolina or wherever they happen to be, get it done, and then send it back. Seems to be -- the practice seems to be if the lawyer is satisfied that it is the client's signature on there, to go ahead and notarize it. (At p. 80).

It is apparent from the Referee's comments that although he believed the respondent's conduct was not entirely proper, he did not feel it worthy of discipline given that it appeared to him that other members of The Florida Bar are engaging in similar misconduct. Further, it can also be inferred that the Referee is declining to discipline one attorney when other attorneys are engaging in similar misconduct and are not being disciplined.

The Bar submits that this is not a case of selective enforcement. The respondent admitted he solicited his secretary to improperly notarize a document and she did notarize the document upon his request. The issue of selective enforcement has been addressed previously in The Florida Bar v. Levin, 570 So.2d 917 (Fla. 1990). In that case, the attorney was found guilty of gambling through a "bookie" on football games, being a misdemeanor offense. Other attorneys were also involved in varying degrees. The attorney appealed the referee's recommendation of a public reprimand based, in part, on the assertion that other attorneys had or were engaging in the same conduct and were not being disciplined at all or as much for their transgressions.

The issue of selective enforcement was raised in the Levin matter. Although not directly addressed as such in the opinion, the Court implicitly rejected the argument in approving the

referee's findings and recommendations.

In a recent disciplinary case, The Florida Bar v. Anderson, Case Number 77,269; (February 13, 1992), an attorney was disbarred for misusing approximately $4,500.00 of public funds while she was employed as an executive assistant with the Tampa Housing Authority. The public funds were used to pay the attorney's personal American Express Credit card debt. The attorney unsuccessfully argued, in part, that others were engaging in similar misconduct as there was alleged corruption within the Tampa Housing Authority and therefore, this should excuse her misconduct. In its opinion, this Court specifically stated:

> No one is privileged to commit crime merely because others are doing so. This is especially compelling with a licensed attorney, whose unique and special obligation is to honor the law and encourage others to do so. When others see an attorney breaking the law, they may well assume that such misconduct is acceptable. Attorneys who imitate the crimes of non-lawyers effectively place the imprimatur of their legal training on the misconduct, implying that the law itself either condones such misconduct or at least will ignore it.

Although the Bar is not suggesting that the respondent's misconduct is as serious as misappropriating public funds for personal use, the respondent's misconduct is, nonetheless, serious. The respondent did not encourage another to honor the

law. On the contrary, he encouraged his non-lawyer employee to violate the law by requesting his secretary improperly notarize a document. Thus, the respondent gave the impression that such conduct was permissible given that the request came from a licensed attorney with "special training in the law". Anderson, supra.

Moreover, this Court has held attorneys accountable with respect to improper notarization of documents with various levels of discipline based upon the circumstances of each individual case. In The Florida Bar v. Mike, 428 So.2d 1386 (Fla. 1983), the attorney was charged with various allegations including neglect of a client's case and practicing law while suspended for non-payment of Bar dues. The attorney was also charged with offering to have a notary notarize a signature outside the presence of the person whose signature was to be notarized. Due to the facts of the case and the attorney's one prior disciplinary infraction, the referee recommended he be suspended for a period of two months and that he pay the Bar's costs. This Court approved that recommendation.

In The Florida Bar v. Story, 529 So.2d 1114 (Fla. 1988), the attorney prepared a client's will. However, when the client executed the will, the signatures of the witnesses purporting to attest to the client's signature had already been obtained.

Further, the notarized statement that the witnesses had signed in the presence of the client had been executed prior to the client's execution of the will. The referee recommended the attorney be suspended for thirty days and that he pay the Bar's costs. This Court approved that recommendation.

In another Bar disciplinary case, The Florida Bar v. Seldin, 526 So.2d 41 (Fla. 1988), an attorney was given a two year suspension based upon charges the Bar filed in a five count complaint. In one count, the respondent admitted that as a notary, he had acknowledged the signature of his client, the personal representative in an estate matter, outside of her presence on two conveyances of deed of different dates. The attorney claimed that the reason he had acknowledged the signature of his client without her being present was for her convenience as she was not feeling well at the time. Based upon the seriousness of all of the charges, the Bar recommended the attorney be disbarred. This Court ordered instead a two year suspension due to the attorney's lack of a prior disciplinary history and his reputation in the community.

In a case similar to the instant matter, an attorney solicited a notary public to notarize a deed without having the signee present. In fact, the signature was two years old and the signee had since died. The improperly notarized deed resulted in

a fraudulent transfer of the deceased's property with which the attorney was involved. Subsequent to the deed being recorded, criminal charges were filed against the attorney stemming from the improper notarization of the deed. The attorney pled nolo contrendre to the offense of solicitation of a false notarization, a misdemeanor under Florida law. The judge withheld adjudication of guilt and placed the attorney on a six month period of supervised probation. This case is similar to the Levin case except that the attorney in this case received a public reprimand based upon a conditional guilty plea. See The Florida Bar v. Sireci, Case Number 78,661; The Florida Bar Case Number 90-70,495 (16B), (October 3, 1991).

In another public reprimand case, The Florida Bar v. Day, 520 So.2d 581 (Fla. 1988), the Court found that the attorney had notarized numerous affidavits without requiring the affiants to personally appear before her. There were no other disciplinary charges brought against her, See also The Florida Bar v. Bell, 493 So.2d 457 (Fla. 1986).

It is apparent from the above case law that attorneys have been disciplined for engaging in conduct involving improper notarization of documents. The respondent's conduct in soliciting an improper notarization could have resulted in criminal charges against the respondent as occurred in the Sireci

case. The only difference between Sireci and the instant matter is that as a result of Sireci's conduct, a fraudulent transference took place. If the respondent's actions resulted in prejudice to his client or a fraudulent result, he could have more serious consequences. It could be argued that the respondent's conduct in requesting his secretary improperly notarize the Blakelys' signatures actually benefitted the Blakelys in possibly having their case proceed more expeditiously. However, whether or not the respondent's actions harmed or benefitted his clients is not the issue. It is the respondent's initial act of soliciting the improper notarization and his secretary's carrying out of that request which violated the law and the rules by which all attorneys in the state of Florida must abide.

If this Court finds that the respondent's conduct was unethical and that the Referee was in error in finding the respondent not guilty, then a recommendation of discipline is appropriate. It would appear from the case law enumerated above that a public reprimand might be in order. However, it is the Bar's position that a public reprimand is not sufficient under the circumstances of this case.

Normally in these cases, a respondent's past disciplinary history, if any, is presented to the referee for consideration.

Such information only becomes relevant where a recommendation of guilt is returned and only after that recommendation is made. In this case, the Referee recommended the respondent be found not guilty and the Board of Governors of The Florida Bar took exception. The Bar believes a short-term suspension is warranted, in part, to alert the membership of The Florida Bar that improper notarization by attorneys will not be tolerated. The Bar would again point out that the legislature has recently made the laws governing notaries more stringent, not more liberal. Perhaps these changes were made to hopefully eliminate improper conduct as engaged in by the respondent and his secretary.

In determining the appropriate level of discipline, three considerations must be made as set out in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be fair to both society and the respondent, protecting the former from unethical conduct without unduly denying them of the services of a qualified lawyer. Second, the discipline must be fair to the respondent with it being sufficient to punish the breach and at the same time, encourage reform and rehabilitation. Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. The Bar submits that a sixty day suspension would fulfill these purposes, specifically with respect to the second and third considerations

enumerated above. A sixty day suspension would hopefully encourage the respondent to cease engaging in misconduct of this nature in the future. Further, if as the Referee has indicated, other attorneys are improperly notarizing documents as the respondent has, perhaps a sixty day suspension through this Court's opinion would help deter those attorneys from continuing that unlawful practice.

In conclusion, the Bar does not seek to punish one attorney for the alleged misdeeds of others. The respondent admitted his conduct and he should be held accountable for it. It is worth noting the Referee's findings as to Count II in his report:

> It seems to be fairly common among members of the Bar to accommodate their clients who resided out-of-state to not require they find a notary in their area to notarize pleadings and then send them back to the attorney in Florida. The practice seems to be that if the attorney is satisfied that a pleading contains the client's signature, it is acceptable to notarize it without the clients being present. Although I do not find such conduct entirely ethical, it is a problem that also appears to be common practice among other members of the Bar. (At p. 4).

It is the Bar's position that even though others may be engaging in this same misconduct, it still does not make it right for one or all of the transgressors. What the respondent did was clearly unethical and, more importantly, it was against the law. How can the respondent's claims of ignorance or that others are engaging in similar misconduct diminish the fact that his unlawful conduct

reflects poorly on the respondent as an attorney in the eyes of the public, the Bar, and the courts? The respondent must be disciplined for his misconduct in order to show the respondent and others that they cannot simply ignore the established laws that all citizens must adhere to.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review, with respect to Count 11, the Referee's findings of fact and recommendation of not guilty; accept the findings of fact but reject the not guilty recommendation; order the respondent be found guilty of the rules charged; impose the discipline of at least a sixty day suspension and tax the casts against the respondent which now total $2,582.60.

Respectfully submitted,

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Amended Initial Brief and accompanying Appendix have been sent by regular U.S.mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, **32399-1927**; a copy **of** the foregoing has been furnished by certified mail, return receipt requested, number P **399 876 126**, **to** respondent, **Mr.** Guillermo J. Farinas, 2121 Ponce De Leon Boulevard, Suite **240**, Coral Gables, Florida, 33134; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, **650** Apalachee Parkway, Tallahassee, Florida, **32399-2300**, this 15th day of May, **1992.**

Respectfully submitted,

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