IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

EDWARD B. ROOD,

Respondent.

_____/

Case No. 83,768

TFB No. 94-11,215 (13D)

ANSWER BRIEF

OF

THE FLORIDA BAR

Joseph A. Corsmeier
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 492582

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

In this Brief, the Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Edward B. Rood, will be referred to as "Respondent."

"TR-1" will refer to the Transcript of testimony before the Referee in the disciplinary case styled THE FLORIDA BAR v. EDWARD B. ROOD, TFB No. 95-11,215 (13D), dated September 26, 1995. "TR-2" will refer to the Transcript of testimony before the Referee dated September 27, 1995. "TR-3" will refer to the Transcript of testimony dated September 28, 1995.

"EXH [#]" will refer to enumerated Bar Exhibits introduced into evidence during the final hearing conducted September 26, 27, and 28, 1995.

"RR" will refer to the Report of Referee in Supreme Court Case No. 83,768, dated November 6, 1995.

"Rule" or "Rules" will refer to the Rules Regulating the Florida Bar. "Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, EDWARD B. ROOD, has petitioned this Court to review the referee's findings and recommended sanction of disbarment. The Complainant, THE FLORIDA BAR, herein answers Respondent's Initial Brief. This case involves Respondent's willful contempt of Suspension Orders issued by this Court.

On June 24, 1993, this Court suspended Respondent from practicing law for a period of two years. The Florida Bar v. Rood, 622 So. 2d 974 (Fla. 1993). While that suspension was still in effect, the Court again suspended Respondent on January 20, 1994; this second suspension added another year's suspension, consecutively, to Respondent's then-existing suspension. The Florida Bar v. Rood, 633 So. 2d 7 (Fla. 1994). Thus, Respondent's effective period of suspension extended from June 24, 1993 to June 23, 1996. See RR at 2.

In February, 1994, The Florida Bar ("Bar") received information that Respondent had not complied with the terms of his suspension(s), and was in fact willfully violating the same. An investigation was conducted, pursuant to which the Bar filed a Petition for Order to Show Cause, alleging Respondent's failure or refusal to suspend his practice in accordance with this Court's Orders. The Petition and subsequent documents alleged that

Respondent had continued to meet with, to represent, and to advise clients, and that he had continued to receive, manage, and disburse client funds from his trust account and other bank accounts during the period of his suspension. The referee found, by clear and convincing evidence, that Respondent had, in fact, engaged in the misconduct as alleged by the Bar and proven at the final hearing in this matter. RR at 5.

Two status hearings were held in this matter, on March 24, 1995, and May 22, 1995. A final hearing was conducted on September 26, 27, and 28, 1995. Twelve witnesses appeared and were examined, and 50 documentary exhibits, including several composites, were admitted into evidence. See generally TR-1, TR-2 and TR-3 (indices).

The referee found that "Respondent's suspension was effective on July 23, 1993." RR at 2. After the initial Order of suspension, Respondent moved the Court for permission to continue representation on a handful of cases, whereupon a narrowly proscribed permission was granted. Those cases, and Respondent's work on them, do not form the basis for any allegations in this matter. See RR at 2.

The Bar first learned of Respondent's continued contact with and representation of clients, while suspended, through a statement

given to one of its investigators by Mrs. Emma LoCastro ("Mrs. LoCastro"). Mrs. LoCastro ultimately became a witness in the matter at bar. The referee found, by clear and convincing evidence, that Respondent had "continued to advise Mrs. LoCastro on her two pending cases" after his suspension, and that Respondent had "issued monies to her from his trust account, and a business or personal account" after his suspension. RR at 3.

The referee further found that at least two other clients of Respondent gave "uncontroverted testimony indicating meetings with and receiving funds from Respondent during his period of suspension." Id. Those two clients were Andrew Tucker ("Mr. Tucker") and Katherine Zeller ("Zeller"). See TR-1 at 145-58; TR-1 at 230-38. Both of those clients stated clearly and unequivocally that Respondent had never notified them of his suspension. RR at 3.

Respondent defended by claiming that he had referred the above-named clients and their cases to Michael J. Freeman ("Freeman"), then a practicing Florida attorney. This defense was "rebutted by the testimony of not only Mr. Freeman, witnesses LoCastro, Tucker, and Zeller, but also Respondent." RR at 4.

The referee noted that Freeman's testimony was not credible, as his testimony on direct "appeared rehearsed and memorized." RR at 5. The referee found that on cross examination, Freeman was

"evasive" and "not responsive." Id. Though Freeman had supposedly taken over several pending personal injury cases, he had, at the time in question, no bank accounts whatever. Id.; see also TR-2 at 352. Further, Mr. Freeman had never executed any employment agreements with any of his "supposed clients." RR at 5. Accordingly, the referee found that Respondent had used Freeman as "a straw man or puppet" to enable Respondent to practice law during his suspension. Id.

In further support of these findings, the referee noted that Respondent had never filed a formal Notice of Withdrawal in any of his then-pending cases. RR at 3. The record also shows that pertinent client correspondence had occurred on "Rood & Associates" letterhead, by or through Respondent or Respondent's secretary. See EXH-22, EXH-23. Many of the insurance settlement checks at issue were made out to Respondent and his clients, as co-payees. See EXH-22, EXH-26, EXH-27. While some settlement checks had been issued to Freeman and clients as payees, those were endorsed over to Respondent. RR at 5. All of the subject settlement checks were deposited into Respondent's bank accounts and thereafter disbursed from same.

Much of the Bar's evidence, both documentary and otherwise, was uncontroverted. The referee found that much of the evidence

put on by Respondent was false. See generally RR at 5. The record and Report of Referee support the findings that Respondent continued to practice law in willful contempt of this Court, by use of a ruse, the centerpiece of which was a "puppet" or "straw man" (Freeman), whose testimony regarding his involvement in the subject cases was found by the referee to be remarkable only by virtue of its utter lack of credibility. RR at 5.

The referee found that Respondent had knowingly and willfully violated both of this Court's prior Suspension Orders. The referee recommended that Respondent be disbarred. RR at 6.

SUMMARY OF THE ARGUMENT

The Bar first argues that Respondent, in his initial brief, has merely re-asserted his fabricated version of events, as the same relates to his continued representation of Mrs. LoCastro. He offers this story to this Court, but fails to address the competency or the substance of the mountain of evidence against him. Respondent reprises his discredited defense without providing any additional competent, substantial evidence to support it. Thus, Respondent has not challenged, on any legally cognizable ground, the quantum of proof as it relates to his representation of Mrs. LoCastro. As such, his argument is without merit.

The bare assertions contained in Respondent's brief have been proven to be part of a deception perpetrated by Respondent, a deception which was aided and abetted by his "puppet", Mr. Freeman. Respondent merely repeats a story he knows to be false, and which was clearly proven to be false. This "argument" should be disregarded and exemplifies the lack of respect that Respondent has for this Court and its authority.

Second, Respondent's apparent argument for excluding evidence relating to his representation of the Tuckers and Ms. Zeller is an artifice, and an attempt to misdirect. The referee's main finding, that Respondent employed a gross deception to mask his true

involvement in the LoCastro case, remains unchallenged on any legal ground. Thus, the evidence related to the Tuckers and Ms. Zeller is supplemental to (albeit supportive of) the primary finding regarding Respondent's continued representation of Mrs. LoCastro after his suspensions. Even if this supporting evidence were excluded, the referee's findings concerning Respondent's continued receipt and use of trust funds, his misconduct in the LoCastro matter, and the findings regarding Mr. Freeman, provide clear and convincing proof of Respondent's duplicity and guilt. The additional evidence merely adds to the extent of Respondent's knowing and willful contempt of this Court's suspension orders.

The Bar submits that the pleadings, and the circumstances surrounding the pretrial aspects this case, did in fact provide adequate notice to the Respondent of the extent of the Bar's allegations. It is the Bar's position that Respondent intentionally placed himself at a "disadvantage" in order to manufacture an argument that he had no adequate notice regarding this disputed testimony. The Bar asserts that Respondent did so as part of a strategy to obstruct the Bar and the disciplinary process and to narrow the allegations as much as possible. The referee considered the admissibility of evidence relating to the Tuckers and Ms. Zeller, and permitted the now-disputed evidence to be

introduced over Respondent's standing objection. The Bar notes that Respondent's defense tactics, then and now, include a claim that the Bar failed to cooperate by failing to provide Respondent with Respondent's own case files. That contention by Respondent is not supported by the record. Thus, the supposed "prejudice" imposed on Respondent (through the lack of said files and the testimony given by the Tuckers and Ms. Zeller) is merely another ploy which he has crafted in an attempt to misdirect the Court.

ARGUMENT

In his Initial Brief, Respondent disputes the referee's findings of fact by simply reiterating his version of what occurred in the LoCastro case, a version which the referee found to be unbelievable. Further, he appears to challenge the admissibility of any and all evidence unrelated to the LoCastro case. Respondent essentially argues that the uncontroverted testimony of his former clients, Andrew Tucker, Sallie Ann Tucker, and Katherine Zeller, should have been precluded, presumably because he was unfairly prejudiced by its introduction, since, as he claims, he was not given adequate notice that such evidence would be presented. The Bar argues that 1) Respondent's disputation of the referee's findings is insufficient as a matter of law; and 2) Respondent's argument regarding the admissibility of evidence finds no support in the record, and is therefore without merit.

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDED SANCTION OF DISBARMENT IS APPROPRIATE AND SHOULD BE UPHELD AS A MATTER OF LAW.

A. Respondent has Failed to Make a Prima Facie Showing that the Referee's Findings of Fact are Clearly Erroneous or Lacking in Evidentiary Support.

Although Respondent's initial brief does not follow appropriate format and does not set forth a Statement of the Case

and Facts, the Bar considers the narrative of "facts" presented by Respondent in his Initial Brief to constitute Respondent's challenge of the referee's findings of fact. In the brief, Respondent does not challenge any of the evidence upon which the referee relied in issuing said findings. Respondent sets forth no logical or legal arguments to support his proposition that this Court should ignore the referee's findings and accept Respondent's version of the facts.

In attorney disciplinary cases, a referee's findings of fact arrive at this Court clothed in a presumption of correctness, and it is the petitioner's burden to establish that the referee's findings of fact are wholly without support in the record. The Florida Bar v. Hirsch, 359 So. 2d 856 (Fla. 1978). The referee's findings will be upheld by the Court unless clearly erroneous or without evidentiary support. Id. In this case, Respondent has generally denied the referee's findings in their entirety, as they relate to Respondent's misconduct. In doing so, however, Respondent has failed to cite any portion of the record, and has failed to offer any argument regarding any specific finding. Respondent cites no case authority whatever. His entire "argument" consists solely of an improper regurgitation of his version of facts which the referee clearly disbelieved. Moreover, Respondent

attached to his Brief a document presumably intended to support his version of the facts; however, even that document indicates that Respondent was actively advancing and representing Mrs. LoCastro's legal interests to the adversarial party on October 22, 1993; i.e., during his suspension. Thus, Respondent has utterly failed to meet his burden of production, and his burden of persuasion, as they pertain to his challenge of the referee's findings. Therefore, the Court must ignore Respondent's stated "facts," and Respondent's challenge to the findings must fail as a matter of law.

B. The Record Clearly Shows that Respondent Received Fair Notice of the Extent of The Bar's Allegations of Misconduct.

In The Florida Bar's Petition for Order to Show Cause, the Bar essentially alleged that Respondent had impermissibly received client funds in settlement of a pending dispute, had then impermissibly intermingled those client funds in "an investment bank account in Respondent's name" (para. 19), and had subsequently disbursed said client funds from said account. In its Reply to Respondent's Response to the Petition for Order to Show Cause, the Bar further alleged that Respondent had violated Rule 3-6.1(c), Rules Regulating The Florida Bar, by virtue of receiving, disbursing, or otherwise handling client trust funds.

The Bar restated this basic allegation in its Reply to

Respondent's Final Response to Bar's First and New Allegations (para. 2). In addition to specific allegations regarding Respondent's work on the LoCastro case, this second Reply also contains a generalized allegation regarding Respondent's trust account activity subsequent to Respondent's suspension. (para. 12). Attached to this second Reply, and referenced specifically in paragraph 12, is an Exhibit (#1) containing Respondent's trust account statements relative to the period of suspension.

A fair reading of the meaning and import of the above-cited allegations should have placed a reasonable attorney on notice that the Bar intended to prove that Respondent had improperly processed client funds through his trust accounts, or other bank accounts, while he was under suspension -- in the LoCastro matter and otherwise. Yet, Respondent claims that he was afforded no such notice.

After the pleadings were closed in this matter, the Bar's investigation revealed which other of Respondent's clients, in addition to Mrs. LoCastro, had similarly had their personal injury cases handled by Respondent during the period of his suspension. That is, the Bar was able to link the identities of Respondent's clients with certain trust account activities, of which the Bar was already aware. Also similar to the LoCastro matter was the fact

that these newly discovered clients had likewise had their cases settled by the Respondent, and had been paid their settlement monies by the Respondent in the same manner as had Mrs. LoCastro. Thus, pursuant to these discoveries, the Bar listed "Andrew Tucker" and "Katherine Zeller" as potential witnesses on its Partial Witness and Exhibit List, filed May 10, 1995. On its Amended List of Witnesses, filed August 30, 1995, the Bar added "Sally Tucker." Sally Tucker is, and was, witness Andrew Tucker's wife. Mr. and Mrs. Tucker, and Ms. Zeller, all testified at the final hearing on September 26, 1995. As noted, the referee found that the testimony of these witnesses was "uncontroverted."

When the final hearing began, Respondent purported to be surprised and prejudiced by evidence which the Bar intended to present concerning his work on the Tucker and Zeller cases. See TR-1 at 7. Respondent claimed that none of the allegations previously made by the Bar related to his work on those cases. Id. The referee responded:

> THE REFEREE: What are you indicating? That they are putting on witnesses to bring up charges outside the allegations of the petition?
>
> MR. ROOD: Exactly.
>
> MR. CORSMEIER: Judge, the petition and the reply do reference what we're going to be talking about today. (TR-1 at 7)

. . .

THE REFEREE: . . . All I want to know is this: Did you get these names that he has just brought up on your witness list? (TR-1 at 9)

MR. ROOD: Yes.

THE REFEREE: Did you contact these people in any way?

MR. ROOD: No. I don't know how.

THE REFEREE: Why not?

MR. ROOD: I don't have a file on them. I don't know where they are.

THE REFEREE: Where is the file? Or where are the files?

MR. ROOD: We gave all the files that the Bar wanted to them.

MR. CORSMEIER: Mr. Rood's secretary, Marilyn Rash, signed a receipt indicating we gave every file back to Mr. Rood. And Mr. Egan has the original of that in his possession, Judge. We don't have any of Mr. Rood's files. (TR-1 at 10)

. . .

THE REFEREE: Did he make any disbursements from his trust account to people other than LoCastro?

MR. CORSMEIER: Yes, your Honor. He made disbursements to both the Tuckers and to Mrs. Zeller. (TR-1 at 11)

. . .

THE REFEREE: I will allow their testimony only to the point of showing that the trust account was viable and was used; not insofar as any specific actions with these people as far as representing them. . . . The supplemental petitions do indicate violations of the use of the trust fund by still maintaining it. And I will

allow testimony to show the trust fund was in existence and that it was used not only with LoCastro but with other people. (TR-1 at 12) (emphasis added)

. . .

THE REFEREE: . . . In other words, he had contact with these people, he was under suspension, they were not advised, that he disbursed to them from his trust fund.

Mr. Rood, on the other hand, it appears to me that having been given a witness list it was incumbent upon you to get in touch with each of these witnesses. (TR-1 at 13)

MR. ROOD: Your ruling is correct, sir, and I wish we could get on with it. (TR-1 at 14)

As the foregoing record transcription clearly shows, the evidentiary issue that Respondent raises in this Court was previously addressed by the referee, and fairly heard by him. Respondent, on the record, admits that the ruling made by the referee on this issue was correct. The Bar agrees. The pleadings and the record are replete with notice to the Respondent regarding the pendency of issues involving clients other than Mrs. LoCastro. Further, on page 14 of Transcript 1, Respondent also admits having contacted Mrs. Tucker by telephone prior to the final hearing. Accordingly, the Bar submits that the referee's ruling was in fact a correct one, given the record and the Respondent's admissions regarding notice received and acted upon by him.

In support of its argument, the Bar notes that, in a

disciplinary proceeding, a referee is not bound by the technical rules of evidence. The Florida Bar v. Dawson, 111 So. 2d 427 (Fla. 1959). Moreover, evidence of unethical conduct which may not fall squarely within the scope of the Bar's accusations is admissible in a disciplinary proceeding and, if established by clear and convincing evidence, should be reported because it is relevant to the discipline to be imposed. The Florida Bar v. Stillman, 401 So. 2d 1306 (Fla. 1981).

Because the testimony of the Tuckers and Ms. Zeller was uncontroverted, the facts to which they testified are proven, ipso facto. While the Bar contends that its allegations against Respondent did contemplate and anticipate the testimony given by the Tuckers and Ms. Zeller, Stillman clearly calls for the introduction of such evidence even if the scope of the Bar's allegations had not contemplated such testimony. Therefore, the evidence was properly admitted.

C. The Referee's Recommended Sanction of Disbarment should be Affirmed.

Respondent's conduct in violating this Court's prior disciplinary orders warrants disbarment under the Florida Standards For Lawyer Sanctions. In Standard 8.1, absent aggravating or mitigating circumstances, disbarment is appropriate when the

lawyer:

> (a) intentionally violates the terms of a prior disciplinary order and such violation causes injury to the client, the public, the legal system, or the profession.

Respondent's intentional, flagrant and continuous violations of this Court's suspension orders caused, at a minimum, serious and substantial injury to the legal system and the legal profession and warrants disbarment in itself.

The record in this matter, however, shows that, in addition to the above, numerous aggravating circumstances exist under the Standards. The following aggravating circumstances apply to Respondent's misconduct in the instant disciplinary contempt proceeding:

(1) 9.22(a) prior disciplinary offenses. As set forth in the Report of Referee, Respondent was suspended for one and two years consecutively, beginning in June, 1993. RR at 6.

(2) 9.22(b) dishonest or selfish motive. The record shows that Respondent received portions of the settlements while he was engaged in the unauthorized practice of law, in violation of the suspension orders.

(3) 9.22(c) a pattern of misconduct. The record shows a pattern of misconduct by Respondent.

(4) 9.22(d) multiple offenses. The record shows multiple offenses by Respondent.

(5) 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. The record shows that Respondent failed to comply with subpoenas and orders of the referee.

(6) 9.22(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process. The record shows that Respondent testified falsely and induced others to testify falsely on his behalf. RR at 5.

(7) 9.22(g) refusal to acknowledge the wrongful nature of the conduct. The record shows that Respondent not only failed to acknowledge the misconduct, but affirmatively attempted to hide and obfuscate his misconduct.

(8) 9.22(i) substantial experience in the practice of law. Respondent was admitted to practice in 1941.

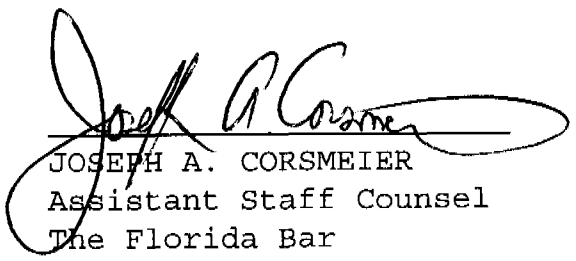
The referee, while not specifically citing the above aggravating circumstances (with the exception of pointing out that Respondent has been practicing since 1941), implicitly addressed and confirmed the applicability of the above aggravating circumstances in his report. The referee report states that Respondent's lengthy service to the Bar, his community service, and

the fact that no clients suffered financially were considered by the referee in recommending disbarment. While not conceding the applicability of these findings in mitigation or even support in the record, the Bar would submit that the existence of these factors, after considering the aggravating circumstances and the nature of Respondent's misconduct, would not justify a reduction of the discipline from disbarment.

CONCLUSION

For all the foregoing reasons, the referee's findings of fact and recommended sanction should be approved and Respondent should be disbarred from the practice of law in the State of Florida.

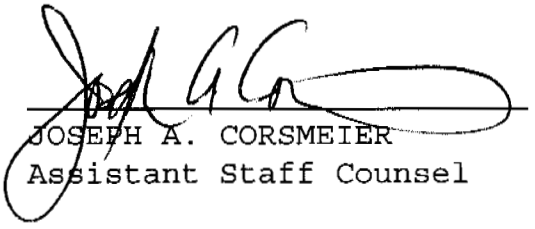
Respectfully submitted,



JOSEPH A. CORSMEIER
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport, Marriott Hotel
Tampa, Florida 33607
(813) 875-9821
Florida Bar No. 492582

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief has been furnished by Airborne Express to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by regular U.S. Mail to Edward B. Rood, Esq., at 200 N. Pierce Street, Tampa, Florida 33602; and a copy by regular U.S. Mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 16th day of February, 1996.



JOSEPH A. CORSMEIER
Assistant Staff Counsel