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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 80,117

WILLIAM F. LAWLESS,

Respondent.

______________________________/

RESPONDENT'S REPLY BRIEF ON CROSS-APPEAL

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ARGUMENT

POINT I

THE REFEREE'S DESCRIPTION OF RESPONDENT'S PRIOR THREE DISCIPLINES IMPROPERLY CHARACTERIZES RESPONDENT'S PAST GRIEVANCE HISTORY.

The referee's description of Respondent's past disciplinary history is wrong. Even the Bar acknowledges that fact. The Bar argues, however, that the referee's mistakes caused no prejudice to the Respondent. Common sense dictates otherwise.

The referee, as he stated in his report, erroneously believed that all three of Respondent's prior disciplinary actions involved misconduct similar to that at Bar. That misapprehension had to have affected both his recommendation that Respondent be suspended for 90 days and the various restrictions that he recommended be placed on Respondent's future practice.

Respondent detailed the mistakes in the referee's reports regarding prior disciplines in pages 7 through 9 of his initial brief on cross-appeal. Specifically, Respondent's private reprimand in 1989 was for failure to properly handle a real estate transaction that closed in 1984. It had nothing to do with "assisting a non-lawyer in the unlicensed practice of law...." as found in Section V of the referee's report (page A6 of the Bar's appendix). This misapprehension certainly was one of the factors that led the referee to recommend that Respondent be forever precluded from utilizing paralegals in his future practice.

The referee mischaracterized Respondent's second reprimand as being one for neglecting a legal matter. In fact, it was for

asking a client to sign a release without asking him to seek independent advice of counsel. While Respondent was willing to refund fees previously paid to him, he wanted a release before so doing.

Finally, the referee thought Respondent's third reprimand was for splitting fees with a non-lawyer in an immigration matter. In fact, splitting fees with a non-lawyer was not even charged in the Bar's amended complaint, let alone be one of the findings of misconduct involved. Although Respondent was disciplined for neglect in that matter, the referee specifically found that the client was not cooperative with Respondent; a factor that contributed to the delay (page A36 of the Bar's appendix).

The referee's misunderstanding of Respondent's past disciplinary actions had to have led him to believe that Respondent was repeatedly engaging in the same type of misconduct. Such is not the case.

On page 5 of its reply brief and cross-appeal answer brief, the Bar attempts to impeach the testimony of Ms. Townsend by alleging a business relationship with Respondent. In fact, Ms. Townsend was the Bar's witness, and it was the Bar that tendered her as an expert. T 114. As their own expert witness, the Bar must accept the credibility of Ms. Townsend's testimony.

POINT II

THE REFEREE'S RECOMMENDATION THAT RESPONDENT PAY TO THE SEGUINS $12,546.00 IS IMPROPER BECAUSE THE RULES REGULATING THE FLORIDA BAR DO NOT PERMIT RESTITUTION FOR MONEY PAID TO A THIRD PARTY, THAT WAS PAID WITHOUT RESPONDENT'S KNOWLEDGE OR CONSENT, AND WHICH

WAS NEVER RECEIVED BY RESPONDENT EITHER DIRECTLY OR INDIRECTLY.

The Bar has pointed to no rules or law authorizing the referee's recommendation that Respondent pay his clients money they paid to a third party, not in Respondent's employ, and which was never directly or indirectly delivered to Respondent. As pointed out in pages 9 through 13 of Respondent's brief, Rule 3-5.1(i) only permits a referee to order restitution if the disciplinary order finds that the respondent has "received" an improper fee or that he has "converted trust funds or property".

There is no finding in the referee's report that Respondent charged or received a clearly excessive or illegal fee or that he converted any funds or property of his client.

Aboudraah was a non-lawyer with offices separate and apart from Respondent's. T 73, 172. He was not an employee of the Respondent. Accordingly, the Bar's attempt to analogize the case at bar to those involving a secretary's misappropriation of trust funds is completely inappropriate. First, there was no misappropriation of trust funds. Secondly, Aboudraah was an independent entity from Respondent.

All of the cases cited by the Bar involve findings that the lawyer received a clearly excessive fee.

Restitution is particularly repugnant when there was a specific ruling that Respondent did not engage in any conduct involving dishonesty, fraud, deceit or misrepresentation. Perhaps, Mr. Aboudraah did. But it was without Respondent's knowledge or participation. It is important to note that any funds paid to Mr.

Aboudraah by the Seguins was directly contrary to paragraphs 3 and 5 of the contract of employment that they signed with Mr. Lawless on January 22, 1987. EX 1. And it was done despite the fact that the Seguins knew from the moment they met him that Mr. Aboudraah was not a lawyer. T 17.

Respondent argues that the Seguins are entitled to no funds from him. Even if they are, however, any claims they have against him should be resolved in the appropriate court of law, not in a disciplinary proceeding. The Florida Bar v Wall, 491 So.2d 549, 551 (Fla. 1986). This is true because Mr. Aboudraah's story has never been heard. It is possible that some, or all, of the money that the Seguins paid was properly delivered to him.

The Bar argues on page 7 of its anwer to this point on appeal that restitution is appropriate because the referee opined that Respondent engaged in improper fee-splitting. As acknowledged by the referee, Respondent was not charged with any such offense, no evidence was taken on the issue, and no such misconduct can now be attributed to him.

POINT III

THE REFEREE'S RECOMMENDATIONS THAT RESPONDENT DISASSOCIATE HIMSELF FROM SUPERVISING ANY PARALEGALS IN HIS PRACTICE IN THE FUTURE AND THAT HE REMOVE HIS NAME FROM LAWYER REFERRAL LISTS ARE NOT AUTHORIZED BY THE RULES REGULATING THE FLORIDA BAR AND ARE COMPLETELY UNJUSTIFIED BY THE FACTS OF THIS CASE.

The Florida Bar points to no authority allowing a permanent deprivation of a lawyer's right to use paralegals in his practice or permanently prohibiting the placement of his name on any lawyer

referral list. Rule 3-5.1 of the Rules Regulating The Florida Bar has no provision for such a recommendation.

The Florida Bar seems to acknowledge on page 9 of its brief that any such restriction could last only for the duration of a period of probation. Respondent argues that the ban, particularly in the case at bar, is entirely inappropriate.

Respondent no longer allows his name to be placed on immigration referral lists. If such prohibition is to be imposed, Respondent submits that it should be limited to that category of referral lists, not to all referral lists.

Respondent's use of Mr. Aboudraah as a paralegal was unfortunate. However, this one bad egg should not forever preclude Respondent's use of paralegals. There is no justification in the case at bar for prohibiting all paralegals in all instances.

As argued in Point I below, the referee's Draconian recommendation regarding paralegals may have stemmed from his mistaken conclusion that Respondent's first discipline was for assisting a non-lawyer in the unlicensed practice of law.

The Bar points to The Florida Bar v Whitaker, 596 So.2d 672 (Fla. 1992) as support for the referee's recommendations. However, the probation in that case, requiring the supervision of respondent's case load and the submission of a "tickler" plan, is a term of probation allowed in Rule 3-5.1(c). That rule specifically permits

> Supervision of all or part of the respondent's work by a member of The Florida Bar;....

There is nothing in the aforementioned rule that allows a ban on paralegals or placement on a lawyer referral list.

The Bar also argues that this Court's decision in The Florida Bar v Willis, 459 So.2d 1026 (Fla. 1984) permits the referee's recommendations. There, in an unappealed case, the Court approved a referee's recommendation that Mr. Willis not be reinstated until he submits to a psychiatric examination. There is nothing in the opinion that gives the basis for the referee's recommendation. Perhaps, Respondent used psychiatric difficulties as evidence of mitigation. More importantly, however, is the fact that a lawyer's physical and mental fitness is always an element to be considered in reinstatement proceedings. Respondent argues that Willis lends no support to a permanent ban on the use of paralegals and the use of referral lists.

POINT IV

THE REFEREE'S FINDINGS OF FACT, AS SET FORTH BELOW, ARE NOT SUPPORTED BY ANY EVIDENCE AND, THEREFORE, SHOULD NOT BE ADOPTED.

A. The referee's finding that Respondent claimed he had "no contact with Mr. Aboudraah in over two years...." is not supported by the evidence before the Referee.

Respondent stands by the arguments made on page 15 of his initial brief on cross-appeal.

B. The referee failed to specifically find that it was Respondent who obtained the Seguins' E-2 Visa for them in February 1991.

There is no factual dispute over Respondent's obtaining the Seguins' E-2 status. The Bar's second expert witness, Ms. Henin,

obtained a renewal of the E-2 status. Renewal means that it was already in effect. The Bar's other expert witness, Deborah J. Townsend, pointed out that not only did Mr. Lawless obtain the E-2 status, but that he did a "fine job" of doing so. T 117, 118.

POINT V

THE APPROPRIATE DISCIPLINE FOR RESPONDENT'S CONDUCT IN THIS CASE, NOTWITHSTANDING HIS PRIOR DISCIPLINARY HISTORY, IS A PUBLIC REPRIMAND OR, AT MOST, A 90 DAY SUSPENSION AS RECOMMENDED BY THE REFEREE.

Respondent stands by the cases cited on pages 16 and 17 of his initial brief for the proposition that a public reprimand is the appropriate discipline for the misconduct at Bar. The mere fact, as pointed out in Respondent's first brief, that he has three prior reprimands is not sufficient aggravation to increase his discipline to a suspension. The Florida Bar v Kaplan, 576 So.2d 1318, 1319 (Fla. 1991) stands for exactly that proposition. Mr. Kaplan had received three prior reprimands, yet this Court only reprimanded him for his fourth instance of misconduct.

Respondent, once he learned of Aboudraah's misconduct, immediately took charge of the Seguins' application and did a fine job of obtaining E-2 status. Quite properly, he did so without charging the Seguins the additional $2,500.00 owed on their contract. It is clear that once he learned of the shortcoming in the representation of his clients, he promptly rectified those omissions.

In essence, this is a neglect case and nothing more.

Should this Court find that suspension is appropriate, such

a sanction should not require proof of rehabilitation. As is true in The Florida Bar v Carter, 502 So.2d 904, 905 (Fla. 1987) a suspension without proof of rehabilitation is sufficient discipline to impress upon a repeat offender the importance of complying with the ethical standards of our profession.

Respondent has not been found guilty of any conduct involving dishonesty, fraud, deceit or misrepresentation. As soon as he learned of the misconduct by Aboudraah, he stopped utilizing Aboudraah's services and he took corrective steps to obtain the Seguins' E-2 status. Respondent has even ceased taking on new immigration clients and has limited his role with present clients to routine renewals of their status. What further proof of rehabilitation does Respondent need to show?

Respondent submits that requiring proof of rehabilitation is nothing more than a punitive measure that is contrary to the three purposes of discipline expressed in The Florida Bar v Pahules, 130 So.2d 233 (Fla. 1970).

CONCLUSION

The appropriate discipline for Respondent's misconduct is a public reprimand to be followed by three years probation. Should a suspension be deemed appropriate, it should be no longer than 90 days, thereby not requiring proof of rehabilitation. Furthermore, this Court should reject the referee's recommendation that Respondent pay to the Seguins the money they paid to Mr. Aboudraah in contravention of their retainer agreement with Respondent. Finally, the Court should further reject the referee's

recommendations that Respondent be permanently prohibited from using paralegals and from having his name placed on lawyer referral lists.

Respectfully submitted,

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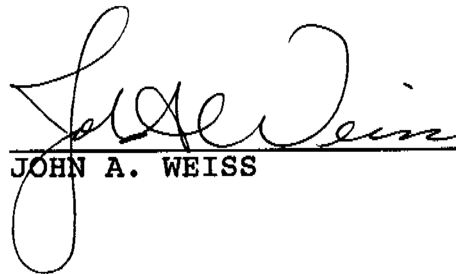
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Reply Brief on Cross-Appeal was mailed to Jan K. Wichrowski, Bar Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, FL 32801-1085 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 10th day of August, 1993.



JOHN A. WEISS