IN THE SUPREME COURT OF FLORIDA

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| THE FLORIDA BAR<br><br>Complainant,<br><br>v.<br><br>KEITH M. KRASNOVE,<br><br>Respondent. | CASE NO. *86,666*<br><br>TFB NO. 95-50,144(17G) |

# REPLY BRIEF OF RESPONDENT

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Before addressing the arguments set forth in The Florida Bar's answer brief (AB), a response to The Florida Bar's supplement to Appellant's statement of the facts is necessary. After accusing Respondent of selectively presenting and "shamelessly" couching as fact portions of the record in Appellant's statement of the facts, The Florida Bar proceeds to misstate the record, On page 7 of the answer brief, The Bar asserts "Respondent falsely testified that, for safekeeping, he took Holiday's money out of his operating account on December 22, 1993 - - moving it to a personal money market margin account. See final hearing transcript, Volume I, p. 112." This "statement of the facts" is not only argumentative, it is erroneous. Volume I, p. 112 of the record does not contain any reference to Respondent placing Ms. Holiday's money into his Schwab account for safekeeping.

The answer brief then begins to address the primary thrust of Respondent's initial brief, i.e., the Referee's recommended discipline is excessively harsh to Respondent and will deprive the public of the services of a qualified attorney. The Bar asserts a review of the report of referee shows the Referee did give careful consideration to each of the three elements set forth by this Court for determining the appropriateness of attorney discipline. (AB at 10). The cited language from the report of referee clearly shows no mention of one prong of this Court's three

pronged test of the purposes to be served by discipline for unethical conduct. The report of referee clearly did not consider whether the recommended discipline would deny the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty.

The answer brief next refers to a statement in the initial brief that Respondent placed the subject settlement funds in his operating account instead of his trust account in order to accommodate Ms. Holiday's need for immediate funds, Counsel for the Bar refers to this statement as being "blatantly, alarmingly, and astonishingly false." (AB at 11). The record shows otherwise. Ms. Holiday herself testified she wanted to receive the money "as soon as possible." (Tr. II - 220).

Respondent's assertion in regard to this matter is also supported by the testimony of Iris Morales. Ms. Morales testified that when Ms. Holiday came to Respondent's office to sign the settlement check "she said that she needed the money immediately. She was quite desperate and she needed the funds for Thanksgiving or some food or whatever, shelter. She was having some difficulty at that time, and that's what I recall at that time." (Tr. III - 447-448).

The answer brief then attempts to inject emotionalism and prejudice, rather than reason and advocacy, by asserting "respondentlied to the referee." (AB at 15). The referee made absolutely no finding that Respondent lied under oath or at any

other time during these proceedings.

The record also does not support bar counsel's assertion Respondent lied to the referee when he testified he placed the subject funds into a personal money market margin account in December 1993 to keep the funds from being dissipated. (AB at 15). Respondent did, in fact, make a deposit into his Schwab account on December 22, 1993, in the amount of four thousand dollars ($4,000.00). These funds came from Respondent's Citibank operating account. (Tr. II - 326).

Another example of the lengths bar counsel will go to twist and distort the proceedings below is found in response to Respondent's concession in the initial brief that he failed to properly supervise his office staff. Bar counsel accuses Respondent of making a "fraudulent statement to the court" in an attempt to "hoodwink the Court with a convoluted argument which has no basis in fact." (AB at 15). Unfortunately, bar counsel then proceeds to make her own argument which has absolutely no basis in fact: "Respondentpurposefully did not instruct his staff to endeavor to negotiate with Ms. Holiday's health care providers because had [sic.] stolen and spent the monies entrusted to him for that purpose." (AB at 15). The record does not contain one single shred of evidence Respondent purposefully failed to instruct his staff as asserted by bar counsel. Also, the referee made no such finding.

Again, the record refutes bar counsel's wild allegations. For example, Ms. Morales testified that after the settlement proceeds were received Respondent told her to be sure to contact the medical providers to see if they would accept a discounted rate of their balance and let him know so that he could disburse a check. (Tr. III - 448). This occurred the day after Ms. Holiday received her portion of the settlement. Ms. Morales testified that she made a few calls and then instructed Tara Cohen, who was going to replace Ms. Morales when Ms. Morales went on maternity leave, to be sure to follow up on contacting the health care providers. (Tr. III - 449). Finally, Ms. Morales' testimony shows that not only did Respondent not instruct his staff to avoid contacting the health providers, he was very concerned when he learned the health care providers had not been paid.

During the final hearing, the following exchange occurred:

> Q: Do you recall what transpired in the Krasnove law firm after the Bar complaint came in and it was obvious to Mr. Krasnove, to you and to Ms. Cohen that the health care providers had not been paid?
>
> A: We were all concerned, and I really wasn't involved in every single detail in personal injury cases, but I do remember overhearing that they were all Concerned. Mr. Krasnove went up to Tara and asked her why they weren't resolved, and I remember Tara explaining that she had been trying to negotiate with the medical providers and she was in the midst of doing so, but she hadn't done it yet. (Tr. III - 464).

The answer brief then interjects the spurious claim of Ms. Holiday that she was somehow manipulated into signing a letter which was sent to The Florida Bar requesting the withdrawal of her Bar complaint. (AB at 16 n.2). Although the report of referee makes no mention of this allegation, Respondent feels compelled to address this issue.

The testimony of Ms. Holiday that she involuntarily signed the letter requesting the withdrawal of her Bar complaint, (Bar's Exhibit 2 ), is refuted by the testimony of Adriana Canals Smith. Perhaps this is the reason the report of referee made no finding in regard to this letter.

Ms. Smith's testimony shows, among other things, that Respondent in no way threatened Ms. Holiday in order to induce her to come to his law firm to discuss the matter (Tr. III - 424); that Ms. Holiday was very apologetic and felt really bad about what had happened (Tr. III - 425); that the letter was not prepared prior to Ms. Holiday arriving at Respondent's office (Tr. III - 427); and that when the letter was prepared Respondent gave it to Ms. Holiday and told her to sign it if she wished and to take it home and mail it herself. (Tr. III - 428-429).

The answer brief then moves to a discussion of applicable caselaw. The answer brief first asserts Respondent's reliance upon the case of *The Florida Bar v. Barrett*, No. 88,103 (Fla. Oct. 17, 1996), is inappropriate. The Bar asserts Barrett

does not apply because the Respondent in that case was not charged with theft of client funds or property. Nevertheless, unlike the present Respondent, the respondent in *Barrett* had three prior disciplinary offenses which all occurred within a short time prior to this Court's acceptance of the consent judgment.

The Bar then asserts *Barrett* is inapplicable because "[i]t has long been the policy of this Court to regard reliance upon a consent judgment, for purposes of precedent, as misplaced." (AB at 16). The answer brief cites absolutely no authority for this assertion. Assuming this is the case, then the Bar's reliance upon the case of *The* Florida *Bar v. Loebl*, 526 So.2d 65 (Fla. 1988), is likewise misplaced. In *Loebl*, the proceedings came before this Court with an uncontested report of referee.

The answer brief then asserts that Respondent's reliance upon *The Florida* Bar *v. Barbone*, 679 So.2d 1179 (Fla. 1996), is "ineffectual because the facts of that case bear no relevance to the case at bar." (AB at 16). Respondent asserts *Barbone* is instructive as it represents another example of an attorney with prior disciplinary offenses and numerous ethical violations who received a lesser sanction than the one recommended for Respondent.

The answer brief then proceeds to discuss a number of cases which the answer brief asserts should be utilized as a guide to this Court in the evaluation of the present case. The cases cited by The Florida Bar are all examples of instances in

which this Court's sanctions fit the misconduct. The present case is so far removed from those relied upon by the Bar there is no comparison at all. A close review of each one of the cases cited by the Bar shows that these cases are truly "inappropriate"and "ineffectual."

For example, the answer brief cites *The* Florida *Bar v. Dubow,* 636 So.2d. 1287 (Fla. 1994). In *Dubow,* the respondent was charged in two separate cases. In one case, the respondent had, during a one year period of time, written 31 checks which were dishonored. Several of the checks were written on closed bank accounts. *Id.* at 1287. In addition, the respondent refused to pay the bank for the overdrafts and was sued by the bank. *Id.* Also, the respondent in Dubow had shortages in his trust account.

In the second case filed against Dubow, the respondent had prepared a forged deed and had a judgment in the amount of over one hundred fifty thousand dollars ($150,000.00) entered against him. The respondent then failed to respond to the Bar's request for admissions and they were deemed admitted. Id. at 1288. The respondent in Dubow was found guilty of *criminal acts* and the referee also found the respondent had lied to The Florida Bar. *Id.* at 1288.

The answer brief then discusses the case of *The Florida Bar v. Graham,* 605 So.2d 53 (Fla. 1992), as a case in which the "respondent (among other acts of

misconduct) commingled and misappropriated funds from a client's settlement proceeds." (AB at 17). What the answer brief fails to mention is the nature of these "other acts of misconduct." A review of the case shows the respondent in ***Graham,*** as in ***Dubow,*** had made false representations to The Florida Bar and had several instances of dishonored checks. In fact, the referee in ***Graham*** specifically found the respondent had lied to The Florida Bar. Id. at 53-54. Also, as in ***Dubow, the*** respondent in ***Graham*** was found guilty of violating Rule 4-8.4(b), R. Regulating Fla. Bar (commission of a criminal act).

The answer brief then cites to this Court, as was done to the referee, the case of ***The Florida Bar*** v. Nunn, 596 So.2d 1053, (Fla. 1992). The present case is far removed from the ***Nunn*** case. The respondent in ***Nunn*** had previously been suspended from the Bar; did not make restitution for four (4) years; was found to have obstructed the disciplinary proceedings in bad faith by intentionally failing to comply with the Bar's investigation; and had made misleading statements to the referee. ***Id.*** at 1054-1055.

***The*** answer brief then also cites ***The Florida Bar v. Solomon, 589*** So.2d 286, (Fla. 1991), and ***The Florida Bar*** v. ***Loebl,*** 526 So.2d 65 (Fla. 1998). In ***Solomon,*** the respondent was already under a suspension at the time of the offenses. 589 So.2d at ***286.*** Also, as in ***Dubow,*** the respondent failed to respond to requests for

admissions. In addition, the respondent in ***Solomon*** was found guilty of check-kiting, forgery of a homestead application, and violation of Rule 4-8.4(b). *Id.* at *286.*

The respondent in ***Loebl,*** as mentioned above, did not contest the report of referee finding he had issued dishonored checks and failed to make any restitution. *526* So.2d at 65-66.

The answer brief next turns to a review of cases where the presumption of disbarment was rebutted by acts of mitigation. Respondent submits a comparison of those cases with the instant case will show this Court a three year suspension is not warranted. For example, ***in The Florida Bar v. Farbstein,*** 570 So.2d *933,* (Fla. 1990), the respondent had several instances of failure to diligently pursue matters. In addition, the respondent closed a trust account and disbursed monies to himself resulting in over a twenty-one thousand dollar ($21,000.00) shortage in client funds. *Id.* at 934.

The case of ***The Florida Bar v. Schiller,*** 537 So.2d 992, (Fla. 1989), is likewise distinguished from the present case. In ***Schiller,*** an audit of the respondent's trust account showed deficiencies in his trust account gradually increasing to over twenty-nine thousand dollars ($29,000.00) during a five year period of time. *Id.* at 992. In the present case, any misappropriation of funds

occurred in relation to one client during a relatively short period of time.

The answer brief next addresses the testimony of the many character witnesses who appeared on behalf of Respondent at the final hearing. Initially, the Bar asserts only one character witness indicated his positive assessment of Respondent would remain intact after being advised of what the Bar intended to prove in the case. (AB at 21). The answer brief then goes on, however, to point out that the testimony of two other individuals (Sammy Perez and Tara McIntosh) would not change regardless of the charges proven against Respondent. (AB at 25).

Several points need to be made about the testimony of Respondent's character witnesses. First, although Judge Fleet did indicate he would impose disciplinary action against Respondent if it was proven Respondent misappropriated client funds, he did not state the severity of the discipline. In fact, Judge Fleet testified that the citizens of the state of Florida would without doubt be deprived of the services of an ethical and competent attorney if Respondent were to be disbarred. (Tr. II - 284).

The answer brief next cites the testimony of Rabbi Friedman and his statement that if it was proven Respondent did something wrong "then I would say he's not honest." (AB at 23). Upon further questioning by counsel for Respondent, however, the rabbi stated that if someone made an error in judgment it would not

necessarily mean they were dishonest. (Tr. II - 345).

The Bar also makes a passing reference to the testimony of Ms. Elstein, without, of course, citing a very relevant portion of her testimony. Ms. Elstein testified that Respondent was a great help for her and she would not have been able to do anything without his services. (Tr. II -*369).*

The answer brief next makes the ludicrous suggestion that the testimony of Neal Sonnett "must be omitted from the Court's consideration." (AB at 26). Mr. Sonnett testified as to Respondent's service to the Bar. Bar counsel had an opportunity to cross-examine Mr. Sonnett. (Tr. III - 512-513). At no time did counsel for the Bar make any objection before the referee regarding Mr. Sonnett's testimony. Mr. Sonnett's testimony is relevant to the issues before this Court and should be considered by the Court.

Finally, the answer brief sets forth an incorrect standard for review in a case of this type. The answer brief cites the case of ***The Florida Bar v. Rue,*** *643* So.2d. 1080 (Fla. 1994), for the proposition that a report of referee should be upheld unless the party seeking review meets his burden of proving that the referee's findings are clearly erroneous or lacking in evidentiary support, (AB at 26). This standard applies to a referee's findings of fact regarding **guilt.** **As** *Rue* points out, this Court's scope of review is broader when it reviews a referee's recommendations for

discipline. *Id.* at 1082. The case of *The Florida* v. McClure, 575 So.2d 176 (Fla. 1991), likewise deals with the standard for review of a referee's fmdings of fact and conclusions as to guilt. 575 So.2d at 177.

Respondent has consistently maintained throughout these proceedings that he engaged in some misconduct. As found by the referee, Respondent is remorseful for his actions. The sole issue to be decided by this Court is the discipline to be imposed upon Respondent. Respondent submits the discipline recommended in this case is not fair to Respondent because it is unduly harsh. (See The ***Florida Bar v. Rue, 643*** So.2d 1080, 1083).

Although counsel for The Florida Bar would never admit it, even Ms. Holiday herself alluded to the way in which the public would be deprived of the services of a competent attorney if Respondent were to be prevented from practicing law for any extended period of time. As Ms. Holiday testified, Respondent represented her in a DUI jury trial and obtained a not guilty verdict. In addition, he obtained the return of her driver's license. (Tr. I - '186-187). Finally, Respondent prevented Ford Motor Company from repossessing Ms. Holiday's car. (Tr. I - 190-191).

A fmal example of the vociferous nature of the Bar's answer brief is found in the conclusion portion of the brief. The answer brief asserts Respondent lied to the Bar and lied to the referee, (AB at 27). These statements are outrageous and should

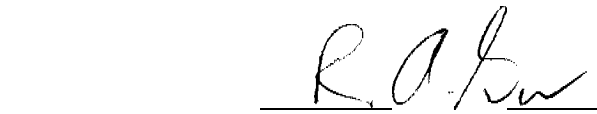
be disregarded by this Court. The referee made absolutely no finding Respondent made any false statements in this proceeding.

The conclusion of the answer brief also twists the facts of the case. The answer brief asserts Respondent first attempted to close the Bar's investigation of this matter by asserting he was waiting for the health care providers to settle with him. When that didn't close the Bar's investigation, he allegedly coerced his client into signing a prepared letter of retraction which he mailed to the Bar. (AR at 27). A review of the record will, of course, show that this alleged sequence of events is erroneous.

## D. CONCLUSION

For the reasons set forth in the initial brief of Respondent and in this reply brief, this court should reject the referee's recommended discipline of a three (3) year suspension and impose a suspension of not more than ninety (90) days.

Respectfully submitted,



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## E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished by U.S. mail to Lorraine Hoffman, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, #835, Ft. Lauderdale, Florida 33309; and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 17th day of April, 1997.

RICHARD A. GREENBERG

xc: Keith M. Krasnove

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