IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

HARRY S. EBERHART,

Respondent.
_____/

Case No. 79,649

TFB File No. 92-00753-02-

AMENDED ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Harry S. Eberhart, will be referred to as Respondent or Mr. Eberhart throughout this Brief. The Appellee, The Florida Bar, will be referred to as such or as The Bar.

References to the Report of the Referee shall be by the symbol "RR" followed by the appropriate page number.

References to the final hearing before the Referee on September 23, 1992, shall be by the symbol "T1" followed by the appropriate page number.

References to the hearing before the Referee regarding discipline on November 3, 1992, shall be by the symbol "T2" followed by the appropriate page number.

References to exhibits submitted into evidence at the final hearing shall be by the symbol "ex" followed by the exhibit number for Bar exhibits.

References to Respondent's Brief shall be by the symbol "RB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Respondent in his initial brief does not set forth adequately the procedural and substantive facts in this case. Therefore they are set forth here.

A. Procedural Facts:

The Florida Bar filed a Complaint and a Request for Admissions on April 6, 1992 in this matter. The Respondent was served with these pleadings on April 10, 1992. (T1 p.3-4). The Respondent did not file a response within the requisite time period as set forth in Rule 1.370(a) of the Florida Rules of Civil Procedure (T1 p.4). The Florida Bar filed Motions for Summary Judgment and to Deem Matters admitted on June 5, 1992. A hearing was held on these motions on September 23, 1992, before the Honorable Referee Philip J. Padovano (T1). The Respondent filed an Answer and Response to The Florida Bar's Complaint and Request for Admissions the morning of September 23, 1992. On October 6, 1992, the Referee granted The Florida Bar Motions for Summary Judgment and to Deem Matters Admitted (order dated October 6, 1992). In his order the Referee found that "[s]ince the response was submitted more than 45 days from the service of the initial pleading (actually more than five months from service of the initial pleading) the response is untimely. By operation of Fla. R. Civ. P. Rule 1.370(a), the matters set forth in the request for admission are now deemed admitted". The hearing regarding discipline, the only

remaining issue, was held on November 3, 1992 (T2). The Respondent appeared telephonically and counsel for The Florida Bar appeared in person.

B. Substantive Facts:

The Respondent sets forth a series of statements by the Referee in his report that he deems to be erroneous. These will be discussed individually and then the facts which support the referee's recommendation will be discussed thereafter.

First, the Respondent alleges that "the referee commented on the supposed fact that the Respondent had been charged with the serious crime of perjury, when the facts were totally different" (RB p.2). The Florida Bar concedes that Respondent was not accused of perjury as is reflected in the transcript on page number 27, but he was accused, by a former associate, of forging his name on documents at real estate closings.

Next, the Respondent states that "the Referee's report conveniently omits the fact that the Respondent charged that a Connecticut attorney had been guilty of perjury at the hearing in which the Respondent was found guilty of violating ethical considerations and suspended for two years" (RB - p.3). Since the Referee had previously granted The Florida Bar's Motion for Summary Judgment and Deemed all Matters relative to a violation of the rules admitted, this argument regarding the substantive rule violation is without merit.

The third error referenced by the Respondent is that "the Referee accepted the proposition of the bar counsel that an attorney who is unable to practice in his home state should not

be permitted to practice in Florida" (RB at p.3). As this is the basis for the The Florida Bar's position and the Referee's recommendation as a matter of law, it is not a factual finding and therefore not a factual error. This issue will be discussed on page 7 of this brief.

The Respondent's final allegation is that "the referee failed to comprehend the degree of culpability of a former associate whom the Respondent had accused of embezzlement and the repercussions of that litigation" (RB at p. 3). This alleged error must pertain to the grievance that was filed by Mr. Moore, a former associate of Respondent, alleging forgery against Respondent. The Referee made a finding in the Report that [t]he Respondent denied the accusation of perjury in the Moore case. This should be read that Respondent denied the accusation of 'forgery', as previously conceded. The Referee's finding is supported by the record.

The case before this Honorable Court concerns a lawyer who misrepresented to opposing counsel that he would provide a release from a third party who had a lien on his client's property. Based on this representation opposing counsel advised his client to proceed with the purchase of Respondent's client's property. Respondent did not provide the release from the third party as represented and the lienholder began foreclosure proceedings. Opposing counsel ultimately paid off the note to halt foreclosure proceedings on his client's property.

Other pertinent findings on this matter concern those discussed during the disciplinary stage. It is conceded by The Florida Bar as well as the Referee that "Although, the conduct underlying the April 19, 1991 suspension in Connecticut is serious, it would not be sufficient in itself to justify disbarment in Florida". (RR-7)

The Referee found the following aggravating circumstances:

1. The Respondent has a prior disciplinary offense.
2. The Respondent has engaged in a pattern of misconduct.
3. The Respondent has committed multiple offenses.
4. The Respondent has substantial experience in the practice of law (RR p.6-7).

The record supports each of these findings. First, the Respondent received a public reprimand on October 19, 1989, by the Statewide Grievance Committee of Connecticut. To support the factors concerning a pattern of misconduct and commission of multiple offenses the Referee relies on the four cases that were pending against the Respondent until his resignation from the practice of law in Connecticut (RR p. 4-5) (T2-p.13-20). The pending cases alleged very serious misconduct on the part of the Respondent. These allegations included an escrow fund violation (ex.7) and an allegation of forgery (ex.11).

The Respondent resigned from the practice of law in Connecticut in lieu of discipline on the four pending grievance matters in Connecticut, waiving any right to apply for readmission (RR p.7). It was due to this resignation that the pending grievances were not fully litigated in Connecticut (RR p.5) (T2 p.22-25)(ex. 18).

SUMMARY OF THE ARGUMENT

The Referee's recommendation that Respondent receive the sanction of disbarment with the special condition that he not be permitted to reapply for readmission to practice law in Florida until he has been readmiited to practice law in the State of Connecticut is appropriate (RR p.7). Although the underlying offense involving misrepresentation would command a suspension, this sanction is warranted due to the attendant aggravating circumstances. These are as follows: the Respondent's prior disciplinary offense; that Respondent engaged in a pattern of misconduct; that the Respondent committed multiple offenses; and that the Respondent has substantial experience in the practice of law.

Further, the more severe sanction is justified due to the Respondent's resignation in lieu of discipline in his home state of Connecticut in which he waived his right to apply for readmission. It is The Florida Bar's contention that a lawyer that is unable to practice law in his home state due to disciplinary measures should be barred from practicing in the State of Florida. This position is supported by the Florida Supreme Court rulings in The Florida Bar re: Sickmen, 523 So. 2d 154 (Fla. 1988), The Florida Bar re: Sanders, 580 So. 2d 594 (Fla. 1991), The Florida Board of Bar Examiners re: R.L.V.H., 587 So. 2d 462 (Fla. 1991). The aforementioned supports the Respondent's recommendation of disbarment with the special condition prohibiting reapplication to The Florida Bar until Respondent is readmitted to his home state.

ARGUMENT CONCERNING

REFEREE ERROR

According to a myriad of case law, the findings of a referee will be upheld unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990). Further, the findings are presumed to be correct and the burden is upon the party seeking review to demonstrate that the referee's report is erroneous, unlawful or unjustified. The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990).

The Respondent has not established that the referee's findings are clearly erroneous therefore he has failed to meet his burden on this issue. In fact, the Referee's findings are supported by competent substantial evidence and therefore should be upheld. The Florida Bar v. Jahn, 539 So. 2d 1089 (Fla. 1990).

ARGUMENT CONCERNING APPROPRIATENESS OF DISCIPLINE

The sanction of disbarment coupled with the special condition that Respondent not be permitted to reapply for admission to practice law in Florida until he has been readmitted to practice law in the State of Connecticut is appropriate. In light of the aggravating circumstances enunciated by the referee that the Respondent has been

previously disciplined, that there is a finding of a pattern of misconduct, that there were multiple offenses alleged and pending at the time of Respondent's resignation, and that the Respondent had substantial experience in the practice of law, warrants this harsh sanction.

Although most of the cases involving a misrepresentation, similar to the case at bar, have imposed the discipline of a term of suspension, the increased discipline is warranted due to the attending aggravating circumstances. In The Florida Bar v. Wilder, 543 So. 2d 222 (Fla. 1989), the Supreme Court of Florida held that the appropriate sanction for falsely representing the status of a case that was neglected by the lawyer to clients is 180 days suspension. Further, in The Florida Bar v. Colclough, 561 So. 2d 1147 (Fla. 1990), the Court held that making misrepresentations in a lawsuit to the Court and to opposing counsel warrants a six month suspension. These cases which impose suspension do not reflect the aggravating circumstances found in this case, i.e., prior and cumulative misconduct. According to The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979), it is appropriate to increase the level of discipline, in that this Court deals more severely with cumulative misconduct than with isolated misconduct.

Further, it is the position of The Florida Bar that Respondent's resignation, in lieu of discipline in his home state waiving any right to make application to be readmitted, are grounds for his disbarment in the State of Florida. The

Florida Bar concurs with the Referee's finding that the most compelling circumstance which justifies the sanction of disbarment is that the Respondent resigned from the practice of law in Connecticut in lieu of discipline waiving any right to apply for readmission (RR p.7). The reason for this position is that the Supreme Court of Florida in The Florida Board of Bar Examiners re: R.L.V.H., 587 So. 2d 462 (Fla. 1991) and subsequently codified in a rule change, Florida Board of Bar Examiners re: Amendment to Rules of the Supreme Court Relating to Admissions to the Bar, 578 So. 2d 704, 707 (Fla. 1991), stated that:

> A person who has been disbarred from the practice of law in a foreign jurisdiction shall not be eligible to apply for admission to The Florida Bar or the Florida Bar Examination for a period of five years from the date of disbarment or such longer period set by the foreign jurisdiction for readmission to the foreign jurisdiction.

The Supreme Court of Florida, in The Florida Bar re: Sanders, 580 So. 2d at 594 (Fla. 1991) and Florida Board of Bar Examiners re: R.L.V.H., 587 So. 2d 462 (Fla. 1991) relying on Justice Ehrlich's special concurring opinion, in The Florida Bar re: Sickmen, 523 So. 2d 154, 156 (Fla. 1988), concluded that "We should not allow the practice of law in Florida of one disbarred in his home state". The Florida Bar re: Sanders, 580 So. 2d at 594 (Fla. 1991); Florida Board of Bar Examiners re: R.L.V.H., 587 So. 2d 462 (Fla. 1991).

The Respondent in this case was not disbarred but he resigned in lieu of discipline waiving any right to reapply in his home state of Connecticut. Not to disbar Respondent would mean that any lawyer who fears disbarment in their home state may resign and relocate to Florida to practice law. It is the opinion of The Florida Bar that such a ruling would be inconsistent with the holdings of The Florida Bar re: Sanders, 580 So. 2d at 594 (Fla. 1991) and Florida Board of Bar Examiners Re: R.L.V.H., 587 So. 2d 462 (Fla. 1991). Resignation in lieu of discipline especially when conditioned upon the waiver of reapplication in the future is at least the equivalent to disbarment if not a harsher penalty as it precludes practice permanently. It is The Florida Bar's position that precluding Respondent from practicing law in Florida is the next natural progression to the series of cases which address this issue (The Florida Bar re: Sickmen, 523 So. 2d 154 (Fla. 1988); The Florida Bar re: Sanders, 580 So. 2d 594 (Fla. 1991); The Florida Board of Bar Examiners re: R.L.V.H. 587 So. 2d 462 (Fla. 1991).

CONCLUSION

Based upon the foregoing facts and argument The Florida Bar respectfully requests that this Honorable Court accept the Recommendation of the Referee and impose the sanction of disbarment with the special condition that the Respondent not be permitted to reapply for admission to practice law in Florida until he has been readmitted to practice law in the State of Connecticut.

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing Amended Answer Brief regarding Supreme Court Case No. 79,649; TFB File No. 92-00753-02; has been forwarded by certified mail #P230-518-257 to HARRY S. EBERHART, Respondent, at his record Bar address of 95 East Main Street, Meridan, Connecticut 06450, on this 2nd day of June, 1993.

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