IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY A. POE,

Respondent.

_____/

Case No. 84,843
[TFB Case No. 94-31,598 (05A)]

RESPONDENT'S RESPONSE BRIEF

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STATEMENT OF THE CASE

The Respondent, Gary A. Poe, accepts the Bar's Statement of the Case as it appears in its Initial Brief, pages 1 through 3, except insofar as any proceedings involving the Board of Governor's of the Florida Bar after May 5, 1995, of which the Respondent has no knowledge.

STATEMENT OF FACTS

The Referee's Findings of Fact and Supplemental Findings of Fact (Appendix A-1) is an accurate statement of the pertinent facts of this case and are incorporated herein.

SUMMARY OF ARGUMENT

Neither the Bar nor the Respondent, Gary A. Poe, has ever denied the facts of this case. However, the Respondent's point made in his Answer, Affirmative Defenses, and at Final Hearing, is that these findings do **not** indicate grounds for disciplinary action.

The Bar admits in the Summary of Argument portion of its initial Brief that, "judgments of other courts of law are not necessarily bindings on attorney disciplinary proceedings." Yet the gist of the Bar's claim is that the Referee erred in finding that although the Bankruptcy Court sanctioned Mr. Poe, that there was no ethical violation. Bar rules and this court's own rulings have assigned referees the task of assessing credibility and all other pertinent factors in reaching a conclusion as to guilt or innocence of ethical misconduct. The Referee did so and his determination should not be upset unless those rulings are clearly erroneous. Nothing in the Bar's Initial Brief indicates such clear error. In fact, the cases cited by the Bar indicate that the court's determination was correct and should not be disturbed on appeal.

Bar Rule 4-3.1 provides for lawyers to bring proceedings or to controvert issues in good faith "to extend, modify, or reverse existing law." Further, the Respondent, Gary A. Poe was bound by the Bar oath to do all that he could on behalf of his client. Mr. Poe challenged a questionable ruling of the Bankruptcy Court regarding discharge of a debt, which constituted child support. He did this by bringing that issue before the Circuit Court which had concurrent jurisdiction with the Bankruptcy Court to determine that issue.

Had the Circuit Court judge ruled in favor of the Respondent's client, Mr. Poe would not be subjected to the Bar's disciplinary challenges. Unfortunately, the Circuit Court deferred to the

Bankruptcy Court and refused to exercise its ability to act concurrently with the Bankruptcy Court. To charge the Respondent with ethical violation in this case was inappropriate. The Referee's decision has so indicated by exonerating Mr. Poe of any ethical wrongdoing. The Referee's decision is based upon unrefuted evidence, is the correct decision, and should not be reversed on appeal.

ARGUMENT

THE REFEREE ACTED WITHIN HIS JUDICIAL AUTHORITY IN REACHING THE CONCLUSIONS OF FACT AND LAW AND RECOMMENDATION WHICH HE REACHED AND WHICH WERE SUPPORTED BY EVIDENCE AT THE HEARING AND IN THE RECORD.

The Bar correctly states the law in its Initial Brief at page 15, that it carries the burden of demonstrating that there is **no** evidence in the record to support the court's findings, The Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994). The Bar has failed to meet that burden.

The Bar's brief repeatedly states an incorrect interpretation of the facts, that the Respondent attempted to collect an attorney's fee that was discharged in bankruptcy. (Page 17 of the Bar's Initial Brief) this is simply not true. Attorney fees were the obligation of Randall Bergeron. It is essential to note that the Respondent Mr. Poe was not a party to the agreement between Mr. and Mrs. Bergeron. When Mrs. Bergeron stopped paying them after the Bankruptcy, the debt to Mr. Poe remained his responsibility. The Respondent's unrefuted testimony at the final hearing was that his client, Randall Bergeron, and Randall Bergeron's ex-wife, Linda, had agreed that Randall Bergeron would pay an extra $50.00 per month in child support to assist Linda Bergeron to pay the debt to the Respondent. When Linda Bergeron filed her bankruptcy, her obligation to her ex-husband to pay his debt was extinguished, yet the extra $50.00 from her ex-husband continued to be paid. In effect, Linda Bergeron was being reimbursed by her husband for a debt which was dissolved. Mr. Poe believed this to be a fraudulent. Randall Bergeron was obligated to continue to pay his ex-wife, while also being obligated to pay his lawyer directly.

At the final hearing, the Respondent introduced evidence by way of a letter from Mrs.

Bergeron's divorce attorney, Mr. Fred Deutschman, dated March 4, 1988, which reads:

> Mr. Bergeron to pay $60.00 per week child support, plus an additional $50.00 per month for 100 months as his payment toward the Poe lien, however, we will specifically assume responsibility for paying off the lien with the transfer of the house. Please review this offer carefully. I fully realize initially this looks like it is placing a significant financial burden on Mr. Bergeron, however, the lien to Poe simply has to be addressed and this provides a manner of relieving Mr. Bergeron of the direct responsibility for the lien while protecting Mr. Bergeron's interest in the marital home. (Appendix A-2)

This agreement was incorporated in the marital settlement agreement between the Bergerons (Appendix A-3) which contains the following language, "Further, as for the child support, the husband shall pay an additional $50.00 per month for 100 months."

In the case of Scharmen v. Scharmen, 613 So. 2d 121 (Fla. 1993), the appellate court found that under the Bankruptcy Code, attorney's fees in dissolution or post-dissolution of marriage proceedings are **not dischargeable** when they involved support issues. In Scharmen, the First District in a footnote to the first paragraph of its decision says, "State court's have concurrent jurisdiction with the Bankruptcy Court to determine the dischargeability of debts falling under 11 USC §523(a)(5) 1988. See in re Orr, 99B.R. 109, 110 (Bankr. S.D. Fla. 1989); Fed.R.Bankr.Pro. 4007 CMT(b), 11 USCA (1984). State courts have concurrent jurisdiction to determine whether a debt is not dischargeable as being in the nature of alimony, maintenance, or support."

While it is true, as argued by the Bar, that the Scharmen facts are not exactly analogous to the Bergeron facts, it is the underlying statement of the Scharmen court which is entirely on point that state courts have concurrent jurisdiction to determine whether or not matters are dischargeable in bankruptcy if they involve debts which are in the nature of alimony, maintenance, or support.

In Scharmen, Linda Jean Scharmen appealed from a Circuit Court order determining that an

attorney fee obligation was discharged by her former husband's bankruptcy. Using the Bar's logic that Mr. Poe should be disciplined for attempting to determine whether Mrs. Bergeron's debt was discharged in bankruptcy, should for consistency, have resulted in Mrs. Sharmin's attorney being subjected to Bar discipline for filing the appeal to determine dischargeability. Mrs. Sharmin's lawyer was successful in challenging discharge. Mr. Bergeron's lawyer was not successful and faces discipline. Presumably, the Bar has taken the position that an after-the-fact determination of dischargeability is not an ethical violation if the challenge is successful, but is an ethical violation if the challenge is unsuccessful. Should this court endorse that position, a chilling effect would be felt in all areas of the law concerning review of matters involving concurrent jurisdiction of courts.

The Bar makes much of the "Supplemental Findings of Fact" determined by the Referee, yet a reading of those findings of fact indicate that Judge Beauchamp gave careful consideration to each of the seven findings: (Appendix A-1)

(1) That Respondent had a duty to attend to the interest of his client, Mr. Bergeron.

(2) That concurrent jurisdiction does exist within the State of Florida as to matters of "child support" in bankruptcy actions.

(3) That Florida law allows the Circuit Court to modify "child support" in the event of a change in circumstances.

(4) That it was reasonable and "not necessarily ill-advised" for the Respondent to seek modification of child support payments.

(5) That the Respondent's own uncontroverted testimony was that his client, Mr. Bergeron, had an obligation to continue to make payments for attorney's fees to the Respondent as well as to make the additional $50.00 payments to his ex-wife.

(6) That Mr. Poe sought the advice of Attorney Edward Jackson, a bankruptcy specialist, prior to pursuing the legal course of action which he took.

(7) That based upon all of the evidence considered by the court, there was insufficient reason to sustain disciplinary action against Mr. Poe.

It is true, as argued by the Bar, that neither the Respondent nor Randall Bergeron filed an adversary proceeding in the Bankruptcy Court. But given the concurrence of jurisdiction in such matters, the Respondent was free to choose his forum. It is not true, however, as argued by the Bar, that the Respondent filed a petition to collect on debts that he knew had been discharged. (Initial Brief, page 24.) The Respondent believed that Mrs. Bergeron's debt to Mr. Bergeron was discharged and sought a judicial determination to modify that situation. Mr. Poe gained nothing personally. Mr. Bergeron remained liable for the attorney's fees. The issue before this Court is whether an attorney who seeks clarification of an ambiguous legal situation should be punished for proceeding to seek a judicial determination of that ambiguity.

The Bar cites at page 25 of its Initial Brief, the Rule Regulating Fla. Bar 3-7.2(b). That rule involves criminal conduct in the nature of a felony, and has no bearing upon a non-criminal, civil sanction of Bankruptcy Court. Clearly, acquittal on a criminal matter does not prevent Bar discipline due to the differences in burden of proof.

The Bar's brief at page 25 cites The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991), where it quotes, "Whether Swickle engaged in criminal misconduct is not at issue here. We are concerned with violations of ethical responsibilities imposed on Swickle as a member of the Bar of this state." The Respondent would point out that this is exactly what concerned the Referee. The Referee did not blindly and automatically accept a sanction by the Bankruptcy Court as evidence of

ethical violations requiring disciplinary action, as recommended by the Bar.

Unlike Swickle, the Respondent was not found guilty of contempt. Mr. Poe was determined to be in violation of the automatic injunction of the Bankruptcy Court. This does not equate to contempt, nor to an ethical violation. Furthermore, it is submitted that the Bankruptcy Court was quite simply, wrong. The Respondent had the right and the duty to seek a determination post-bankruptcy discharge in the Circuit Court as to the dischargeability of the debt and to seek modification of the child support order based upon the nature of the discharged debt.

The Bar also cites the case of The Florida Bar v. Weed, 513 So. 2d 126 (Fla. 1987), but that case involved issues of double jeopardy and *res judicata,* neither of which are at issue in the present case. The Bar similarly cites its Rule 3-4.6 and argues that the Bankruptcy Court's sanction constitutes "final disciplinary adjudication." But nowhere in the record is there support for that position. The Bankruptcy Court simply ordered payment of all of Mrs. Bergeron's costs and attorney's fees. It made no determination as to ethical violation of any sort by Mr. Poe and ordered no fine. In the case of The Florida Bar v. Calvo, 601 So. 2d 1194 (Fla. 1992), cited by the Bar at page 30 of its Initial Brief, the point is made that findings of "foreign adjudication of discipline," should be "considered" in disciplinary proceedings. But the record indicates that the Referee below thoroughly considered the determination of the Bankruptcy Court and still found that the sanctions were not controlling and that no misconduct was committed by Mr. Poe.

The Bar at page 30 cites the case of The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993) as evidence of the Respondent's misconduct disregarded by the Referee below. But the facts in Jasperson involve multiple incidents of fraud committed on the court and involve the fact that the client could gain no advantage whatsoever by the proceeding filed by the attorney. There is simply

no similarity between the Jasperson case and the instant case other than money sanctions were imposed in both.

In The Florida Bar v. Haydon, 583 So. 2d 1016, 1017 (Fla. 1991), this Court stated the burden of reversing a Referee's findings: "A Referee's Finding of Fact are presumed to be correct and will be upheld unless clearly erroneous or lacking in evidentiary support." In The Florida Bar v. Colclough, 561 So. 2d 1147, 1149-50 (Fla. 1990), the court stated that the Referee is charged with the responsibility of assessing the credibility of witnesses based on their demeanor and other factors. This is what Judge Beauchamp did in the instant case.

In The Florida Bar v. Bajoczky, 558 So. 2d 1022, 1023-24 (Fla. 1990), the court said, "We cannot say the Referee's findings are clearly erroneous", and upheld the Referee's findings and recommendations. It is submitted that neither can Judge Beachamp's findings be said to be "clearly erroneous" and must be upheld.

CONCLUSION

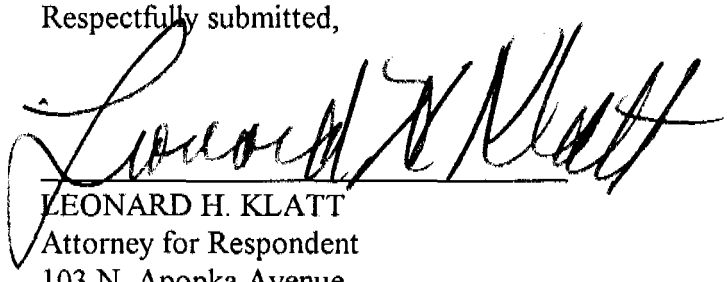
The Referee below found the Respondent to be "not guilty" as to failure to provide competent representation to a client; "not guilty" as to alleged counseling of a client to engage in or assisting a client in conduct that he knew or reasonably should have known to be criminal or fraudulent; "not guilty" as to alleged representation of a client when his exercise of independent professional judgment in the presentation of that client may be materially limited by his responsibility to another client or to a third person or by his own interest; "not guilty" as to alleged acquisition of a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client; "not guilty" as to alleged bringing or defending of a proceeding, or asserting or controverting of an issue therein, that is frivolous and without basis for doing so; "not guilty" as to alleged failure to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; "not guilty" as to using means, during the representation of a client, that have no substantial purpose other than to embarrass, delay, or burden a third person; "not guilty" as to allegedly engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and, "not guilty" as to allegedly engaging in conduct that is prejudicial to the administration of justice. It would appear that the Bar used a shotgun in this case, which has missed its mark.

The Bar has maintained from the outset that an imposition of sanctions on an attorney and his client for seeking clarification as to the dischargeability of a debt in the Circuit Courts of this state, constitutes an ethical violation simply and entirely because a Bankruptcy judge imposed monetary sanctions. In retrospect, perhaps Mr. Poe should have sought a determination of dischargeability in the Bankruptcy Court. But the decision to seek a determination in the Circuit Court evidences a

concern for the best interests of his client. Had Mr. Poe not done so, presumably could have subjected himself to disciplinary sanctions for failure to use due diligence in the pursuit of his client's cause.

There is evidence to support the Referee's findings and the Referee's findings indicate that the Bar did not meet its burden of proving any ethical violation. It is respectfully submitted that this Court should follow its own precedent and refuse to upset the thoughtful determinations of the Referee, Judge Beauchamp, as to his findings of "not guilty" to any ethical violations and to dismiss the appeal and award costs and attorney's fees to the Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Respondent's Response Brief and Appendix have been sent by Regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the Bar Counsel, James W. Keeter, Esq., at The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085; and a copy of the foregoing has been furnished by regular U.S. Mail to John F. Harkness, Jr., Esq., Executive Director of The Florida Bar, at 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300 and to John T. Berry, Esq., Staff Counsel of The Florida Bar, at 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 27th day of July, 1995.

Respectfully submitted,

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Attorney for Respondent

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APPENDIX TO RESPONDENT'S RESPONSE BRIEF

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APPENDIX