IN THE SUPREME COURT OF **FLORIDA**

THE FLORIDA **BAR,**

Complainant,

vs

LARRY *G.* **RTGHTMYER,**

Respondent.

CASE NO 78,615

TFB **NO** 90-11,348(6D)

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The parties will be referred to as they stood before the Referee, to-wit: Complainant, THE **FLORIDA BAR** and Respondent, LARRY G. **RIGHTMYER.** Respondent will utilize **the same** symbols used by **THE FLORIDA** BAR in **its** Brief in support of its Petition for Review.

(TR) Transcript of Final Hearing March 20, 1992

(RR) Report of referee

(R) Record

(RR1) Referee's Response to Motion to Amend and for Rehearing and to Respond to Motion for Rehearing

EXHIBIT 1 - Information for Perjury 25 counts

EXHIBIT 2 - Judgment and Sentence 3 counts adjudication of guilt - 4 years probation

STATEMENT OF THE CASE

On March 15, 1990 Respondent, LARRY G. RIGHTMYER was charged in a 25 count information with perjury arising from his testimony in a civil mortgage foreclosure suit in Pinellas County, Florida. (TR-7 Exhibit 1) Pursuant to a plea agreement Respondent pleaded nolo contendere to 3 counts of the information and the remaining counts were dismissed. (TR-60 Exhibit 2)

On January 24, 1991, Respondent was adjudicated guilty and sentenced to four (4) years probation. (TR-8 Exhibit 2)

Based upon the conviction, on February 20, 1991, the Florida Supreme Court entered its order suspending Respondent effective March 22, 1991.

Hearing before the Referee Judge Dick Greco took place March 20, 1992. (TR) His initial report was filed April 17, 1992, and after the Florida Bar's Motion to Amend for Rehearing, the Referee filed his "Response to Motion to Amend and for Rehearing." (RR-1)

The initial referee's report (RR) recommended the following penalties:

> Count I of Bar Complaint - Trust Violations: 12 months suspension and thereafter until rehabilitated plus 12 months probation upon reinstatement.

Count II of Bar Complaint - Perjury Conviction: 36 months suspension and thereafter until rehabilitation proven. Consecutive to 12 months suspension in Count I plus 12 months probation. Additional rehabilitation requirements of legal ethics, passing the ethics portion of the bar exam, psychological and alcohol evaluation and costs. (RR)

The Referee denied the Florida Bar's Motion for Rehearing, (RR-1) but amended the discipline as follows:

Count I - 12 months consecutive to Count II (discipline in other respects the same)

Count II - 36 months made retroactive to March 22, 1991 (Florida Supreme suspension)

The Florida Bar filed its Petition for Review of the Referee report on August 5, 1992.

STATEMENT OF THE FACTS

Respondent, LARRY G. RIGHTYMER, offered perjured testimony in a civil mortgage foreclosure suit in Pinellas County, Florida. (Exhibit 1 & 2) (TR-56-57) At the Referee's hearing, Mr. Rightmeyer testified that he brought together a lender (Wilson), a contractor (Rocco) and Rocco's interior decorator and paramour (Bevilacqua). Rocco needed $50,000 to help his construction project. Wilson agreed to loan Rocco $50,000 for 30 days with $5,000 interest (10% a month) The usurious transaction was to be secured by Rocco's 2 lots and Rocco's decorator, who put up her home as security for the loan. (TR-56-58)

The $50,000 plus interest was not paid and Wilson instituted foreclosure action against Rocco and his decorator Bevilacqua. (TR-58) Respondent became a witness in the foreclosure case and tried to cover up the usurious nature of the loan by representing the additional $5,000 interest as really being principal previously **paid** to Rocco. Essentially, instead of a $50,000 loan with $5,000 usurious interest, the transaction was made to appear as a $55,000 principal loan by the lender Wilson. (TR-55-60)

The mortgage foreclosure was rejected by the trial judge who ruled in favor of Ms. Bevilacqua. (TR-58) Mrs. Bevilacqua was evidently made whole and Repondent Rightmyer

repaid Wilson $75,000 plus Rocco's lots. (R-59) Respondent did not gain anything from the foreclosure suit. (TR-59)

With respect to the trust violations, no client suffered a financial loss.

"THE REFEREE: Thank you, sir.

I will ask Mr. Ristoff. The Bar alleges -- of course, I suppose the Respondent has admitted as to the trust account violations that are in existence -- is there any claim by the Bar as to those instances? Is there any loss to any other individuals at this time?

MR. RISTOFF: None to our knowledge, Your Honor, no.

THE REFEREE: So, the Bar's contentions are there was commingling of funds but no client as this time is out of--financially out of any monies?

MR. RISTOFF: This is correct.

THE REFEREE: Now, I want to ask, also, several questions of the Respondent. Mr. McDermott, you consult with your client to do that.

I heard testimony today, certainly from Mr. Rightmyer, that possibly there was a problem with some alcohol and he alluded to the fact he had read some brochures. Did he ever receive any counselling or currently in Alcoholics Anonymous?

MR. McDERMOTT: (Addressing his cient.) Respond to that, **please.**

MR. RIGHTMEYER: I have not received direct counselling on it. I've talked to other alcoholics.

> Like I said, I haven't had a drink in two years. When the bottom drops out, you finally hit, that is all there is.
>
> THE REFEREE: I suppose I probably should have asked Susan Allen. She alluded to some type of counselling she asked you to undergo. What would that have been?
>
> MR. RIGHTMYER: Alcoholics counselling.
>
> (TR-91-92)

Respondent RIGHTMYER offered four witnesses as well as his own testimony in mitigation. The guilt aspect of the Florida Bar complaint was admitted. (TR-5)

Thomas Quinn is Mr. Rightmyer's employer. Mr. Quinn's company builds bridges and fabricates steel. (TR-11) He was a client and acquaintance of Respondent and hired Respondent because of his engineering background. He stated Respondent was remorseful and distressed over his legal problems. (TR-14) Mr. Quinn related he trusts Mr. Rightmyer "very much so he handles several million dollars worth of business right now." (TR-15)

Respondent's former wife, Susan Allan, testified in his behalf. (TR-18)

She stated:

> "... hindsight, of course, I can *see* that all of this stress and everything was bothering him." (TR-22)
>
> ***
>
> "...I knew he was spending a lot of long hours. He started drinking a

lot. He was always good to the children and such but you could see that this was just really tearing him apart. I begged him to get counselling but he would have no part of it. **(TR-23)**

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"He seemed, you know, very distraught over it, very remorseful over it. It truly embarrassed him. Whether it was just what happened here professionally as well as publicly. It's constantly in the newspapers. I feel that he truly feels bad." (TR-26)

Dr. Sidney Merin was accepted as an expert psychologist by the Court. (TR-32)

Dr. Merin had evaluated Mr. Righmyer in 1984 in a civil custody proceeding. (TR-32) Dr. Merin testified to finding Respondent:

"...verging on manic behavior."

(TR-33)

***

"That was the stage for what I believe in retrospect now some of problems he had eventually gotten into. He considered that the world was his plum. There was no problem he could not solve. Much of his heightened activity was impulsive at this time. Often purposelessness. It was excessive and very often grandiose. He had an unrealistic self-appraisal, which is not at all uncommon with personalties who are rather inclined toward being manic. They can solve the world's problems if you just listen to me type of thing."

(TR-34)

Dr. Merin, after administering the Minnesota Multiphasic Personality Inventory test in 1992 observed:

> "So, I compared the profile now with what we had in 1984. What we find here is just a remarkable different sort of personality. Whereas earlier he wanted to make these terrific impressions, earlier he was moving in all sorts of directions. Totally self-assured and very optimistic. Now he is a very toned down personality. Much more logically directed. More inclined toward subordinating impulses. He already learned this. He no longer is this anxious, energetic, active, agitated sort of individual. Very controlled. Indeed a nice profile. In contrast to what he was like in 1984 when he had all of this energy, verging on manic behavior. We just don't see it now whatsoever. He has more realistic self-appraisal. He knows what his faults are. He knows what his errors are. He has no difficulty now being able to adhere to concepts of right and wrong."
>
> **(TR-39-40)**

Dr. Donald H. Eckert, Respondent's pastor for 15 years testified:

> "A. Well, I saw a very professional person performing in his law practice. On several occasions I have witnessed his representing people in and out of my congregation. I saw him as a private individual in our neighborhood, participating in neighborhood associations where he was acting on behalf of the good of the neighborhood. **I** saw him sacramentally because I baptized his children and I am familiar with his family, especially his mother and his brothers, or brother. So, I'm familiar, well-acquainted with Larry, both as an individual in home

and society as well as professionally."

***

"Q. Are you aware of the problems he underwent with regard to his perjury conviction?

A. I was made aware of that.

Q. Do you know from your own experience what effect that that has had and the Bar proceedings have had on Mr. Rightmyer?

A. Well, he had been demoralized, of course, because he had been having a very active clientele, whom several of my people were part of his clients, several of which he looked after at no cost whatsoever because they were members of the church. So, I knew that Larry was sorry that he had gotten mixed up in this kind of thing."

(TR-73-74)

Respondent testified to having serious financial problems and lawsuits during the period of his violation. As to his drinking and the effect of his conviction he stated:

"Q. You mentioned something about drinking during that period of time.

A. Yes. I was a drinker. I would drink at nighttime. I thought, "Well, if I don't miss any time from work and I don't drink during the day, I guess I'm not an alcoholic." But if you read the pamphlets AA puts out and if you add up the score, I guess that is not right. When the bottom finally fell out on all of this two years ago, I stopped. I haven't had a drink since. I stopped.

Q. What effect has this action, perjury action and conviction, had upon you and the suspension from the Bar?

A. Well, let me start with this. Now, I might have had a good chance of getting custody of my first two

kids. That is blown. I don't even have communication with them now because their mother tells them all kinds of stuff about me, some of which is true. So, I lost my family. I was happy together with Susan and those two children. That is gone. 1 lost all the properties that I had. All my investments. I'm totally broke now. In a period of two years I went from having maybe over a millon dollars' worth of assets, a couple million. I'm broke now. I have nothing.

Q. You have a house. You live in a house, right?

A. I live in a house. That is what I've got. I had a car. I had my car refinanced a few months ago- not refinanced, repossessed. They came at work at my job and drove it off with a truck. Loaded it up. I was down in Miami."

(TR-62-63)

Respondent further testified:

"A. Well, I think that because if somebody has--if somebody has a disease and somebody has alcoholism and somebody is doing something this is not right and they become rehabilitated, I think it's just the same if somebody has AIDS and nobody wants to shake their hand. It's a disease. I think that the Supreme Court has ruled that it's a disease. I learned my lesson. That is what it is all about. It isn't that I'm a bad person. I practiced successfully for over twenty-five years. I had to do something right to stay in practice. Clients kept coming back. I had a nice practice, successful practice. I lost that. Lost my office. Lost everything. I lost my practice.

Q. Mr. Rightmyer, additionally you're charged with some trust vio-

lations. Can you explain--let me ask you this. Were any clients ultimately out any money from that?

A. No. The opposite. Mine is the opposite. "

(TR-65)

SUMMARY OF ARGUMENT

The finding of fact and recommendations of the Referee below are correct. Conviction of a felony does not automatically result in disbarment and the mitigating factors found by the Referee are entitled to great weight. Respondent's recommended suspension based upon such mitigating factors is supported by the evidence below.

ARGUMENT

The Referee's Report and Recommendation as to a suspension of Respondent as opposed to disbarment is correct.

Respondent conceded to the Referee that disbarment is the usual penalty for a perjury conviction. (TR-83)

However, Respondent disagrees with the position of the Florida Bar that disbarment is appropriate in this case. The Bar seemingly takes the position that disbarment is automatic. That is not the law.

The Florida Supreme Court in Florida Bar vs Jahn, 509 So. 2d 285 (Fla. 1987) clearly held:

> "The Bar's second argument is that this Court should adopt an automatic disbarment rule whenever an attorney is convicted of a felony. We reject this suggestion and will continue to view each case solely on the merits presented therein."
>
> (509 So. 2d at page 286)

The Referee in Jahn, supra., recommended a three year suspension. The Court also addressed the issue of chemical dependency as follows:

> "An attorney with a chemical dependency problem, whether the drug of his choice is legal such as alcohol, or illegal such as cocaine, should be encouraged to seek treatment to rid himself of the dependency. We have held in prior bar discipinary cases that an addicted attorney who has demonstrated positive efforts to

> free himself of his drug dependency should have that fact recognized by referee and this Court when considering the appropriate discipline to be imposed."
>
> (509 So. 2d at page 287)

In the hearing below Respondent testified to his alcohol problem as well as mental stress. The mental stress was verified by Dr. Sidney Merin.

In Florida Bar v Musleh, 453 So. 2d 794 (Fla. 1984) the Court noted that it is appropriate to consider mental illness in mitigation of wrongful actions.

The Florida Bar urges that the cumulative effect of trust violations coupled with the criminal conviction warrant Respondent's disbarment. However, this Court in Florida Bar vs Farbstein, 570 So. 2d 933 (Fla. 1990) stated that a suspension and not disbarment as appropriate where full restitution is made and recovery is made from alcohol and drug addiction. In this case Respondent's trust violation did not involve loss to any client. Likewise, the parties to the foreclosure suit wherein the perjury was committed were made whole.

See also Pavlick v Florida Bar, 504 So. 2d 123 (Fla. 1987) holding that neither the Integration Rule nor case law require disbarment for attorneys convicted of a felony.

The Florida Bar cites two perjury cases wherein disbarment was determined to be appropriate as opposed to

suspension. In Florida Bar v Ryder, 540 So. 2d 121 (Fla. 1989) the Supreme Court upheld a referee's recommendation of disbarment because the referee specifically found: "there are insufficient mitigating factors to justify reduction of the recommended penalty of disbarment."

In Florida Bar vs Leon, 510 So. 2d 873 (Fla. 1987) the Supreme Court concluded that disbarment was appropriate for Circuit Judge Leon (as opposed to a 3 year suspension) due to the "nature of Leon's action." (Emphasis added) Judge Leon stood convicted of 2 counts of perjury and one count of official misconduct.

Respondent submits that the Ryder, supra. and Leon, supra. cases are not determinative here. The referee below specifically found mitigating factors. The referee in Ryder, supra. found insufficient mitigating factors. Although not stated, it would appear that the Leon, supra. case resulted in disbarment by virtue of his judicial position. Also the Leon, supra. case does not show any mitigating factors.

Referee Greco specifically found:

> "Although Respondent's acts of perjury are grounds for disbarment, I find that there are mitigating circumstances here that cause this Referee to recommend a lesser penalty than disbarment. Those circumstances are as follows:
>
> 1. Respondent was experiencing severe marital difficulties the time of his actions, along with

business and financial difficulties.

2. Respondent was experiencing an alcohol problem and possibly psychological problems, at the time of his wrong actions.

3. It does not appear that any person who may have been affected by Respondent's actions has not been made financially whole and no financial loss to any person was presented.

4. Respondent admitted his guilt, has shown remorse and recognized that his actions were incorrect and harmful to the public, the Bar, himself and his family.

5. Respondent appears to recognize that punishment is justified and has accepted and admitted the criminal charges as well as the Bar's allegations against him.

6. But for these acts, witnesses for the Respondent acknowledge his remorse and testified as to his better qualities and good reputation.

7. But for these acts which occurred in 1987 and a public reprimand which occurred in 1986, Respondent appears to have enjoyed a good reputation as a member of the Florida Bar for the last twenty-seven years.

I do not find that these mitigating circumstances excuse Respondent's conduct. There really appears to be no "ex-

> cuse" whatsoever. Indeed, it appears to this Referee that at the time of the perjury, Respondent was acting on his own and in furtherance of his own greed and self-serving interest.
>
> However, taking all facts and circumstances into consideration, this Referee must make a recommendation of what I feel would be proper disciplinary procedures for this particular case and this particular Respondent. I must consider said circumstances in light of Respondent's state of mind at the time. Realizing that these acts occurred in 1987, nearly five (5) years ago and considering that since that time Respondent has fully and completely admitted his guilt, changed his way of thinking and appears to be truly remorseful for his actions. I am recommending the suspension with conditions. Otherise, without my findings of probative and compelling mitaging circumstances, I would surely recommend that Respondent be permanently disbarred from the practice of law.
>
> (RR)

The Referee below made specific findings in mitigation. He was aware of the Florida Bar's position and cases supporting disbarment.

The Supreme Court in State ex rel Flordia Bar v Murrell, 74 So. 2d 221 (Fla. 1954) stated:

> "Both Mr. Drinker and the Courts

> tell us that disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charge against him."
>
> (74 So. 2d at page 223)

In Florida Bar vs Diamond, 548 So. 2d 1107 (Fla. 1989) Diamond had been convicted of six counts of mail and wire fraud. The Referee in Diamond, supra. found the presence of many mitigating factors in recommending a suspension as opposed to disbarment. The Supreme Court noted:

> "The Bar raises two arguments. First, it again presses its argument that Diamond should be disbarred. The Bar says the conduct that let to the felony convictions in this case was particularly egregious because Diamond utilized his talents as an attorney to participate in consumer fraud on a mass scale. Were this conduct not extensively mitigated we would agree. But we cannot ignore the abundant character testimony from prominent, sober, and reliable witnesses. We find especially telling the fact that Judge Davis, who sat on Diamond's case, testified in Diamond's behalf."
>
> (548 So. 2d at page 1108)

The Florida Bar is in effect asking the Court to substitute its recommendation and findings of fact for those of the referee. That conclusion is not sound, for it would result in an automatic disbarment for a perjury conviction. That is not the law and the referee's findings are clothed with a presumption of correctness.

The function of the refereee is to make findings of fact and he did just that as to mitigating circumstances. This Court should not ignore that finding.

The referee below and Respondent relied primarily upon the case of Florida Bar vs O'Malley, 534 So. 2d 1159 (Fla. 1988). This Court clearly stated that testifying falsely under oath is misconduct which is grounds for disbarment.

In O'Malley, supra. the referee recommended a 90 day suspension and other rehabilitative requirements.

The Court stated:

> "The referee in his report failed to place due emphasis on the fact that O'Malley deliberately and unequivocally lied under oath. His answers at deposition were directly contrary to the truth; he later admitted this. A lawyer may commit no greater professional wrong. Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment."

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"We agree with the referee's finding of mitigating circumstances, and but for his findings, this would be a case for disbarment:

There are mitigating circumstances regarding Respondent's conduct as well. There was mention at trial that Respondent was experiencing marital difficulties at the time, and had a serious alcohol problem. Although it was after litigation was brought against him. Respondent eventually paid nearly seventy thousand dollars as restitution. The delay in payment was apparently due to Respondent's concern over legal issues in the civil action. Further, at the time of his misconduct, Respondent had only been practicing law a few (two and one-half) years. Mr. (Joseph) Boyd testified at the hearing that Respondent had a good reputation for honesty. Additionally, the Respondent has shown remorse as well as recognition of the wrongfulness of his behavior."

(534 So. 2d at page 1162)

The mitigating factors found to exist in O'Malley, supra. are virtually the same found by the referee as to Respondent Rightmyer.

Those factors were:

1. Alcohol

2. Litigation - restitution of nearly $70,000.00

3. Good reputation for honesty

4. Remorse and recognition for his wrongful behavior

Respondent Rightmyer gained nothing from his

acts. He testified falsely in the foreclosure suit under a misguided notion that the parties all knew what they were doing. Bevilacqua prevailed in the suit and got her attorney's fees. The lender Wilson was repaid $75,000.00 for his losses by Respondent.

Additonally, Respondent was undergoing personal litigation as well as lawsuits resulting from Rocco's conduct.

Based upon those mitigating factors found by the referee the recommended discipline is fair to the Florida Bar and Respondent.

Numerous Florida Supreme Court cases set forth the rule that a referee's findings of fact will be accepted by the Court unless clearly erroneous or lacking in evidentiary support. The Court will not reweigh evidence or substitute its judgment for that of the referee. While the matter of discipline is subject to broader review the Court, nevertheless, gives great weight to the referee's recommendations. Referee Greco made specific findings of fact as to mitigation of the penalty.

In Florida Bar vs Simmons, 581 So. 2d **154** (Fla. 1991) the attorney sought to influence a prospective member of a jury venire in an upcoming criminal trial. The referee recommended a 1 year suspension. The Florida Supreme Court stated:

> "Such misconduct warrants a more severe sanction than a ninety-one day suspen-

sion. (Recommended by Florida Bar and Respondent) Ordinarily, this type of offense would warrant disbarment. The referee's recommendation (1 year suspension) however, carries great weight. The referee had the opportunity to see and hear Respondent and weight the mitigating factors against the seriousness of the offense. We are persuaded that his conclusion should not be disturbed."

(581 So. 2d at page 157)

CONLUSION

Respondent, LARRY **G.** RITGHTMYER, **submits that the report and recommendation** of **the referee and amended order** after **rehear**ing be approved by this Honorable **Court.**

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Reply Brief has been furnished by US Mail this the day of September 1992 to:

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