047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ALAN E. DUBOW,

Respondent.

_____/

Supreme Court Case
No. 80,327 and 80,479

On Petition for Review

Answer Brief of Complainant

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INTRODUCTION

For the purposes of this brief, The Florida Bar will be referred to as "The Florida Bar", "the Bar" or "Florida Bar". Alan E. Dubow will be referred to as "Respondent" or "Dubow".

Abbreviations utilized in this Brief are as follows: "TR1" will refer to the transcript of the hearing held on February 24, 1993, on the Respondent's Motion to Vacate the Order Deeming Matters Admitted. "TR2" will refer to the transcript of the hearing held on March 22, 1993, on the Respondent's Motion for Rehearing of the Order Denying Motion to Vacate, Motion to Strike the Trial Date and Motion for Leave to File Late Answers. "TR3" will refer to the transcript of the final hearing held on May 10, 1993 as to the appropriate level of discipline to be imposed. "TR4" will refer to the transcript of the hearing held on May 20, 1993 on the Florida Bar's Motion to Reopen the Final Hearing as to the Appropriate Discipline. The Florida Bar's Complaint, filed on August 20, 1992 will be referred to as "A1" in that it is attached as the first document in the Appendix included with this brief. The Florida Bar's Complaint, filed on September 17, 1992 will be referred to as "A2" as it is attached as the second document in the Appendix included with this brief. The Request for Admissions will be referred to as "the Request". Respondent's Reply to Motion for Order Deeming Matters Admitted will be referred to as "A3" in that it is attached as the third document in the Appendix included with this brief. The Report of Referee dated June 4, 1993 will be referred to as "A4" as it is attached as the fourth document in the Appendix included with this brief.

STATEMENT OF THE CASE AND OF THE FACTS

In May, 1987, Respondent was retained as an attorney by Jorge Mendez to prepare a Warranty Deed to a certain real property and to obtain the signature of the guarantor. (A1) On or about May 31, 1987, Respondent traveled from Miami, Florida to Nassau, Bahamas to purportedly obtain the signature of the guarantor and act as a notary. The signature obtained was a forged signature and the Respondent fraudulently notarized this signature as he was outside the United States. (A1)

As a result of the above acts, the Respondent caused such Deed conveying the subject real property from the guarantor to Mendez to be recorded in the Public Records of Dade County, Florida. (A1)

Subsequent to the aforementioned acts, the Respondent formed Cocoplum Investors, Inc. and served as a principal of said corporation. The corporation took title of the subject real property by Warranty Deed and placed a mortgage on the property. (A1)

As a result of this conduct, the Respondent was named as a third-party defendant in a four count complaint to Quiet Title in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County. The complaint alleged, inter alia Respondent's participation in the preparation, signing and such recording of a forged deed and fraudulent notarization of such deed. The Court entered an Order of Summary Judgment and Final Judgment against the Respondent in the amount of $151,774.37. (A1) Respondent has made no restitution.

The Respondent, between June 17, 1987 and June 21, 1988 caused thirty-one checks to be dishonored. The Respondent refused to pay

his bank, Florida National Bank, for the overdrafts and as a result the Respondent was sued civilly by Florida National Bank. A judgment was entered against the Respondent on or about May 14, 1990. (A2)

Several of the dishonored checks were as a result of writing checks on closed accounts. Other checks were dishonored as a result of check-kiting. Additionally, other checks were dishonored as a result of insufficient funds. (A2)

The Respondent also maintained a bank account identified as Alan E. Dubow, Trust Account at Key Biscayne Bank during the period of September 13, 1984 until June 18, 1990. During that period of time, specifically on September 30, 1987 and again on January 30, 1987, the Respondent's liabilities exceeded his balance thereby indicating a shortage in the trust account. (A2)

As a result of findings of probable cause, The Florida Bar filed its complaint and Request for Admissions in the Florida Supreme Court on August 20, 1992 as to case no. 80,327 and on September 17, 1992 as to case no. 80,479. Although, Rule 1.370(a) of the Rules of Civil Procedure provides that matters are automatically admitted if not responded to, The Florida Bar filed a Motion for Order Deeming the Matters Admitted on January 5, 1993 in that Respondent had failed to respond to Requests for Admissions in both cases. The Referee entered an order granting the Motion on January 11, 1993. On January 12, 1993, the Court received a response from the Respondent. This included a response to the Request and a Reply to the Motion for Order Deeming the Matters Admitted. (TR1 p.4)

A hearing was held on the Respondent's Motion to Vacate the Order Deeming the Matters admitted. At this hearing, the Respondent attempted to rely on excusable neglect as a reason for not responding to the requests. The Respondent further alleged that the Referee signed the order too quickly, thereby not giving the Respondent adequate time to respond to the Florida Bar's Motion. (TR1 p.22)

The Referee, however, indicated to the Respondent that, in the first place, the Respondent never raised the defense of excusable neglect in his response. (TR1 p.21) Additionally, the Referee informed the Respondent, in reference to his claim that the order was signed too quickly that "I don't know that when I look at the file, counsel [Mr. Dubow], and I see that some of these requests were submitted in August and some were submitted in September and I have no response to either one -- I don't have to wait even three or four days to sign it." (TR1 p.25) The Referee refused to set aside the order deeming matters admitted.

A final hearing as to the appropriate level of discipline only was held on May 10, 1993. The Referee found the Respondent guilty of violating Rule 4-8.4(b), Rule 4-8.4(c), Rule 4.8.4(d) and Rule 5-1.1 of the Rules of Professional Conduct and the Rules Regulating Trust Account. The Referee recommended disbarment as the appropriate discipline. (A4)

The Referee based the disbarment recommendation on case law and The Florida Standards for Imposing Lawyer Sanctions as well as testimony presented by The Florida Bar and by the Respondent. For example, The Florida Bar introduced a witness, Mr. James C. Evans

the attorney who represented Florida National Bank as a witness in aggravation to evidence Mr. Dubow's refusal to make restitution. Mr. Evans testified that any attempts to resolve the problem of money owed to Florida National Bank were not successful and therefore a lawsuit was initiated against the Respondent. (TR3 p. 30-33)

Richard Allen, the attorney who represented Frank Carvajal also testified on behalf of The Florida Bar in aggravation.

BY MS. LAZARUS:

Q. Did you prevail in that litigation, Mr. Allen?

A. Yes, my client did.

Q. Was there also a judgment against Mr. Dubow by Sunshine State Mortgage?

A. Yes, there was.

Q. Was that judgment ever satisfied?

A. Not to my knowledge.

Q. Do you have an opinion as to Mr. Dubow's honesty and veracity, in your dealings with him in this particular case?

A. Yes.

***

BY MS. LAZARUS:

Q. What is that opinion?

A. I have a very poor opinion of his veracity and character.

Q. What do you base that opinion on?

A. Several factors. Number one, my dealings with Mr. Dubow as a party to the lawsuit itself.

There was one occasion that I recall where I moved for summary judgment, either against Mr. Dubow or against his corporation, which he was a principal in.

We were successful --

THE REFEREE:

I am interested in what happened during the course of the trial. That's what the Court is concerned about, not what his reputation for truth and veracity is in the community.

I want to know just what was involved in your dealings with him in that lawsuit.

THE WITNESS:

There was a summary judgment hearing at which my client prevailed. Mr. Dubow then filed a motion for rehearing at which he stated that I had agreed to cancel the hearing and that's why he didn't show up at the hearing.

That was a false statement. I had never at anytime told Mr. Dubow that I was going to cancel that hearing.

So certainly, I think that his filing that pleading was false and supported my conclusion about his character and veracity or lack thereof.

Second of all was the facts that I discovered through my representation of Mr. Carvajal in that action.

The case involved, once again, a quiet title action, based upon a deed which my client alleged was forged.

Through my representation and discovery in that action, I concluded that in fact the deed was forged and Mr. Dubow had involvement in that forgery. He notarized the deed in the Bahamas. He had stated on the deed that it was notarized in the United States.

Moreover, the date of the notary was also in error. It was not notarized on the date that Mr. Dubow said it was.

We also learned in that action that the signature on that deed, which Mr. Dubow purportedly notarized, was also a forgery. It was in fact a tracing involving several different pens.

So that also supports my conclusion that Mr. Dubow is of ill character.

(TR3 p. 51-54)

The Respondent presented nine (9) witnesses in mitigation including himself.

SUMMARY OF ARGUMENT

The Respondent argues two points of appeal in his Initial Brief. The first of these arguments is that the Referee erred in deeming all matters admitted, without a hearing, and then failing to subsequently allow Respondent to withdraw the admissions and then file late answers. The second argument contends that the Referee's recommendation of disbarment was not supported by competent substantial evidence, whereas competent substantial evidence supported a finding other than disbarment.

The Florida Bar, in its answer brief will prove both of the above arguments to be without merit. This will be accomplished by following a simple series of facts. Due to the Respondent's deliberate failure to respond to The Florida Bar's Request for Admissions, the facts were deemed admitted, as provided for by the Florida Rules of Civil Procedure, Rule 1.370(a) and by case law. Subsequent to the facts being admitted, clearly the commission of violations of the Rules of Professional Conduct was prevalent on behalf of the Respondent. Finally, subsequent to the determination of guilt, appropriate disciplinary measures were imposed by the Referee.

POINTS ON APPEAL

I

WHETHER THE REFEREE ERRED IN DEEMING ALL MATTERS ADMITTED, WITHOUT A HEARING AND THEN REFUSING TO SUBSEQUENTLY ALLOW RESPONDENT TO WITHDRAW THE ADMISSIONS AND THEN FILE LATE ANSWERS? (RESTATED)

II

WHETHER THE REFEREE'S RECOMMENDATION OF DISBARMENT WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE? (RESTATED)

ARGUMENT

I

THE REFEREE DID NOT ERR IN DEEMING ALL MATTERS ADMITTED, WITHOUT A HEARING AND THEN REFUSING TO SUBSEQUENTLY ALLOW RESPONDENT TO WITHDRAW THE ADMISSIONS AND THEN FILE LATE ANSWERS. (RESTATED)

The Respondent, in his Initial Brief, argues that the Referee erred in deeming all matters admitted, without a hearing, and then refusing to subsequently allow Respondent to withdraw the admissions and then file late answers. The Respondent cites to cases in his brief that show failure to respond to Request for Admissions was due to inadvertence, excusable neglect or late filing. In the case at bar, the Respondent's counsel has attempted to draw a similar parallel by stating, in reference to the Respondent's failure to respond to the Request, that "[t]he gentleman recognized that for whatever reason he had made an oversight...he misunderstood...[h]e thought the Rules of Civil Procedure did not apply. He got bad information or whatever. But it never was...that he intended intentionally not to comply with the duty before the court." (TR2 p.7-8)

The Respondent also attempted to claim excusable neglect for not having filed the Response. The Respondent states that "[e]ssentially, I think there is excusable neglect on my part." (TR1 p.21) In fact, when the Referee indicated that nothing in the file or in the Respondent's Motion to Vacate Order Deeming Matters Admitted made reference to excusable neglect, the Respondent was unable to identify why his deliberate refusal to respond would constitute excusable neglect. (TR1 p.28)

The Respondent's deliberate refusal to respond is clearly evidenced in the Respondent's Reply to Motion for Order Deeming Matters Admitted. The Respondent states that he "has consulted local counsel who...did advise the undersigned that Complainant was not entitled to take discovery of this type from the Respondent, due to the prosecutorial nature of this proceeding. Respondent relied on said advice in not...responding to the Request for Admissions." (A3)

None of the Respondent's defenses are viable reasons for the admissions not to be deemed admitted as provided by Rules Regulating the Florida Bar, the Florida Rules of Civil Procedure and case law.

Rule 3-4.1 of the Rules Regulating The Florida Bar mandates that "[e]very member of The Florida Bar...is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by the court." As a result, all other rules are known or should be known by the Respondent. Therefore, the Respondent's defense that he was not aware or was misinformed that the Florida Rules of Civil Procedure applied in Florida Bar proceedings is not a valid defense.

Rule 3-7.6(e)(2) of The Rules Regulating The Florida Bar provides that "[d]iscovery shall be available to the parties in accordance with the Florida Rules of Civil Procedure." Accordingly, Rule 1.370(a) of the Florida Rules of Civil Procedure provides that a "party may serve upon any other party a written request for the admission of any matters within the scope of rule 1.280(b)..." The rule further sets forth that:

> [t]he matter is admitted unless the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter within 30 days after service of the request or such shorter or longer time as the court may allow but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the process and initial pleading upon the defendant.
>
> Rule 1.370 of the Florida Rules of Civil Procedures

The Florida Bar filed two separate complaints and Request for Admissions, on August 20, 1992 and on September 17, 1992. Responses to the Requests for Admissions were due on October 5, 1992 and November 2, 1992, respectively. The Florida Bar received no responses. In fact, the Referee made specific reference to the fact that the Respondent did not respond to the Requests by saying that "if it was that significant, I can't understand why you didn't respond. The only time you responded was when they [The Florida Bar] sent an order, a motion asking that I deem them [the Requests] admitted." (TR1 p.27) Further, the Referee reminded the Respondent that " [a]t no time before that [the filing of the motion by The Florida Bar] did you even notify the Court when you got the admissions that you weren't going to answer them or could there be a hearing on whether the Rules of Civil Procedure apply or whether discovery applies." (TR1 p.27)

After waiting additional time for the Respondent to file his response, The Florida Bar filed a Motion to Deem the Matters Admitted. It was not until January 12, 1993, after this Motion was received and an order granted deeming the matters admitted, that

the Respondent filed a response to the Motion along with responses to the Request, but still maintaining that The Florida Bar was not entitled to such discovery.

In The Florida Bar v. Solomon, 589 So. 2d 286 (Fla. 1991), this Court found that "[w]hen there is no answer to Bar's request for admissions, referee may correctly deem matters alleged admitted." Other courts have followed suit. Specifically, in Granville v. Capital Bank, 456 So. 2d 960, 961 (Fla. 3rd DCA 1984), the court held that the "[t]rial court did not abuse its discretion in refusing to allow filing of responses to bank's request for admissions to be tendered several months late and after order had been entered ruling that requests were admitted." Similarly, in the instant case, the Referee did not abuse her discretion in denying a late response to be tendered after an order had already been issued deeming the matters admitted.

In a recent case, the Supreme Court dictated that The Florida Bar had perfected service by mailing requests for admissions to the respondent's record Bar address by certified mail. When the respondent failed to respond to the request, the matters were deemed admitted and based on those admissions, the referee was able to render an adjudication of guilt against the respondent. See The Florida Bar v. Daniel, 18 FLW s517 (Fla. 1993).

Finally, in the Respondent's Initial Brief, the case of Pelkey v. Commander Motel Corp., 510 So. 2d 965 (Fla. 4th DCA 1987) is cited as saying that the error (of not responding to Request) could be considered harmless even where no motion was filed. It is interesting to note that the very appellate court that rendered

this opinion distinguishes its own opinion. In Singer v. Nationwide Mutual Fire Insurance Co., 512 So. 2d 1125, 1126-27 (Fla. 4th DCA 1987), the Court stated that:

> [w]e recognize that we held in Pelkey [supra], that the absence of a motion under Florida Rules of Civil Procedure 1.370(b) does not preclude the trial court from granting relief from admissions resulting from the failure to timely respond to the request for admissions. However, that holding was based on a different set of facts where belated responses were filed within the time fixed by the rule, but four days late according to the shortened time provided by court order...

In the instant case, no responses were ever filed, and Singer did not even file the affidavit until after Nationwide had relied on the admitted responses...and had filed its motion for summary judgment. (Emphasis added.)

It is clear that the Respondent in the instant case has acted just as Singer did in the above case. The Respondent took no action regarding the Request until The Florida Bar had motioned for the matters to be deemed admitted. Had The Florida Bar never filed the motion, the Respondent, by his own admission, would not have responded. In fact, The Florida Bar was not required to file the motion as the matters are automatically admitted after the 45 day response time.

Simply said, the Respondent, having been given due process, neither through his motions nor through his brief, cannot and should not be granted relief for not having filed a response to the Request. The Respondent's deliberate refusal to answer the Request since he believed he was not subject to the rules is a flagrant disregard for The Rules Regulating The Florida Bar and the Florida Rules of Civil Procedure.

ARGUMENT

II

THE REFEREE'S RECOMMENDATION OF DISBARMENT WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE. (RESTATED)

The Respondent argues in his brief that the Referee's recommendation of disbarment was not supported by competent substantial evidence, whereas competent substantial evidence supported a finding other than disbarment.

Is the Respondent asking the Court to find that introducing false evidence before the Referee is competent substantial evidence worthy of discipline less than disbarment? Is the Respondent also asking the Court to find that a pattern of misconduct including check-kiting, lying to The Florida Bar, commingling funds in a trust account, shortages in a trust account and outstanding judgments with a refusal to make any substantial restitution constitutes competent substantial evidence worthy of discipline less than disbarment? Further, is the Respondent expecting the Court to find that a flagrant disregard of the Rules Regulating The Florida Bar and the Florida Rules of Civil Procedure presents competent substantial evidence worthy of discipline less than disbarment? The case law and Standards for Imposing Lawyer Sanctions would not and should not cause that conclusion.

The Respondent additionally attempts to present testimony of character witnesses in an attempt to show his fitness to practice law and to mitigate the discipline. This is yet another defense that does not work for the Respondent. For example, the Respondent, in his brief, eludes to the testimony of Mr. Jay Fusco

who testified that the Respondent was a person of high repute within the Bankruptcy community. The Respondent contends that Jay Fusco's testimony is competent substantial evidence. Can this be competent substantial evidence given the fact that the witness rendered this opinion without prior knowledge of a November 4, 1992 order from Bankruptcy Judge Paskay which fined the Respondent as a result of a misrepresentation to the Court? (TR3 p. 81-84)

The Respondent continues in his brief by referring to the testimony of John W. Persse who testified that the Respondent enjoyed a good reputation. Again, this opinion was formed prior to knowledge of the November 4, 1992 order. (TR3 p. 106-110)

The Florida Bar, on the other hand, did present competent substantial evidence to warrant disbarment as the effect of the admissions entered, the violations incurred and aggravating factors presented. Additionally, case law and the Florida's Standards for Imposing Lawyer Sanctions provide for disbarment as a result of the Respondent's actions.

The Florida's Standards for Imposing Lawyer Sanctions provides under Standard 9.22, the factors to be considered in aggravation when imposing discipline. These factors include a pattern of misconduct, multiple offenses, submission of false evidence, false statements or other deceptive practices during the disciplinary process and an indifference to making restitution.

The Florida Bar presented all of the above factors as aggravating factors of the Respondent's actions during the hearing on discipline. The Florida Bar indicated a practice on the Respondent's part of being dishonest as he was dishonest to the

Bar, dishonest to the bank, dishonest to the guarantor and dishonest to the Bankruptcy Court. (TR3 p. 166-175) Moreover, the Respondent has made no substantial attempt to make restitution and in fact attempted to provide false evidence of a satisfaction of judgment as proof of restitution. (TR4 p. 3-4) To accomplish this, the Respondent proffered a satisfaction of judgment claimed to be prepared by a John Fernandez. Although the Respondent attempted to have this document admitted into evidence, the Referee did not allow it because it was not a certified copy. (TR3 p. 152-153) The Florida Bar then discovered that in fact the satisfaction was not authentic and Respondent's counsel went so far as to say "I am also dubious about the validity of it." (TR4 p. 7-8) The Respondent's counsel went on to further declare that "there probably [is] no valid satisfaction." (TR4 p. 21) This statement is clearly a direct contradiction to the Respondent's previous contention that the judgment was satisfied. The Respondent also falsely notarized a document which he knew or should have known to be a false document.

Although The Florida Standards for Imposing Lawyer Sanctions does not cite failure to respond to request for admissions as an aggravating factor, it is still an offense within the purview of the courts and therefore can be placed under the category of multiple offenses within the aggravating factors. See The Florida Bar v. Baron, 408 So. 2d 1050, 1051 (Fla. 1982).

Standard 4.11 mandates that "[d]isbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." Further, Standard

5.11(b) provides that disbarment is appropriate when "a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation or theft." Finally, Standard 6.11 provides that "[d]isbarment is appropriate when a lawyer: (a) with the intent to deceive the court, knowingly makes a false statement, or submits a false document...and...causes a significant or potentially significant adverse effect on the legal proceeding."

The Florida Bar v. Solomon, 589 So. 2d 286 (Fla. 1991) provides that "[i]ssuing worthless check constitutes unethical conduct and results in professional discipline...[and] misuse of client funds, commingling, and check kiting can warrant disbarment." The Court also held that "[w]here there is no answer to Bar's request for admissions, referee may correctly deem matters admitted."

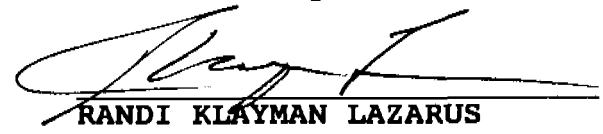
Clearly, the courts believe that actions such as the Respondent's justify disbarment. In The Florida Bar v. DeSerio, 529 So. 2d 1117 (Fla. 1988), the Court found that "[f]ailure to keep proper trust account records, improper commingling of funds in trust account, and improper withdrawal of funds from trust account warrants disbarment." In yet another case, "[m]isappropriation of funds and misrepresentations to bar warrant disbarment..." See The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992). Also, "[c]umulative nature of misconduct involving inability to account for funds given by clients warrants disbarment without opportunity to apply for readmission for four years. See The Florida Bar v. Hunt, 441 So. 2d 618 (Fla. 1983). Disbarment is clearly warranted.

CONCLUSION

The violations committed by the Respondent are grave and warrant the most stringent discipline allowed. The Respondent knowingly and willingly participated in check kiting, commingling of funds, unaccounted for shortages in trust account, misrepresentations to the Florida Bar, misrepresentations to a referee, failure to respond to The Florida Bar's Request for Admissions, and failure to make restitution.

The Respondent was afforded due process during the disciplinary proceeding and by his own failure to take advantage of such, had matters deemed admitted where he had proffered no response. The Referee did not err in having these matters admitted. The Respondent erred in not responding to the Request.

The discipline recommended by the Referee is fair and appropriate in light of the violations committed by the Respondent and the aggravating factors connected to the Respondent's conduct.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Answer Brief was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Nicholas R. Friedman, Attorney for Respondent, 100 North Biscayne Boulevard, 24th Floor, Miami, Florida 33132 on this 18th day of October, 1993.

RANDI KLAYMAN LAZARUS
Bar Counsel

A P P E N D I X

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