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NOV 3 1992
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO. 78,526
CASE NO. 78,881

JOHNNY F. SMILEY,

Respondent.

_____/

CORRECTED RESPONDENT'S REPLY BRIEF

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ARGUMENT

POINT I

PORTIONS OF THE REFEREE'S FINDINGS OF FACT ARE WHOLLY WITHOUT EVIDENTIARY SUPPORT AND SHOULD BE DISREGARDED BY THIS COURT.

This case shows just how loose procedures have become in disciplinary proceedings. Under the guise of aggravation, the Bar introduced a complaint to a grievance committee without producing the complainant. Another example is the Bar's introducing an unverified motion in a bankruptcy case, without producing any witnesses, as proof of Respondent's trying to defraud creditors. Finally, the referee has found Respondent guilty of charging excessive fees when there is no evidence before the Court on the reasonableness of the fees.

Much more serious, however, is the Bar's charging, and the referee's finding guilt for, criminal misconduct when criminal charges have not even been filed.

Respondent cited in Point I of his initial brief seven instances where the Bar argued, and the referee found, "facts" that were without evidentiary support and, in most instances, were irrelevant. Those instances are discussed in pages 13 through 24 of Respondent's brief.

In reply to the Bar's answer brief, Respondent will briefly discuss each sub-point.

A. The referee improperly found that Respondent delayed reimbursement of Bishop Kinsey's funds. In paragraph 3D of her report, the referee made the following finding:

> Respondent delayed reimbursement of the $10,000.00 after numerous requests by one of the sellers in the transaction but finally replaced $5,053.01 of the $10,000.00 by paying that amount to the IRS on February 7, 1991, after he received notice of the tax due from the seller and after inquiry was made by the seller's new attorney.

Those findings are not supported by the evidence. The referee would give this Court the impression that repeated demands were made to Respondent to return the $10,000.00 and that he delayed in paying the $5,053.01 due to the IRS. In fact, the evidence shows exactly the opposite.

The Bar concedes that the referee's finding of repeated requests by the seller and the seller's new attorney is erroneous. Bar Brief p.7. This major oversight by the referee is indicative of the general inaccuracy of her factual findings.

Respondent dealt with this issue on pages 13 through 15 of his initial brief. The evidence shows that soon after receiving the IRS tax notice, Respondent prepared a check for $5,053.01 as payment of the buyer's taxes.

There is no evidence of repeated requests for the payment of the taxes. The only request was the forwarding of the tax bill with the expectation that it would be paid and, in fact, it was.

The clear intent of the referee's "findings" is that Respondent had to be repeatedly asked to pay the $5,053.01. That is not true. He paid it promptly. And, the remaining $4,947.00 was available for payment to Bishop Kinsey shortly thereafter. However, the Bar's freeze on Respondent's trust account delayed that disbursement for a year.

B. The referee improperly found that Respondent's conduct caused the Clarks to lose their home.

Both the Bar and the referee gloss over the fact that Respondent reached an accord with the Clarks' mortgage holder to defer foreclosure on their house provided they make up the arrearages within a 30 day period. T II 18,19; T I 50. The Clarks could not make up the arrearages. That, not Respondent's secretary's failure to apprise him of the foreclosure sale, is the reason for the Clarks losing their home.

Both the Bar and the referee ignore the fact that Respondent had nothing to do with foreclosure proceedings being filed in the first place. The Clarks were chronically behind on their payments. T I 55; T II 50. Because the Clarks did not know Respondent prior to foreclosure being filed, the Bar is not blaming him for that state of affairs. Simply put, the Clarks could not afford the home they were living in. That is the reason for their losing it.

Ironically, even had bankruptcy been successful, the new payments on the Clarks' house would have been higher than the ones they could not afford to make in the first place. T II 20.

It is simply unfair to say that the Clarks lost their house because of Respondent's conduct.

C. The referee improperly found that Respondent assured Ms. Webb that her foreclosure had been filed before he, in fact, filed it.

There is no evidentiary support for this finding whatsoever.

Mrs. Webb's testimony on this point is quoted on pages 18 and 19 of Respondent's initial brief. She stated that she met with Respondent on October 27, 1989 to discuss the foreclosure on her rental property. She stated that she could not remember whether he told her that he had already filed the foreclosure or whether he was going to file it after that meeting. However, she is positive that the papers relating to the foreclosure were definitely sent to her after the October 27, 1989 meeting.

Respondent respectfully suggests that Mrs. Webb's lack of memory does not constitute clear and convincing evidence that "Respondent assured Ms. Webb that the foreclosure action had been filed" as found by the referee in paragraph 7.E. on page 6 of her report.

D. The referee improperly found as an aggravating factor that Respondent filed his bankruptcy in the Southern District Florida to evade his creditors.

Based on nothing more than an unverified motion filed in Respondent's bankruptcy case, Exhibit 8, the referee found that Respondent "falsely certified his residency" in the Southern District Florida "in an effort to evade his creditors." The movant, a creditor and Respondent's former law partner, was not even required to testify before the referee.

In making her findings, the referee ignored the only testimony before her on the issues.

Respondent's testimony was that he was actually living in the Southern District Florida when he filed his bankruptcy due to his

employment there. T II 61. She ignored the fact that he filed in the Southern District upon the advice of a Jacksonville, Florida bankruptcy referee. TII 61. She ignored the fact that although Respondent had not met the 90 day venue requirement, that if no one challenged the venue it would have been an acceptable filing. T II 61, 62. In fact, the former law partner is the only creditor that challenged the filing.

Although Respondent's first petition in bankruptcy was dismissed, he refiled after the 90 day period elapsed and that filing was perfectly proper. T II 63.

There was not a single word of testimony before the referee by any creditor that he or she was defrauded by Respondent's filing. There is no evidence that Respondent failed to notify any creditors of his filing. Yet, the referee makes a quantum leap, based on the Bar's argument, that Respondent made a false certification to a bankruptcy court and that he was trying to evade his creditors.

E. The referee improperly found in aggravation that Respondent permitted the Lucases' bankruptcy to be dismissed.

Despite repeated objections, the referee accepted into evidence an affidavit from the Lucases alleging misconduct on Respondent's part. Neither Mr. nor Ms. Lucas testified. Once again, it was accepted under the guise of "aggravation". In point of fact, the grievance committee at the time of final hearing (and now, for that matter) has made no finding of misconduct on Respondent's part on the Lucas matter.

The Bar's justification for submitting the affidavit into evidence is its typical response that hearsay (and apparently any hearsay) is admissible. However, a document unsupported by the person executing it should not be the sole basis for finding misconduct. There should be a requirement, at least, of corroborating evidence.

The Bar cites The Florida Bar v Vannier, 498 So.2d 896, 898 (Fla. 1986) as support for its position that Ms. Lucas' affidavit is sufficient to find Respondent guilty of misconduct. In Vannier, the respondent objected to documents seized by the FBI from the headquarters of the Church of Scientology. It was undisputed that Vannier was an undercover agent for that church.

While this Court rejected Vannier's objections, the Court noted that

> The hearsay in question was adequately authenticated and its reliability established. Id. 898.

In the case at Bar, Ms. Lucas's affidavit was neither authenticated nor was its reliability established. It was nothing more than an allegation presented to the grievance committee and which had not resulted in any finding of misconduct.

More offensive, however, is the Bar's reliance on The Florida Bar v Stillman, 401 So.2d 1306 (Fla. 1981) for the often made argument that referees can consider evidence of misconduct not charged in the Bar's complaint.

This Court must correct the Bar's current interpretation of the Stillman doctrine. Basically, the Bar argues that anything

that the Bar wants to place into evidence can be admitted. Even if it is totally unconnected with the current charges.

The Bar quoted on page 13 of its brief the Stillman doctrine. It says that evidence "not squarely within the scope of the Bar's accusations" can be admitted. The quoted language intimates that there should be a nexus between the evidence sought to be admitted and the charges. In the instant case there is absolutely no connection between the Lucas complaint and the charges filed. However, the referee allowed the affidavit as evidence, and then used it as the sole basis for her finding that Respondent "permitted" the Lucases' bankruptcy to be dismissed.

F. The referee improperly found that Respondent failed to cooperate with The Florida Bar in producing his trust account records.

Respondent deals with this issue on pages 22 and 23 of his brief. The referee's opinion notwithstanding, the Bar's auditor testified that Respondent was "cooperative" and that he never hindered Mr. Pearson's access to Respondent's office. T I 74.

Respondent's failure to produce records was due to the fact that his records were locked up in storage. His inability to free his records was due to the Bar's freezing of his income and their demand that $12,000.00 of his funds, which could be used to free the records, be frozen to pay their costs.

G. The referee improperly found that Respondent has shown an indifference to making restitution.

Rather than indicating Respondent's attitude as being indifferent towards restitution, the evidence shows just the opposite. Respondent promptly came up with the $5,053.01 necessary to pay the IRS bill and had the remaining $4,900.00 in his trust account shortly thereafter.

The referee's primary justification for her "indifference" finding is the fact that Respondent stipulated to reimburse to Ms. Carney $968.41 based on the auditor's opinion that the costs were unsubstantiated. Rather than arguing about it, Respondent showed the proper attitude and agreed to refund to Ms. Carney the costs rather than quibbling over how much was justified and how much was not.

In the Marlow Jones case, as with Ms. Carney, Respondent agreed to restitution rather than arguing about the matter. The most important factor is that Respondent immediately agreed to reimburse the funds that the auditor opined were improperly held. He was not indifferent to his clients.

It should be noted to this Court that neither Ms. Carney nor Mr. Jones testified.

POINT II

THE REFEREE IMPROPERLY RECOMMENDED THAT RESPONDENT BE FOUND GUILTY OF CHARGING AN ILLEGAL OR CLEARLY EXCESSIVE FEE AND THAT HE ENGAGED IN CRIMINAL MISCONDUCT ALTHOUGH CRIMINAL CHARGES HAVE NEVER BEEN FILED.

A. The Clark clearly excessive fee. There is no evidence in the record from any witness to the effect that Respondent's fees

in the Clark matter were "clearly excessive" or improper in any way. The Bar points to no such testimony in its answer brief.

If The Florida Bar is going to prove up charges of excessive fee, it must present expert witnesses, or at least practitioners, to testify as to the unreasonableness of the fee. Failure to do so should be fatal.

As explained on pages 24 and 25 of Respondent's initial brief, from $90.00 to $120.00 of the $590.00 Respondent received from the Clarks was paid out as filing fees. He earned the remaining fee. He filed the bankruptcy and negotiated with the mortgage-holder's lawyer to give the Clarks a 30 day redemption period.

The Bar's reliance on The Florida Bar v Grusmark, 544 So.2d 188 (Fla. 1989) as justification for the referee's finding is inappropriate. In Grusmark, the referee recommended that the accused lawyer refund $3,000.00 of a $5,000.00 fee because he only worked four or five hours to earn it. Therefore, the facts in Grusmark and Respondent are drastically different.

Most significantly, however, in Grusmark is the fact that an arbitration committee, after hearing the evidence presented to it, found that Mr. Grusmark had charged an excessive fee. In other words, the referee in the Grusmark case had evidence beforehand of a clearly excessive fee. The arbitration panel so found. In the case at Bar, there is no such evidence.

B. Criminal misconduct. Respondent has neither been charged with nor convicted of a criminal offense. Therefore, there can be no finding that he has engaged in criminal activity.

Respondent recognizes that numerous opinions by this Court in the past have acknowledged violations of Rule 4-8.4(d) (proscribing criminal acts). However, the fact remains that no lawyer in this state is guilty of a crime, i.e., has engaged in criminal misconduct, until he has either pled to such a crime or until a jury finds him guilty after trial.

Respondent would refer the Court to his arguments on pages 25 through 27 of his initial brief for a more detailed discussion of this point.

POINT III

THE REFEREE IMPROPERLY RECOMMENDED THAT RESPONDENT PAY RESTITUTION TO THE CLARKS AND TO MRS. WEBB.

Respondent reiterates his argument that, prior to the adoption of new Rule 3-5.1(i), the referee did not have the authority to order restitution to the Clarks and to Mrs. Webb.

Respondent repeats the argument made in Point II and on pages 27 and 28 of his brief regarding the propriety of restitution.

There was no evidence before the referee that Respondent's fees were clearly excessive. Absent that evidence, there can be no such finding and, accordingly, no restitution.

Restitution to the Clarks was inappropriate as argued in Point II. A above.

A refund to Mrs. Webb is completely unjustified. In the first place, she got her certificate of occupancy. Getting that certificate obviates her entitlement to a refund. Moreover, the testimony was unrebutted that Respondent spent approximately

$860.00 in costs while pursuing Ms. Webb's foreclosure. In other words, he received only about $340.00 in fees for his work. It is clearly unjustified to order him to refund $1,202.00 to Ms. Webb under these circumstances.

POINT IV

THE REFEREE IMPROPERLY RECOMMENDED THAT A LIEN BE IMPOSED AGAINST RESPONDENT'S TRUST FUNDS.

The Florida Bar points to no authority for its request for a lien on Respondent's earned fees that the Bar forced him to place in a special trust account. Absent specific authority for such a lien, Respondent submits that the referee's recommendation is invalid. The Florida Bar v Allen, 537 So.2d 105 (Fla. 1989).

Respondent repeats the arguments made on pages 28 through 30 of his brief regarding this issue. In short, The Florida Bar has no business forcing a lawyer to deposit earned fees into a special trust account for the purpose of insuring payment of its costs. In the case at Bar, Respondent has $12,000.00 surplus in his trust account which his family desperately needs for subsistence. The Florida Bar's attitude is "me first". Rather than showing any compassion for Respondent's family and, for that matter, for any of Respondent's other creditors, The Florida Bar wants to seize this money to insure payment of its own costs.

There is no justification for the Bar's impatience. Costs will be repaid before Respondent is reinstated or readmitted to practice.

POINT V

A TWO YEAR SUSPENSION, TO BE FOLLOWED BY THREE YEARS PROBATION, IS THE APPROPRIATE DISCIPLINE TO BE IMPOSED IN THIS CASE WHEN ALL MITIGATING FACTORS ARE TAKEN INTO CONSIDERATION.

Respondent urges this Court to adhere to its prior declaration that disbarment should be reserved for lawyers that are completely unfit to practice law. The Florida Bar v Hirsch, 342 So.2d 970, 971 (Fla. 1977). That philosophy, when coupled with the three purposes of discipline (protection of the public; a sanction fair to the lawyer; and deterrence; The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970)) dictates a suspension for Respondent's misconduct. Any other sanction becomes a punishment and is antithical to the remedial, not punitive, nature of these proceedings DeBock v State, 512 So.2nd 164 (Fla. 1987).

The three cases cited by The Florida Bar in Section A of Point V of its brief actually support Respondent's argument for suspension. In both The Florida Bar v Shanzer, 572 So.2d 1382 (Fla. 1991) and The Florida Bar v Shuminer, 567 So.2d 430 (Fla. 1990) the lawyers were disbarred for more serious misconduct and in cases with fewer elements of mitigation. The third case cited by the Bar, The Florida Bar v O'Malley, 534 So.2d 1159 (Fla. 1988) resulted in the accused lawyer being suspended for three years.

In Shanzer the lawyer was found guilty of five counts of misappropriation of trust funds and one count of misappropriating the interest on trust funds. The number of defalcations and the taking of the interest distinguishes the charges in Shanzer from the case at Bar.

A more important distinction exists between the instant case and Mr. Shanzer's. At the time of final hearing complete restitution had not been made (Mr. Shanzer still owed $3,644.00 in restitution) and there was no evidence of good character before the referee.

Respondent, unlike Mr. Shanzer, not only has made full restitution but has a $12,000.00 surplus in his special trust account. And, he had eight reputable witnesses attesting to his good reputation.

The facts in the Shuminer case are far more egregious than the case at Bar. Mr. Shuminer misappropriated in excess of $20,000.00 and used the funds, at least in part, to buy himself a Jaguar automobile. Included among the four counts of misappropriation of trust funds that were described in the Court's opinion was one instance where he settled a case for $7,500.00 for his clients and repeatedly lied to them over many months about the status of the settlement. He first told them it wasn't settled and then said that only $3,200.00 had been offered.

Another difference between Shuminer and the case at Bar is that Mr. Shuminer still owed restitution at the time of final hearing.

In O'Malley the Court suspended the accused lawyer for three years, rather than disbarring him, despite his false testimony under oath. Significantly, in O'Malley this Court rejected the referee's conclusions in numerous respects. Most important among those rejections were the Court's finding that Mr. O'Malley took

$57,000.00 for personal gain. Respondent here asks this Court to reject the referee's unwarranted conclusions just as it did in O'Malley.

Despite Mr. O'Malley's false testimony and his taking of trust funds held for personal gain, he was not disbarred.

In Part B the Bar emphasizes in its brief numerous aggravating factors. Respondent, too, can point to the Florida Standards for Imposing Lawyer Sanctions as support for his argument that a two or three year suspension is the appropriate discipline. Standard 9.32 lists factors which may be considered in mitigation. Respondent submits that the following factors in mitigation are applicable to his case:

(a) Absence of a prior disciplinary record;

(d) Timely good faith effort to make restitution or to rectify consequences of misconduct. Respondent timely made Bishop Kinsey's first tax payment and, within three more months, had sufficient funds in trust to cover all clients (including refunds for unearned fees). Respondent has cooperated with The Florida Bar in making restitution and, but for the freeze on his trust account, would have made restitution to all parties before the Bar even filed its formal complaint.

(e) Full and free disclosure to the Bar and cooperation. When first confronted by The Florida Bar, Respondent immediately admitted his shortages. While he has not had records available to him for disclosure to the Bar (as a direct result of the freezing

of his assets) Respondent has cooperated with the Bar's auditor to the best of his ability.

(f) Inexperience in the practice of law. Respondent was forced into practice as a sole practitioner without any training in trust account procedures. This inexperience led to the deplorable state of his trust account records and contributed to his problems. He also was woefully inexperienced in law office management.

(g) Character or reputation. The testimony of Respondent's eight witnesses attested to his superb reputation for character and legal ability. His community and Bar activities attest to his dedication to his community and to his profession. While he is guilty of misconduct that warrants stern discipline, disbarment is simply not appropriate.

(l) Remorse. What is remorse if it is not acknowledgement of wrongdoing and taking prompt steps to rectify that misconduct? Respondent from day one has admitted culpability and, shortly after disciplinary proceedings commenced, had sufficient funds in his trust account to make complete restitution to all parties. A review of this testimony before the referee indicates one who is ashamed of his conduct, understands the gravity of it, and wishes an opportunity to make amends.

CONCLUSION

This Court should suspend Respondent from practice for two, or at most, three years, with reinstatement to be followed by three years probation. The referee's recommended discipline and the

challenged findings of fact should be rejected by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Respondent's Corrected Reply Brief were hand delivered to Mimi Daigle, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 3rd day of November, 1992.

JOHN A. WEISS