IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

vs.

Case No. 80,327 and 80,479

ALAN E. DUBOW,

Respondent.

RESPONDENT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The Florida Bar's Answer Brief does not directly answer the argument of the initial Brief but rather argues side issues and relies on an incomplete statement of facts to reach conclusions which do not directly match its case citations.

A license to practice law, whether a right or a privilege, is usually the sole source of income to the license holder. As such, it is too important and too valuable to be decided on a legal technicality rather than the merits of the underlying case. This case should be remanded for a trial on the merits.

REPLY ARGUMENT I

THE BAR'S RELIANCE ON CASES REGARDING ADMISSIONS IS MISPLACED WHERE THE FACTS ARE SUBSTANTIALLY AT VARIANCE

In its Statement of Facts at page 2 and its Argument on pages 11 and 12, The Florida Bar erroneously states that Respondent failed to respond to the Florida Bar's Motion for Order Deeming the Matters Admitted until after the Referee had entered an Order granting the Motion. In fact, Respondent responded to Motion for Order Deeming Matters Admitted bears a Certificate of Service of January 7, 1993, only two days after The Florida Bar filed its Motion and four days before the Referee entered its Order. (The Florida Bar's Appendix 3). It should further be noted that the Respondent's Reply is date-stamped January 11, 1993. The stamp is

illegible other than the date, but obviously refers to docketing by the Clerk of Court or receipt by The Florida Bar. At the same time, Respondent also filed a Response to Request for Admissions. From these dates, it is obviously that Respondent filed his response to The Florida Bar's motion immediately upon receipt of same and before and Order was entered. While the amount of time taken to respond to The Florida Bar's motion is certainly not dispositive in this matter, this error on the part of The Florida Bar in reconstructing the sequence of events should be pointed out as the sequence as described by The Florida suggests Respondent was further neglectful in filing his response to The Bar's motion.

The facts in the instant case are quite simple:

Respondent failed to timely answer Request for Admissions; The Bar filed a Motion to Deem the Matters Admitted; Respondent filed a Reply and answered the request; the Referee entered an Order deeming all matters admitted; the Referee denied subsequent motions to set aside the Order Deeming the Request for Admissions Admitted.

There is one fact in this case that distinguishes it from the authority relied upon by The Florida Bar in its Argument. In this case, the Respondent did respond to the Request for Admissions, albeit the response was untimely. Further, the Respondent made several requests of the Referee to vacate the Order and allow his late responses to Request for Admissions to stand.

The cases relied upon by The Florida Bar in its Brief are quite dissimilar. In two of the cases relied upon by the Bar the

Respondent never tendered responses to the Request for Admissions and never requested an opportunity to do so. ***The Florida Bar v. Solomon***, 589 So. 2d 186 (Fla. 1991); ***The Florida Bar v. Daniel***, 18 FLW s517 (Fla. 1993). These two authorities, then, do not even address the issue presented in this appeal. The other authority relied upon by The Florida Bar, ***Granville v. Capital Bank***, 456 So. 2d 960, 961 (Fla. 2d DCA 1984) may well be more on point. In that case, the Third District held that there was no abuse of discretion in refusing to allow filing of responses to a Request for Admissions tendered several months late and after an Order had been entered ruling that the requests were admitted. Unfortunately, the holding was the sole mention of the admissions in the Third District's opinion. One cannot compare the facts of that case with the instant case because no facts are set out in the opinion. As noted above, the Respondent actually filed his responses to The Florida Bar's Request for Admissions before the Order had been entered ruling that the requests were admitted. That single fact is sufficient to distinguish ***Granville***.

Accordingly, this case is distinguished from any of The Bar's citations and the conduct of the Respondent in this case is entirely consistent with the substantial body of existing case law cited In Respondent's Initial Brief. There is no precedent that The Florida Bar has shown this Court consistent with the facts in this case. There is, to the contrary, an existing body of case law which shows that the Referee should have allowed this case to go to

a trial on the merits. The due process requirements of both the Florida and Federal Constitutions demand no less. Where, as in this case, the practice of law constituted the Respondent's sole livelihood, the technical default is an unduly harsh result. (*See* Transcript, page 161, lines 21,23).

REPLY ARGUMENT II

THE BAR'S ARGUMENT REGARDING COMPETENT SUBSTANTIAL EVIDENCE ARE AN EXERCISE IN PULLING ONE'S SELF UP BY ONE'S OWN BOOTSTRAPS

The Florida Bar relies on the very facts that it has obtained by admission and not by proof. But, the question must be asked - Why did The Bar not offer competent proof of aggravation rather than rely on its own admissions? For example, if The Bar really had evidence that the alleged bounced checks had caused anybody other than Respondent harm, where was such evidence?

We submit that argument regarding aggravation should come from the testimony at the hearing, rather than the contested admissions. What if, for example, the Respondent had been duped by a business associate into taking bad checks? Would The Bar properly be permitted to then make the same argument? We submit it would not. Are these not the facts which the Respondent should be permitted to develop at a trial on the merits? We submit that he should be so permitted such an opportunity, if he can do so.

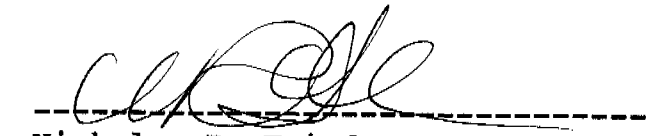
While The Florida Bar presents in its Statement of Facts at page 4, its own "opinion" evidence of veracity and character, it

has omitted from the transcript at pages 30-33, the objections to testimony of character evidence not based on reputation in the community, but based from a single contact in litigation from adversary counsel. That is clearly not the appropriate test for opinion testimony of character and veracity. Such testimony turns upside down the basic rules of evidence. While The Florida Bar's proceedings may not be bound by strict rules of evidence, on the standards used below, all one has to do is find disgruntled opposing lawyers and put them on the stand at a disbarment proceeding. That is not the standard of evidence for lawyers or any other profession. The discipline should be based on competent, substantial evidence before being determined to be sufficient grounds to take away a person's sole livelihood.

CONCLUSION

None of The Florida Bar's arguments match the factual underpinnings of this case, where **BEFORE** an Order deeming matters admitted was entered, the Respondent responded to The Florida Bar's motion and submitted responses to the admissions. Before taking away someone's sole livelihood a trial on the merits, rather than trial by technicality should be provided. Failing to allow the late response to The Florida Bar's request for admissions in this case would be so at variance with the current interpretations of the Florida Rules of Civil Procedure that it would have the effect of overruling numerous, time-tested precedents.

This case should be remanded for trial on the merits.



Nicholas R. Friedman
Attorney for Respondent

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing has been mailed this day of October, 1993 to: Randi Klayman Lazarus, The Florida Bar, 444 Brickell Avenue, Miami, FL 33131 and to John A. Boggs, Director of Lawyer Regulations, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399.

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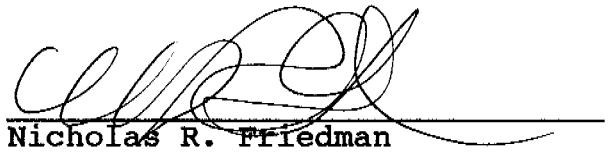

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